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DR. NORMAN A. WIGGINS

A TREATISE

ON THE

LAW OF TRIALS

IN ACTIONS

CIVIL AND CRIMINAL

By SEYMOUR D. THOMPSON, LL. D.

Author Thompson on Stocks and Stockholders; Thompson on Homesteads and Exemptions; Thompson on Corporations; Thompson on Negligence, etc, etc.

SECOND EDITION

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DR. NORMAN A. WIGGINS

IN FOUR VOLUMES

VOL. III

CHICAGO

T. H. FLOOD & COMPANY

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THE LAW OF TRIALS

VOLUME III

FORMS OF INSTRUCTIONS

DR. NORMAN A. WIGGINS

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CHAPTER LXXXVI.

INSTRUCTIONS—GENERAL

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C. Witnesses.

A. Instructions Cautionary and Explanatory.

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Note: Forms of instructions, however excellent, can serve no purpose other than as a guide for the framing of other instructions applicable to the facts of the particular case. Practitioners are cautioned that the use of approved forms is attended with danger. Instructions must be based upon the facts of the particular case, always bearing in mind laws peculiar to the local jurisdiction. For a discussion of the elements and use of instructions, see Vol. II, Chapters LXV–LXIX, inclusive.

§ 2866. Instructions to be Considered in their Entirety.

(a) "You will, on the issues submitted, consider the court's instructions to you in their entirety, and not in isolated or detached parts alone, and be bound by the law as given you herein; but you are the exclusive judges of the weight of the evidence and credibility of the witnesses, and by your conclusions thereon, under the law as given you in charge by the court, let the verdict be determined."—Approved: Texas & N. O. R. Co. v. Jackson (Tex. Civ. App.), 113 S. W. 628.

(b) "I intended to add, gentlemen, that no one instruction should be considered by you alone; but all the law or instructions given you by the court are to be considered together as the law governing the case. I instructed you on the law, provided the evidence and the theory of the state be true. I have also instructed you upon the law, provided the evidence and theory of the defendants be true. It is a question of fact for you to decide which to be true."—Approved: Dempsey v. State, 83 Ark. 81, 102 S. W. 704.

(c) "You are to try the question in the case submitted to you upon the testimony introduced upon the trial, and upon the law as given you by the court in these instructions. The court, however, has not attempted to embody all the law applicable to this case in any one of these instructions, but in considering any one instruction you must construe it in the light of and in harmony with every other instruction given, and, so considering and so construing, apply the principles in it enunciated to all the evidence admitted upon the trial."—Approved: Lampman v. Bruning, 120 Iowa, 167, 94 N. W. 562.

§ 2867. And Followed Notwithstanding a Juror's Private Opinion.

"The court instructs the jury that you have taken a solemn oath to try this cause according to the law and evidence given you in open court, and you have no authority to consider or be controlled by anything else than given you as law by the court; and unless your verdict accords with the law as given you by the court, you are guilty of willful perjury. It makes no difference what you think the law ought to be, you have no authority to consider or be controlled by anything else as law than that given you by the court."—Approved: State v. Miller & Kremling, 53 Iowa, 154.

§ 2868. Jury to Confine their Attention Solely to the Evidence.

(a) "In deciding this case I charge you are the sole and exclusive judges of the facts. You should look only to the evidence introduced and allowed to remain as evidence in the trial. You should not allow outside matters of any kind to influence your minds. It is your duty to pass upon the merits of this case according to the evidence given in open court, and exclude from your minds any special knowledge that any of you may have concerning this matter, except such matters as are of common knowledge. You should take into consideration the whole of the evidence relating to the case and all the facts and circumstances proved at the trial."—Approved: Dearden v. San Pedro, L. A. & S. L. R. Co., 33 Utah, 147, 93 Pac. 271.

(b) "In your jury room you should not refer to, discuss, or consider anything in connection with this case except the evidence received upon the trial. All extraneous matters, statements, and suggestions should be carefully discarded by you; and you should base your verdict solely upon the evidence, and be guided by these instructions alone. By your verdict the protection which the law wisely throws around the virtue of a woman and the family relation should not be lessened, nor the rights of this defendant disregarded."—Approved: State v. Butts, 107 Iowa, 653, 78 N. W. 687.

(c) "In determining any of the questions of fact presented in this case, the jury should be governed solely by the evidence introduced before them. The jury have no right to indulge in conjectures or speculations not supported by the evidence."—Approved: Ramsey v. Burns, 27 Mont. 154, 69 Pac. 711.

§ 2869. And Not Consider what the Court's Opinion on the Facts may be.

"Rulings have been made by the court in your presence, and questions have been asked of witnesses by the court. From these things, or from anything that has occurred in the trial, you are not to infer what the opinion of the court may be as to the guilt or innocence of the accused. With the court's opinion you have nothing whatever to do, and if you have even any suspicion of what the court may think in the matter, you have no right to consider it any more than you would have a right to consider the opinion of anybody else. The question of the guilt or innocence of the defendant is for you alone, regardless of what anybody else may think about it."—Approved: People v. Osborn, 12 Cal. App. 48, 106 Pac. 891.

§ 2870. Counsel's Statements of what is Expected to be Proven not to be Regarded as Evidence.

"Any statements of counsel as to what they expect to prove or offer to prove, or any attempt to prove a fact, the proof of which is not admitted by the court, or which has been ordered stricken from the record by the court, must be entirely disregarded and dismissed from your minds, and it must in no wise affect your verdict."—Approved: State v. Rhys, 40 Mont. 131, 105 Pac. 494.

§ 2870a. Nor Extraneous Matter in Argument of Counsel.

"They should pay no attention to extraneous matter used in argument by the attorneys, but must try the case on the evidence adduced on the trial and the law given in charge by the court; that they were sworn to do that, and not to consider anything said by the attorneys outside of the record in this case."—Approved: State v. Parker, 125 La. 565, 569, 51 South. 590.

§ 2871. Excluded Evidence Not to be Considered.

"The court deems it proper to admonish you that you are not to consider evidence which has been excluded by the court in determining any fact in the case."—Approved: People v. Roberts, 1 Cal. App. 447, 82 Pac. 625.

§ 2872. Duty of Jury to be Impartial.

"You sit here as judges of the facts, and as judges of the facts you must not put yourself in the place of either the plaintiff or the defendant, because, if you do, you bring into play a kind of sympathy either for the plaintiff or the defendant. You are to sit here in solemn capacity of judges, absolutely free from any bias or prejudice or sympathy or any like human emotion, sit here calmly and judicially and determine first what the facts are and then determine from those facts the things I have instructed you you must determine, what things can properly and reasonably be inferred from the facts that have been adduced here from the witness stand. Your endeavor in the jury room should be to arrive at a just, and honest and fair verdict under the evidence in this case, and you should be actuated by no other motive."—Approved: Reese v. Detroit United Ry., 159 Mich. 600, 124 N. W. 539.

§ 2873. And Try Case against Railroad the Same as against Individual.

(a) "You are instructed that it is your duty to try this case and to decide it precisely as you would a case between two individuals. The fact that the defendant is a railway company should make no difference whatever with the jury. You should base your finding solely on the testimony of the witnesses, the facts and circumstances in evidence, and the inferences to be drawn therefrom, without regard to who is plaintiff or who is defendant. In arriving at your verdict, all of the instructions, though read to you by opposing counsel, should be considered together, for all of them are the court's instructions, and declare to you the law by which you are to be governed."—Approved: W. W. Taylor & Sons Brick Co. v. Kansas City Southern R. Co., 213 Mo. 715, 112 S. W. 59.

(b) "You are instructed by the court that it is your imperative duty to try this case and decide the same as if it was a suit between two individuals. The fact that the person injured was a boy, and the defendant a corporation, should make no difference with you in the trial of this action. In considering and deciding this cause, you should look solely to the evidence for the facts, and the instructions of the court for the law, in the case, and find your verdict accordingly, without any reference to who is plaintiff and who is defendant. The fact that the plaintiff has brought suit in this action constitutes no ground whatsoever on which to base the presumption that he is entitled to a verdict against the defendant. That he is a poor boy constitutes no reason why the plaintiff should be entitled to a verdict. All these things are outside of what you are to consider."—Approved: Pledger v. Chicago, B. & Q. R. Co., 59 Neb. 456, 95 N. W. 1057.

(c) "It is your duty to try the case as though it was one between two individuals. The defendant is entitled to be treated precisely as an individual, and no inferences or presumptions are to be drawn or indulged against defendant that would be improper in an action between two individuals."—Approved: Witt v. Town of Latimer (Iowa), 117 N. W. 680.

(d) "You are instructed that in the consideration of this case and in the determination of any of the issues or questions involved, you

should not be influenced or actuated in any degree by sympathy or by the fact that the plaintiff is an individual or the defendant a corporation, but you should determine such issues and questions the same as if this action was between two individuals of equal standing."—Approved: Haskovee v. Omaha St. Ry. Co., 85 Neb. 295, 303, 123 N. W. 305.

§ 2874. And Should be Influenced by the Facts, Not Sentiment.

"I take it that it is unnecessary to say to an intelligent jury that we are not here in the administration of public justice to be actuated by feelings of sentiment; that may do very well outside of this courthouse, but we are here to see that the law, which is laid down as a rule of conduct for all citizens, is enforced. Whenever a party is charged with violation of law, it is my duty to give you the law; it is your duty to apply the facts to the law, and, if the state has established the guilt of the party accused beyond a reasonable doubt, you should find a verdict of guilty; and you cannot allow your judgments, according to your oaths, to be influenced by sentiment or anything of that kind."—Approved: State v. Petsch, 43 S. C. 132, 20 S. E. 993 (995).

§ 2875. Pleadings are not Evidence.

"You will take with you the pleadings, that is, the complaint and answer and the reply in this case, all exhibits in evidence, and, gentlemen, these pleadings, that is, the complaint and answer and reply, are not testimony in the case. They are not evidence in the cause. They are simply statements of what the parties on each side claim to be the facts, but not evidence of the facts, and the issue in the cause, that is, the issue of facts, you must determine under the instructions of the court from the evidence in the cause before you, and from the admissions of the parties, respectively, that have been laid before you or have been submitted to you."—Approved: Staats v. Pioneer Ins. Ass'n. 55 Wash. 51, 104 Pac. 185.

§ 2876. But if They Allege One Thing, and the Proof Shows Another, the Pleader Loses.

"In this case the plaintiff alleges that he was injured by reason of the step or stirrup on defendant's caboose being loose and by his attempting to get on the car by putting his foot in the stirrup, and that in so doing the stirrup moved, and he was thrown down and injured, and, if you believe from the evidence that he was injured in any other manner than in the manner alleged by him, then you will find a verdict in favor of the defendant."—Approved: El Paso & S. W. R. Co. v. O'Keefe, 50 Tex. Civ. App. 579, 110 S. W. 1002.

§ 2877. Counts to be Considered Separately and Verdict be for Total.

"The court further instructs the jury that they should in their verdict make a separate finding on each count of the plaintiff's petition, and if on any account your finding includes interest, you should calculate the amount of the interest and add to it the sum upon which the interest is

calculated and render your verdict on such count for the total of both." —Approved: Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co., 210 Mo. 715, 109 S. W. 47.

§ 2878. Evidence to be Considered as a Whole.

"In determining the issues in this case, you should take into consideration the whole of the evidence, and all the facts and circumstances proved on the trial, giving to the several parts of the evidence such weight as you think they are entitled to. And in determining the weight to be given to the testimony of the several witnesses, you should take into consideration their interest in the event of the suit, if any such is proved, their conduct and demeanor while testifying, their apparent fairness or bias, if any such appears, their appearance on the stand, the reasonableness of the story told by them, and all the evidence and circumstances tending to corroborate or contradict such witnesses, if any such are proved."—Approved: Richardson & Boynton Co. v. Winter, 38 Neb. 288, 56 N. W. 886.

§ 2879. And Looked at in the Light of Common Sense.

(a) "The court instructs the jury that you are to look at the evidence in this case in a common sense light, and to judge it by that experience and observation of human affairs of which you are possessed as individual members of society, and will endeavor to arrive at the truth as the evidence shows it to be. If the claim made by either party is unusual and unnatural, out of the ordinary course of affairs, you are not required to take the same for granted upon slight evidence; nor should you so find except upon proof of a reliable character and which satisfies the mind."—Approved: State v. Geddis, 42 Iowa, 264.

(b) "You must determine this case upon the law as given to you by the court and the evidence as you have heard it from the witness stand, but in so doing you may call to your aid and use the knowledge and experience you possess in common with the generality of mankind."—Approved: Sanford v. Gates, 38 Kan. 405, 406, 16 Pac. 807.

§ 2880. Jury to Confer Patiently and Try to Reach Agreement.

(a) "You now have been deliberating upon your verdict for more than 29 hours. Now, where a jury finds a difficulty in agreeing, and the various jurors entertain different ideas concerning the evidence or the inferences and conclusions to be drawn therefrom, it is the duty of each juror to patiently listen to and consider the argument of his fellow jurors, with an honest desire to ascertain the truth of the matters concerning which you disagree. No juror should contend for his original ideas or conclusions concerning matters of disagreement after he has become convinced that his position first taken was wrong. No juror should hold out through a spirit of stubbornness. Neither should a juror permit the friendship or admiration, the ill feeling or prejudice, he may entertain for any counsel connected with the case, to influence

him. Considerable time has been consumed in the trial of this case. It is not probable that further evidence can be furnished another jury in the trial of the case if you are finally discharged because you cannot agree and the case is again tried. You are probably in as favorable position to decide the case as another jury can be. I want you to realize that it is your work and your duty to decide this case, and to decide it correctly. I hope you will, on retiring to your room, do so, each with the honest conscientious desire to agree and to return a verdict which is justified by the evidence and the law, and which will meet the approbation of your own conscience."—Approved: Jessen v. Donahue, 4 Neb. Unoff. 838, 96 N. W. 639.

(b) "No captious doubts, no foolish or unwarranted ideas, should enter into the consideration of this case or any other case that you shall have to determine. As honest men, trying to discharge your duty between these people, you are to give the matter fair consideration. Stubbornness, mulishness, is no good characteristic of jurymen. No juryman is entitled to enforce his dishonest opinions upon his fellows. Take this case, under these views, under your consideration, and give it such fair, candid, and honest consideration as twelve conscientious, honest men ought to do, and render a verdict as you shall believe the preponderance of testimony is in this issue."—Approved: Mead v. Harris, 101 Mich. 585, 60 N. W. 284.

(c) "You should agree. Let me tell you this. I have been holding court since the middle of September, four weeks at Aiken, two weeks at Hampton and two weeks at Bamberg, and have been here two weeks, and haven't had a mistrial. This is the tenth week, and we have tried all sorts of cases, and there is no reason why you should not get together and come to a verdict in this case, if you desire to do right. If there is a fire burning in the wilderness and you 12 men see it and want to get to it, there is no reason why you cannot get to it. If one or two or three fellows shut their eyes and start in another direction, they will never get to it. When a man goes on a jury, he has got nobody to serve but the truth. He ought to be absolutely blind to every other appeal. He ought not to set his head in stubbornness against his fellows. I heard a judge tell a jury this one time: That a juror should take as part of the facts of a case the opinion of the man who sits next to him, listen to that opinion, and, if it is good, hear it; take what truth there is in it. Now, there are practically only two matters in this case. It is my duty to tell you what this contract means, and it is your business to take what I say."—Approved: Caldwell v. Duncan (S. C.), 69 S. E. 660.

(d) "The evidence which you are compelled to pass upon is not so complicated and so voluminous and difficult to understand that a jury should not arrive at the truth within a reasonable time.

"I can see no reason, gentlemen, why you should not agree upon a verdict in this case, and we expect you to do so.

"The real question for you to determine in this case, is what is in fact the truth."—Approved: Spick v. State, 140 Wis. 104, 126, 121 N. W. 664.

§ 2881. But Each Juror is to Decide According to Own Conscience.

"Gentlemen of the jury, however, I will charge you that when you go into the jury room you may discuss the case together, and compare notes and reason together; but before you make up your verdict you must make up in your own mind, without reference to the other jurors, that the man is guilty of the degree in which you are to find him guilty. In short, when men are jurors they sit here as individuals, so far as their individual verdict is concerned, and the juror should be governed by his own conscience, and not by the minds and consciences of his fellow jurors."—Approved: Simon v. State, 108 Ala. 27, 18 South. 731 (732).

§ 2881a. Limiting Evidence to Specific Purpose of its Introduction.

(a) "Testimony has been introduced by the prosecution which it is claimed tends to show the commission of other acts or offenses by the defendant similar to those charged in the indictment. I charge you that this evidence was admitted for the sole purpose of proving guilty intent, motive, or guilty knowledge of the defendant, and that it can be considered by you for no other purpose."—Approved: People v. Glass (Cal.), 112 Pac. 281.

(b) "So in this case the evidence of trespasses was admitted, not that it established a defense for killing deceased, but that you may consider it to aid you, so far as it can, in determining the object and intent of defendant in being armed at the place where deceased was killed, and in determining whether the killing was unlawful or accidental. And if the killing was because of such trespasses and feeling aroused thereby, or because deceased was trespassing when killed, and not accidental, as defendant claims, it is murder and you should so find by your verdict."—Approved: State v. Nielson, 38 Mont. 451, 456, 100 Pac. 229.

(c) "Although the verdict to which each juror agrees must, of course, be his own conclusion, and not a mere acquiescence in the conclusions of his fellows, yet, in order to bring 12 minds to a unanimous result, the jurors should examine with candor the question submitted to them and with due regard and deference to the opinions of each other. In conferring together the jury ought to pay proper respect to each others opinions, and listen with candor to each others arguments. If much the larger number of the panel is for a conviction, a dissenting juror should consider whether the doubt in his own mind is a reasonable one which makes no impression on the minds of so many men equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, and with equal desire to arrive at the truth, and under the sanction of the same oath. And on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the conclusions of a judgment which is not concurred in by most of those with whom they are associated, and dis-

trust the weight are sufficiency of that evidence which fails to carry conviction to the minds of their fellows,"—Approved: State v. Egland (S. D.), 121 N. W. 798.

§ 2882. Limiting Recovery to Charge of Negligence in Petition.

"You are further instructed that the only negligence charged against the defendant in this case is that, while plaintiff was boarding a car at ..... while the same was standing still, said car was negligently started forward rapidly and so suddenly that the plaintiff was thereby thrown upon one knee and injured, and that defendant knew, or by the use of reasonable diligence could have known, that plaintiff was in the act of boarding said car. Now the court instructs you that in this case the plaintiff is limited to the charge of negligence as above specified in this instruction, and no other acts or conduct of the defendant, its agents, servants, or employes, either of commission or omission, are submitted to you for your consideration, and you must not consider any other acts or conduct of the defendant, its agents or employes. If plaintiff has failed to prove to your satisfaction, by the greater weight of the credible evidence in this case, that she received her injuries by the negligence of defendant's servants as alleged, then she must fail in her action, and your verdict must be returned in favor of the defendant."—Approved: Sterrett v. Metropolitan St. Ry. Co. 225 Mo. 99, 123 S. W. 877.

§ 2882a. Non-Production of Witness Matter for Consideration by Jury.

"It was also proper at the time, as it is proper now, for the jury to consider why it was that the defense did not call upon the young man R., who was found in the ice box, to explain what kind of a house he was in, and why he went into the ice box. It is also proper for the jury to consider why it was that no explanation was offered, and why M., who had been the housekeeper and servant of the defendant for a period of ——— months prior to ———, and who had been in his house on the ———, was not here as a witness. It may easily be that the defendant was justified in law and morals in not calling them, but you may inquire why the explanation was not given." Approved: State v. Callahan (N. J. L.), 69 Atl. 957.

§ 2883. No Presumption against Either Side when Witness Accessible to Both.

"The court charges the jury that they have no right to presume any person who is not present and testifying would give evidence unfavorable to the railroad company, and no greater obligation rests on the defendant to bring such person than rests on the plaintiff. The jury must try this case on the evidence before them, and not on something that either they or counsel may imagine some absent person might testify."—Approved: Illinois Central R. Co. v. Weinstein (Miss.), 55 South. 48.

N. B. This instruction held allowable because of remarks of plaintiff's counsel in his closing argument.

§ 2884. Failure of Accused to Testify not to be Alluded to.

"The law provides that the failure of the defendant to testify shall not be taken as a circumstance against him, and you must not allude to, comment on, or discuss in your retirement the failure of the defendant to testify in this case, nor will you refer to or discuss any matter not before you in evidence."—Approved: Dougherty v. State (Tex. Cr. R.), 128 S. W. 399.

B. Evidence.

§ 2885. Rebuttable Presumption that Transactions are Honest.
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2898. Admissions in Pleadings Obviate the Necessity of Proof.
2899. Presumption of Life—Stronger or Weaker According to Circumstances.
2900. Mortuary Tables Not Absolute Proof, but Aids to Jury.

2885. Rebuttable Presumption that Transactions are Honest.

"The law presumes transactions are honest, and made for an honest purpose, until the contrary is shown, and the burden of the proof to show a dishonest purpose in this case is upon the defendant."—Approved: Chaffee v. Atlas Lumber Co., 43 Neb. 224, 61 N. W. 637.

§ 2886. Testimony Suppressed Presumed to be Against him who Suppresses.

(a) "The holding back of evidence may be used as a presumption of fact against the party who holds it back or holds it out of reach. And if the jury believe, from the evidence, that Ella Morehouse, the girl referred to in the article that was published by the defendants, was sent, or caused to be sent, away by the plaintiff, or plaintiff's friends on his behalf, and with his consent or by his direction, you may consider this fact in determining whether the plaintiff's conduct had been such as to justify the publication complained of."—Approved: Vifquain v. Finch, 15 Neb. 505, 19 N. W. 706.

(b) "It is claimed by the defendant that he has produced all the documents which he has touching matters in controversy in this case. It is for you to determine from the evidence whether he has complied with this subpoena or not; and if you find from the evidence that the defendant has complied with the subpoena and has produced all of the written instruments and papers connected with the transactions mentioned in the complaint and in the answer, then, of course, no penalty is to be suffered by him at this trial. But if you should find from the evidence that he has failed, neglected, or refused to bring into court all the instruments and papers connected with the transactions mentioned in plaintiff's complaint and mentioned in the answer to this case, which he had in his possession and under his control at the time this subpoena was served upon him, the 8th day of January, 1908, then the law will presume, it will be your duty to presume, that such instruments which he failed to produce are such as the plaintiff claims them to be."—Approved: Thomas v. Fos, 51 Wash. 250, 98 Pac. 663.

(c) "If you find from the evidence in this case that one George P. Chase, on account of his relation with the execution and delivery of the note in suit, would be able, if his evidence were produced, to give satisfactory evidence as to the genuineness or want of genuineness of the signature of Martin J. Bligh, and if you further find that the plaintiff has had it peculiarly within his power to produce the evidence of such witness, and that he has not done so, then I charge you that from these facts you have a right to presume as against the plaintiff that the evidence of this witness, Chase, if produced, would have been unfavorable to the plaintiff."—Approved: Glosson v. Bligh, 41 Ind. App. 14, 83 N. E. 263.

§ 2887. Burden of Proof to be Satisfied by Preponderance of Evidence.

(a) "The jury are instructed that in this case the law puts the burden of proof upon the plaintiff; that is, she must satisfy the jury by a preponderance of the evidence that she was injured, and has sustained damage as charged in her petition, and that such injury was caused by the fault or negligence of the defendant; and if she has failed so to do she cannot recover in this case."—Approved: Town of Norman v. Teel, 12 Okl. 69, 69 Pac. 791.

(b) "The burden is upon the plaintiffs to establish that the death of the deceased was caused by the negligence of the defendant; and, if you find that his death was not due to the negligence of the defendant, then you need consider nothing further, as your verdict in that case must be for the defendant. The negligence of the defendant company must be established by a preponderance of the evidence; and by a preponderance of the evidence is not meant the greatest number of witnesses, but it means the evidence which is most convincing to your minds."—Approved: Roberts v. Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.

(c) "The burden of proof is on the plaintiffs to prove the issues and claims made by them by a preponderance of the evidence; that is, that they are the owners of said cattle, and are entitled to the immediate possession thereof. But by the terms of the contract the defendants are to assume the burden of proof, and prove that all cattle which have died

during the time said cattle were in their possession were lost from causes other than from want of proper feeding."—Approved: Farrar v. McNair, 65 Kan. 147, 69 Pac. 167.

(d) "Now, I want to make clear to you, if I can, this matter of burden of proof. If the testimony in a case were equally balanced, just as much testimony, credible testimony, on one side as on the other, then it is the duty of the court or jury to decide against the person who has the burden upon him, because by the burden means that he must show to the satisfaction, and if it is evenly balanced, then, of course, the person who has had the burden has not overcome that; so that, when I say the burden of proof in the main case of showing that the deceased lost his life by being caught on a set screw that was unguarded is upon the plaintiff, it means that they must make it out to your satisfaction or by a fair preponderance of the evidence. Likewise, when I say the burden of proof of showing negligence upon his own part, which has approximately caused his death, is upon the defendant, they must make that out to your satisfaction, by a fair preponderance of the evidence."—Approved: Bush v. Independent Mill Co., 54 Wash. 212, 103 Pac. 45.

§ 2888. Preponderance of Evidence is Not Greater Number of Witnesses.

(a) "You may also take into consideration the greater number of witnesses that may testify upon one side or the other of the contested issue. However, the preponderance of evidence is not necessarily with the greater number of witnesses, but it is that superior weight of evidence that inclines the minds of honest, impartial jurors to accept and believe one side in preference to the other, regardless to the number of witnesses from which it may be derived."—Approved: Quiggle v. Vining, 125 Ga. 98, 54 S. E. 74.

(b) "A fair preponderance of the evidence does not mean necessarily that a greater number of witnesses shall be produced on one side or on the other; but that on the whole the jury believes the greater probability of the truth to be upon the side of the party having the burden of the proof."—Approved: Money v. Seattle, R. & S. Ry. Co. (Wash.), 109 Pac. 307.

(c) "You are instructed that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance is, you should take into consideration the opportunity of the witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved or admitted on the trial, and, from all these circumstances, determine upon which side is the weight or preponderance of the evidence."—Approved: Haskovec v. Omaha St. Ry. Co., 85 Neb. 295, 303, 123 N. W. 305.

(d) "In determining upon which side is the preponderance of the evidence, you should take into consideration the opportunities of the

several witnesses for seeing, etc., * * * and from all this determine upon which side is the weight or preponderance of the evidence."—Approved: Davis v. Mohn (Iowa), 124 N. W. 206.

§ 2889. But Evidence having the Greater Weight, however Slightly.

(a) "The jury are instructed that the burden is upon the plaintiff, and it is for it to prove every material allegation of its petition by a preponderance of the evidence. If, upon any one or more of the material allegations of the plaintiff's petition, the evidence is evenly balanced, or if it preponderates in favor of the defendant, then the plaintiff cannot recover, and the jury should find for the defendant. By a 'preponderance of the evidence' is meant the weight of evidence; that which, on the whole evidence, when fully, fairly, and impartially considered by the jury, produces the stronger impression upon the mind of the jury, and is more convincing as to its truth when weighed against the evidence in opposition thereto."—Approved: Toncray v. Dodge County, 33 Neb. 802, 51 N. W. 235.

(b) "By this term 'preponderance of the evidence' as I have used it in these instructions, is meant the best evidence; that which appeals to your intelligence as jurors, and as men versed in the ordinary affairs of life, as being the most probable happening—being the most probable event. Now, the evidence which satisfies your mind upon that score is always the best evidence—is always the evidence that is entitled to your consideration, and that is what the law means when it uses this expression 'preponderance of evidence.' It means evidence of that character; evidence which appeals to your judgment and to your intelligence as establishing certain facts; and in determining that, you should look to the witnesses; who they are, and what they are; their interest in the case; their means of knowing the facts concerning which they testify; their manner of testifying—all these things should be taken into consideration by you in determining where the preponderance of evidence is."—Approved: Johnstone v. Seattle, R. & S. Ry. Co., 45 Wash. 154, 87 Pac. 1125.

(c) "The court instructs the jury that while as a matter of law the burden of proof is upon the plaintiff and it is for him to prove his case by a preponderance of the evidence, still if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it would be sufficient for the jury to find the issues in his favor."—Approved: Libby, McNeill & Libby v. Kearney, 124 Ill. App. 339.

§ 2890. Jury Not Bound to Accept Uncontradicted Evidence as Conclusive.

"That you are not bound to accept as conclusive the statement of the witnesses that the engine was in good order and carefully operated, although there may be no direct evidence to contradict them, but you will consider all the circumstances and evidence bearing upon the condition of the engine and mode of operating it, and the circumstances under which the fire took place, in arriving at your verdict."—

Approved: St. Louis Southwestern Ry. Co. v. Trotter, 89 Ark. 273, 116 S. W. 227.

§ 2891. Positive Evidence of Greater Weight than Negative, Witnesses being Equally Credible.

"The court instructs the jury that when one witness testifies that a certain fact took place, or that certain words were spoken, and several other witnesses equally credible testify that they were present at the time and place where the fact took place or where the words were spoken, and had the same means of information, and further testify that such fact did not exist or that the words were not spoken, it is their province to weigh the testimony and give a verdict according to the weight of testimony as it may preponderate on either side."—Approved: Frizell v. Cole, 42 Ill. 362.

§ 2892. Caution as to Accepting Casual Statements or Admission.

(a) "Statements or admissions of a party satisfactorily proven, which bear upon or give character to the acts of a party, or throw light upon a pending controversy, are proper to be considered by the jury; but evidence of casual statements or admissions of a party, made in casual conversations to disinterested persons, should be considered by the jury, in determining the weight to be given to them, in view of the liability of witnesses to misunderstand or forget just what was said, depending upon all the surrounding circumstances."—Approved: Emery v. State, 101 Wis. 627, 78 N. W. 145.

(b) "Evidence of casual statements or admissions of a party, made in casual conversations to disinterested persons, are regarded by law as very weak testimony, owing to the liability of the witness to misunderstand or forget what was really stated or intended by the party. It is considered to be the weakest kind of evidence."—Approved: Grotjan v. Rice, 124 Wis. 253, 102 N. W. 551.

(c) "Testimony with regard to verbal statements should be received with great caution. The evidence, consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake, in consequence of the person speaking not having clearly expressed his own meaning, or in consequence of the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the person in fact did say. This kind of testimony should be scanned closely. Where the precise words are shown and proven, by intelligent and reliable witnesses, they often lead to satisfactory conclusions. Where a witness can only give what he thinks is the substance of what was said, the weight to be given to such testimony depends largely upon the strength of memory and intelligence of the witness."—Approved: Ellis v. Republic Oil Co., 133 Iowa, 11, 110 N. W. 20.

§ 2893. Duty of Court to Construe Written Evidence.

"The court instructs the jury that the evidence upon this question (whether illegal stock was issued) is mainly record evidence or written

evidence, and under the law it is the duty of the court to construe such instruments, and to state the effect of such evidence, and it is the duty of the jury to receive and to accept the instructions so given; and this is so even though you may think the instructions here given are wrong."—Approved: Merrill v. Reaver, 50 Iowa, 404.

§ 2894. View of Premises Not Evidence but an Aid to Understand it.

"The purpose of viewing the premises is to enable the jury better to understand the testimony of the witnesses respecting the same, and more intelligently apply such testimony to the issues before them, and not to make them silent witnesses in the case. You will consider the evidence in the light of your view of the premises, but you must determine the facts of the case from the evidence alone. You must not base your verdict in any degree upon your examination of the premises."—Approved: Guinn v. Iowa & St. L. Ry. Co., 131 Iowa, 680, 109 N. W. 209.

§ 2895. Opinions Measured by the Facts they are Based on.

"The value of opinions of nonexpert witnesses is measured by the facts on which they are based. If the facts disclosed by the testimony upon which the opinion is based do not sustain the opinion, then the opinion is of proportionately small weight. If, on the other hand, the facts upon which the testimony is based sustain or tend strongly to sustain such opinion as to mental condition, then it will be entitled to proportionately greater weight. So you will carefully consider all of the testimony of said nonexpert witnesses, and, guided by the foregoing rules, give to the same such weight as you deem it justly entitled to."—Approved: Conway v. Murphy, 135 Iowa, 171, 112 N. W. 764.

§ 2896. Limiting Evidence to the Question of Impeachment.

"The evidence introduced before you of the witness Mrs. Clementine McClendon, to the effect that the plaintiff, a few days after the death of the deceased, E. G. Tipton, executed a deed to her purporting to convey the land in controversy to the said Mrs. Clementine McClendon, and her testimony to the effect that she brought suit against the defendant in this case for the land in controversy, and that she lost said suit, and her further testimony that she reconveyed said land to the plaintiff, was admitted only on the issue affecting the credibility of the said Mrs. Clementine McClendon, and, on the issue showing a motive to testify as she did, and as to whether the same does affect her credit as a witness, or does show a motive to testify, are questions altogether for your consideration, and you will not consider said testimony for any other purpose."—Approved: Tipton v. Tipton (Tex.), 118 S. W. 842.

§ 2997. Admissions against Interest in Former Trial.

"It is claimed by the plaintiff in this case that upon a former trial Vanatta, as attorney for the defendant, admitted that, if the services were performed and there was no special contract, and if the different items in the bill of particulars are correct, then the charges made for such services are fair and reasonable. You are further advised that, if this was a general admission of the facts referred to and without limita-

tion, the defendant became bound thereby in this trial, and, if you find from the testimony that such admission was so made and without qualifications, then as to all items of service contained in the paper called the 'bill of particulars,' the question of the value of such services is settled, in accordance with the charges therein made, provided that such services were actually performed and if such items were otherwise correct. But if it was an admission for the purpose of that trial only, and was so understood at the time by the parties, it would not be binding upon the defendant now. And you are further instructed that, if you believe from the evidence that, at the former trial, it was understood or agreed between plaintiff and the defendant, by their counsel or otherwise, that the paper called a bill of particulars, and marked Exhibit J, was to be considered as a bill of particulars proper, that is to say, that it stated all the items of account against defendant by plaintiff and being the only items sued on, then all the items testified to by plaintiff as having been discovered subsequent to the former trial of this cause are not to be considered or allowed for if you find the other issues hereinbefore spoken of in favor of the plaintiff."—Approved: Moynahan v. Perkins, 36 Colo. 481, 85 Pac. 1132.

§ 2898. Admissions in Pleadings Obviate the Necessity of Proof.

"The court instructs the jury that the affidavit of the defendant denying the execution of the note is not evidence; and they have no right to consider it in determining whether the defendant executed and delivered the note in evidence."—Approved: Hunter v. Harris, 131 Ill. 482, 23 N. E. 626.

§ 2899. Presumption of Life—Stronger or Weaker according to Circumstances.

"There is a presumption that a person living at a certain time continues to live until the contrary appears; that is, when the life is once shown it is presumed to continue until it is shown to have ended. That presumption may be stronger or weaker according to the circumstances of any particular case. It is not a conclusive presumption, but it is a presumption which the jury is warranted in drawing from the fact of life being shown that life continues until it otherwise appears."—Approved: State v. Plym, 43 Minn. 385, 45 N. W. 848.

§ 2900. Mortuary Tables Not Absolute Proof, but Aids to Jury.

" 'Now, the expectancy tables have been shown here in evidence. Her age is 29 and his age 33. Her expectancy is 36 2/10 years and his expectancy 33 21/100. These are simply given to you as aids, not as absolute proof that he would live 33 years, or that she would live 36 years.' "—Approved: Merrinane v. Miller, 148 Mich. 412, 111 N. W. 1050.

C. Witnesses.

§ 3001. Witness Presumed to Speak the Truth—Presumption Repelled how.
3002. Credibility of Witness Exclusively for the Jury.
3003. Facts to be Considered in Judging of Credibility.
3004. Mental Incapacity to Receive and Retain Impressions.
3005. General Character, business and Antecedents of Witness.
3006. And his General Appearance and Manner and Conduct on the Stand.
3007. Interest and Relationship to be Considered.
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3010. No Right Arbitrarily to Discard Testimony of any Witness.
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3014. Affirmative as Against Negative Testimony.
3015. Testimony as to Measurements and that of Estimates.
3016. Testimony opposed to Physical Facts.
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3018. No Inference to be Drawn against Employes of Party.
3018a. Witness Swearing Falsely Jury may Discard Part or all of Testimony.
3019. Entire Testimony of Witness Swearing Falsely to a Material Fact may be Rejected.
3020. And Where Palpable that Witness has Deliberately Sworn Falsely.
3021. Except such Parts as are Corroborated by Other Credible Evidence.
3022. Where Witness Successfully impeached Testimony may be Rejected, unless corroborated.
3023. The Jury to say if Impeachment is Successful.
3024. Expert Testimony is not to be Considered if Hypothesis is not Proved.
3025. Opinions of Experts are not Binding on the Jury.
3026. Opinions of Experts Received with Caution and Considered with other Proof.
3027. Opinions Competent Evidence of Facts not in Ordinary Experience.
3028. Testimony of Experts in Hand-writing weak against Positive Testimony of Credible Witness.
3029. Expert Testimony as Corroborative Evidence.

§ 3001. Witness Presumed to Speak the Truth—Presumption Repelled how.

"A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he or she testifies, by the

character of his or her testimony, or by his or her motives, or by contradictory evidence. You are instructed that your power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence. The jury are the exclusive judges of the credibility of the witnesses and the weight to be given their testimony."—Approved: State v. Dotson, 26 Mont. 305, 67 Pac. 938.

§ 3002. Credibility of Witness Exclusively for the Jury.

(a) "You are the sole judges of the credibility to be given to the testimony of each and every witness who has testified before you."—Approved: Wheeler v. State, 79 Neb. 491, 113 N. W. 253.

(b) "You are the sole judges of the credibility of the witnesses and the weight to be given to the testimony of each."—Approved: Nelson v. State, 3 Okl. Crim. Rep. 468, 106 Pac. 647.

§ 3003. Facts to be Considered in Judging of Credibility.

(a) "The jury are the sole judges of the credibility of the witnesses and of the weight and value to be given to their testimony. In determining as to the credit you will give to the witness, and the weight and value you will attach to a witness's testimony, you should take into consideration the conduct and appearance of the witness upon the stand, the interest of the witness, if any, in the result of the trial, the motives actuating the witness in testifying, and witness's relation to or feelings for or against the defendant, or the alleged injured party, the probability or improbability of the witness's statements, the opportunity the witness had to observe and to be informed as to matters respecting which such witness gives testimony, and the inclination of the witness to speak truthfully or otherwise as to matters within the knowledge of such witness. All these matters being taken into account with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit and the testimony of each witness such value and weight, as you deem proper."—Approved: State v. Hottman, 196 Mo. 110, 94 S. W. 237.

(b) "In considering and determining what weight or effect you will give the testimony of each witness, you should take into consideration what interest or want of interest the witness had in the result of the suit, his or her demeanor upon the stand, the apparent intelligence or want of intelligence of the witness, the opportunity or want of opportunity of the witnesses for knowing the facts concerning which they testify, the probability or improbability of the facts related by the witnesses, and their apparent candor and fairness, or want of such, where witnesses directly contradict each other. You should consider all the testimony in the case, and, after considering it all, and the surrounding circumstances appearing on the trial, determine which of the witnesses are the most worthy of credit, and give credit accordingly."—Approved: Jessen v. Donahue, 4 Neb. Unoff. 838, 96 N. W. 639.

(c) "The jury are instructed that the credibility of the witnesses is a question exclusively for the jury to determine. In determining the weight to be given to the testimony of the several witnesses, the jury

should take into consideration their interest in the result of the suit, if any such is proved; their conduct and demeanor while testifying; their apparent fairness or bias, if any such appears; their opportunities for seeing or knowing the things about which they testify; the reasonableness or unreasonableness of the story told by them; and all the evidence and facts and circumstances proved, tending to corroborate or contradict such witness, if any such appear."—Approved: Toncray v. Dodge County, 33 Neb. 802. 51 N. W. 235.

(d) "A large number of witnesses have appeared before you in this case, and the court now instructs you that you are the sole judges of the credibility of their testimony, and, in determining the weight to be given the testimony of the several witnesses, you shall take into consideration their interest in the event of this prosecution, if any such interest is proved; their motive for testifying as they have, if any is shown; their conduct and demeanor while testifying; their apparent fairness or bias, if any such appears; their appearance on the witness stand; the reasonableness of the stories told by them; their means of information concerning the matters and things about which they testify; and all the evidence and circumstances tending to corroborate or contradict any witness,—and then give to the testimony of each witness such weight and credit as to you it shall seem entitled. If the fact appears that witnesses disagree in minor points in their recollection and recital of the several matters and transactions sought to be proved in this case, it does not necessarily militate against the candor of any of them; it may only indicate a failure of observation; and the court instructs you as jurors you have not the right to captiously or unreasonably disregard the testimony of witnesses, but, unless there appears to be something that indicates a lack of candor or truthfulness on the part of any witness, the testimony of each witness should receive proper and careful consideration by the jury. You are to determine this case and arrive at your verdict from the evidence now before you, and are not to be influenced by statements or insinuations, or any other fact or circumstance that is not in evidence in this case."—Approved: Davis v. State, 51 Neb. 301, 70 N. W. 984.

§ 3004. Mental Incapacity to Receive and Retain Impressions.

"Now, if you believe and find from the preponderance of the evidence in this case that Eunice Hudspeth, on the 23d day of March, 1909, or at the time she testified in this case, was laboring under such a defect of reason from nymphomania or other disease of the mind, and under such derangement of the mind, as to render her incapable of receiving a sound mental impression of the transaction regarding which she testified, or if you believe that she had the capacity to receive such mental impression as would render it impossible for her to retain and impart such impression correctly, or if she is laboring under such defect of reason from disease and derangement of the mind as would render it impossible for her to know and understand the nature and obligation of an oath, then in law she would not be a competent witness, and, if you should so find, you will disregard her testimony altogether and not consider it for any purpose in this record. If, on the other hand, gentle-

men, the defendant has not established by a preponderance of the testimony that she was laboring under a diseased condition of the mind caused from nymphomania or some other disease on the 23d day of March, 1909, and if he has failed to establish by a preponderance of the testimony that she was at the time she gave evidence in this case laboring under a disease of the mind that rendered her incompetent to testify, as set out in the last preceding paragraph of this charge, then you are instructed that you may consider her testimony in passing on the guilt or innocence of the defendant; you being the judge exclusively of the weight to be given to her testimony and the credibility of her as a witness."—Approved: Jenkins v. State (Tex. Cr. R.), 131 S. W. 543.

§ 3005. General Character, Business and Antecedents of Witness.

"I charge you further that in weighing the testimony of a witness you should take into consideration his general character, what his business is and has been, who he is, where he comes from, and what his antecedents are, if the same have been proven. These are all circumstances which it is proper for you to consider in determining for yourself just what weight should be given to the testimony of any particular witness, either for the state or for the defendant, who has testified in the case." —Approved: State v. Haynes, 7 N. D. 352, 75 N. W. 267.

§ 3006. And His General Appearance and Manner and Conduct on the Stand.

"You are the sole judges of the credibility of the witnesses, of the weight of the evidence, and of the facts. It is your right to determine from the appearance of witnesses on the stand, their manner of testifying, their apparent candor or frankness or the lack thereof, their apparent intelligence or the lack thereof, which witnesses are more worthy of credit, and to give weight accordingly. In determining the weight to be given to the testimony of the witnesses you are authorized to consider their relationship to the parties, when the same is proved, their interest, if any, in the event of the suit, their temper, feeling or bias, if any has been shown, their demeanor on the stand, their means of information and the reasonableness of the story told by them, and to give weight accordingly."—Approved: State v. Morgan, 27 Utah, 103, 74 Pac. 526.

§ 3007. Interest and Relationship to be Considered.

(a) "You are the sole judges of the credibility of the witnesses, of the weight of the evidence, and of the facts. It is your right to determine from the appearance of witnesses on the stand, their manner of testifying, their apparent candor or frankness or the lack thereof, their apparent intelligence or the lack thereof, which witnesses are more worthy of credit, and to give weight accordingly. In determining the weight to be given to the testimony of the witnesses you are authorized to consider their relationship to the parties, when the same is proved, their interest, if any, in the event of the suit, their temper, feeling, or bias, if any has been shown, their demeanor on the stand, their means of information, and the reasonableness of the story told by them, and to give weight accordingly."—Approved: State v. Morgan, 27 Utah, 103, 74 Pac. 526.

(b) "The jury are further instructed that while the law permits the plaintiff in the case to testify in his own behalf, nevertheless the jury have the right, in weighing his evidence, to determine how much credence is to be given to it, and to take into consideration that he is the plaintiff and interested in the result of the suit."—Approved: C. & E. I. R. R. Co. v. Burridge, 211 Ill. 9, 13.

§ 3008. Corroboration of Prosecuting Witness in Rape Not Necessary, as Matter of Law.

"It is the province of the jury to determine the weight and credibility to be given the testimony of a female upon whom it is alleged in an information that a rape has been committed, and who testifies to the facts and circumstances of such rape as of any other witness testifying in the case. And if such testimony creates in the mind of the jury a satisfactory conviction and belief beyond a reasonable doubt of the defendant's guilt, it is sufficient of itself without other corroborating circumstances or evidence, to justify a verdict of guilty of rape upon the trial of the case."—Approved: People v. Keith, 141 Cal. 686, 75 Pac. 304.

§ 3009. Party Testifying—His Interest to be Considered.

(a) "The plaintiff in this action is an interested party, and in considering the weight which should be given to his testimony you should consider the fact of such interest, and the motive which he has to testify to such statement of facts as will be favorable to himself, and a like test should be applied to the evidence of any other interested witness."—Approved: Blankavag v. Badger Box & Lumber Co., 136 Wis. 380, 117 N. W. 852.

(b) "The court instructs the jury that the defendant is a competent witness in his own behalf and you may consider his testimony, but in determining what weight and credit you will give his testimony, you may take into consideration the fact that he is the defendant on trial and interested in the result of the trial."—Approved: State v. Brown, 216 Mo. 351, 354, 115 S. W. 867.

§ 3010. No Right Arbitrarily to Discard Testimony of Any Witness.

(a) "The court tells the jury that they are the exclusive judges of the credibility of the witnesses, and the weight to be given their testimony, but that they have no right to arbitrarily disregard the testimony of any witness; but in determining the credibility of witnesses, and the weight to be given their testimony, the jury must take into consideration the interest of the witness in the thing about which he testifies, his means of knowledge, bias, and prejudice in regard to the thing, about which he testifies and his demeanor while testifying. And, when the jury have considered the testimony of witnesses according to these principles, they should give to the testimony of each witness all the weight to which his testimony is entitled, if any."—Approved: Wright v. Commonwealth, 109 Va. 847, 65 S. E. 19.

(b) "The court instructs the jury for the defendant, that the law

makes the defendant a competent witness for himself, and permits him to testify in his own behalf, and his testimony you cannot arbitrarily, under your oaths, disregard, simply because he is the defendant in the case; but it is the duty to consider V—s' testimony, as you consider the testimony of any other witness in the case, and, if you have no other reason to disbelieve him as a witness than the fact that he is the defendant in the case, then it is your sworn duty to believe him, and believe that he spoke the truth, and if it is sufficient, in connection with the other testimony in the case, to raise in your minds a reasonable doubt of his guilt, then you should promptly find him not guilty."—Approved: Vails v. State (Miss.), 48 South. 725.

(c) "The court instructs the jury, as a matter of law, that in this state one accused and on trial charged with the commission of a crime may testify in his own behalf, or not, as he pleases. You are instructed that when a defendant does testify in his own behalf, then you have no right to disregard his testimony merely because he is accused of crime; that when he does so testify he at once becomes the same as any other witness, and his credibility is to be tested by and subjected to the same tests as are legally applied to any other witness; and in determining the degree of credibility that shall be accorded to his testimony the jury have a right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct upon the witness stand; and the jury may also take into consideration the fact, if such is the fact, that he has been corroborated or contradicted by credible evidence or by facts or circumstances in evidence."—Approved: People v. Scarbak, 245 Ill. 435, 437, 92 N. E. 86.

§ 3011. Duty to Reconcile Testimony if Conflicting.

(a) "You are the sole judges of the credibility of the witnesses, and the weight to be given to their evidence. If the evidence is conflicting, you must reconcile it if you can, consistently, with the honesty of the witnesses. In considering testimony you should not discard any without good cause for so doing. You should consider the feelings and interest of the witness, if he has any; his conduct and demeanor upon the stand; his hopes and fears; the reasonableness or unreasonableness of his story; whether he is contradicted or corroborated by other evidence in the case; his opportunities of seeing and hearing what he testifies to having seen and heard; and you should examine all of the evidence in the light of reason and common experience."—Approved: Hatfield v. Chicago, R. I. & P. R. Co., 61 Iowa, 434, 16 N. W. 336.

(b) "The law presumes they are all honest and speak the truth, but if, after an honest effort to reconcile the evidence, you are unable to do so, then you may believe that which to you seems the most reasonable and credible—that which as honest, conscientious, upright, intelligent jurors, wanting to do right, and render a just verdict, you believe to be the truth of the alleged transaction or transactions, viewing them in the light of all the surroundings as detailed from

the witness stand, and in the light of human conduct, of reason, and common sense."—Approved: Warnack v. State, 7 Ga. App. 73, 66 S. E. 393.

§ 3012. If Testimony Irreconcileable Credit to be Given the More Worthy.

"You are the sole judges of the weight of the evidence and the credibility of the witnesses; and, where witnesses testify directly opposite to each other, you are not bound to consider the weight of evidence evenly balanced, but, in determining the weight and credit that shall be given to the testimony of any witness, you may take into consideration his appearance upon the stand, his manner of testifying, his apparent candor and fairness or lack of the same, his intelligence or lack of intelligence, his opportunity or lack of opportunity for seeing and knowing the things about which he testified, his interest or lack of interest in the result of the action, and, together with all the facts and circumstances shown at the trial, determine the weight and credit that should be given to the testimony of any witness, and give credit accordingly."—Approved: Rose v. State, 3 Okl. Crim. Rep. 12, 103 Pac. 1066.

§ 3013. If Witness of Unsound Mind, Testimony to be Rejected.

"I allowed this testimony to be introduced as to the mental condition of this woman for the purpose of showing you, or allowing you to judge, as to how long her husband might be deprived of her society, or of her labor as a wife, in the discharge of her domestic duties in the household, and for no other purpose. You are at liberty to investigate all the proof in this case that has been offered to you as to whether this woman is sane or insane. I charge you that if you shall find that now this woman is without sufficient mental capacity to understand what is going on, you are not at liberty then to consider her testimony in this case at all, for you are only at liberty to consider the testimony of a person who is compos mentis, or of sound mind; for a person who is without sound mind, capable of remembering or giving testimony in a case, is not to be allowed in a court of justice. One of the physicians here testified that she was insane now. If you shall come to that conclusion, then you are not at liberty to regard her testimony at all in this controversy; but if you shall have arrived at the conclusion that she is sane now and capable of knowing what she is doing and saying, and of remembering what transpired at the time this accident occured or this injury happened, then you are to consider her testimony, and you are at liberty to consider it in connection with the permanent character of this injury, and also in weighing the testimony of the expert witnesses who have been produced in this case, who there is some evidence to show testified on a previous occasion that this woman would be permanently insane."—Approved: Bowdle v. Detroit St. Ry. Co., 103 Mich. 272, 61 N. W. 529.

§ 3014. Affirmative as Against Negative Testimony.

(a) "In the consideration of the evidence of equally credible witnesses, affirmative testimony, as that a bell was rung, is entitled to more weight than negative testimony, as that a bell or whistle was not

heard."—Approved: Annacker v. Chicago, R. I. & P. R. Co., 81 Iowa, 267, 47 N. W. 68.

(b) "The rule of law is that the positive testimony of one credible witness to a fact is entitled to more weight than the testimony of several witnesses equally credible who testify negatively, or to collateral circumstances merely persuasive in their character from which a negative may be inferred."—Approved: Hinton v. Cream City R. Co., 65 Wis. 323, 27 N. W. 147.

(c) "The evidence of witnesses to the fact that they passed over and along the street in the immediate vicinity of where the accident occurred shortly before or after the occurrence, and that they did not see any lights and barriers around the trench in question, is negative in its character, and is in itself entitled to comparatively little weight, as compared with the testimony of equally credible witnesses who testified to passing over and along the same street at or about the time, and to seeing lights and barriers around the trench. A person passing along a highway may not notice an object, although it exists, or, having noticed it, the impression thereby created may pass from his memory; and the testimony of such person to the effect that he did not see such an object carries little conviction, as against the testimony of an equally credible witness who testifies positively to having seen the object in question."—Approved: Hildman v. City of Phillips, 106 Wis. 611, 82 N. W. 566.

§ 3015. Testimony as to Measurements and that of Estimates.

"And I further charge you that, in determining where the clear preponderance of the credible evidence is, you are not to ignore or disregard the direct, positive evidence of witnesses who made measurements as to certain facts in dispute in this case, and, so disregarding such evidence, find the fact to be in accordance with the testimony of witnesses who, without making such measurements, merely estimate or give their judgment of the same, as the testimony of witnesses who have measured distances and made memoranda of such measurements at the time of taking, if otherwise credible, is of greater weight than the evidence of witnesses who merely give their recollection based upon estimates of such distances."—Approved: Koepke v. City of Milwaukee, 112 Wis. 475, 88 N. W. 238.

§ 3016. Testimony Opposed to Physical Facts.

"If any witness produced upon the trial has testified to anything which you know by the evidence of your senses on the view, is false, you are not bound to believe the witness as to such fact, and you may disregard his testimony as to said fact, although no other witness has testified on the stand to the fact as the jury knows it to be."—Approved: American States Security Co. v. Milwaukee Northern Ry. Co., 139 Wis. 199, 120 N. W. 844.

§ 3017. Rules in determining Preponderance of Evidence.

(a) "The jury are further instructed that it does not necessarily follow that a plaintiff has failed to establish his case by a preponderance of proof because he has testified to a state of facts which are denied by the

testimony of the defendant. In such a case, in arriving at the truth, the jury have a right to take into consideration every fact and circumstance proven on the trial, such as the situation of the parties; their acts at the time of the transaction and afterwards, so far as they appear in evidence; their statements to others, if any proven, in relation to the matters in question, as well as their statements to each other,—as well as their appearance on the witness stand, and their manner of testifying in the case."—Approved: Grand Island Mercantile Co. v. McMeans, 60 Neb. 373, 83 N. W. 172.

(b) "You are instructed that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance is, you should take into consideration the opportunity of the witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, in view of all the other evidence, facts, and circumstances proven or admitted on the trial, and, from all these circumstances, determine upon which side is the weight or preponderance of the evidence."—Approved: Hoskovec v. Omaha Street Ry. Co. (Neb.), 123 N. W. 305.

(c) "The weight of evidence does not necessarily depend upon the number of witnesses who testify for the respective sides. In determining the question, you are at liberty to take into consideration the interest of the witnesses or any of them in the result of your verdict, their relationship to the parties in interest, if any, their intelligence, their means or opportunity of knowing the truth of the matter about which they testify, the reasonableness or unreasonableness of their statements, and the extent to which they are corroborated by other witnesses, if at all, you may consider the appearance and demeanor of the several witnesses while giving their testimony, and observe the candor and fairness with which they testify, or the want of those qualities, and determine for yourself the weight or credit to be given to the testimony of the several witnesses. If you believe any witness has knowingly or willfully testified falsely, you are at liberty to disregard the whole of such witness' testimony, except such portion as may have been corroborated by other credible witnesses or evidence. You should not arbitrarily reject the testimony of any witness without just cause, but should seek to harmonize the testimony of all the witnesses on the hypothesis of truth unless for good cause you are compelled to do otherwise."—Approved: Hoskovec v. Omaha St. Ry. Co., 80 Neb. 784, 115 N. W. 312.

(d) "The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury, and the law is that, where a number of witnesses testify directly opposite to each other, the jury are not bound to find the weight of the evidence as evenly balanced, and the jury have a right to determine, from the appearances of the witnesses on the stand, their manner of testifying, their apparent candor and frankness, their apparent intelligence and from all other surrounding circumstances attending the trial, which witnesses are the more

worthy of credit, and to give credit accordingly."—Approved: McKinnie v. Lane, 230 Ill. 544, 82 N. E. 878.

§ 3018. No Inference to be Drawn against Employes of party.

"You may take the testimony of these railroad men; you may take their appearance upon the stand; you may take into consideration any interest which they might have that would in any way influence their testimony here, but no inference unfair to men should be drawn because they are in the employ of the railroad company; you will take into consideration the testimony of the plaintiff—and then weigh up the testimony on both sides, and say where, in your judgment, the truth lies, and what your duty would be in giving weight to testimony."—Approved: Lovely v. Grand Rapids & I. Ry. Co., 137 Mich. 653, 100 N. W. 894.

§ 3018a. Witness Swearing Falsely Jury may Discard Part or all of Testimony.

"You may judge of the credibility of a witness by the manner in which he gives his testimony, his demeanor upon the stand, and the reasonableness or unreasonableness of his testimony, his means of knowledge as to any fact about which he testifies, his interest in the case, the feeling he may have for or against the defendant, or any circumstance tending to shed light upon the truth or falsity of such testimony, and it is for you at last to say what weight you will give to the testimony of any and all witnesses. If you believe that any witness has wilfully sworn falsely to any material fact in this case, you are at liberty to disbelieve the testimony of that witness in whole or in part, and believe it in part and disbelieve it in part, taking into consideration all the facts and circumstances of the case."—Approved: Snyder v. State, 86 Ark. 456, 459, 111 S. W. 465.

§ 3019. Entire Testimony of Witness Swearing Falsely to a Material Fact May be Rejected.

(a) "You are the judges of the weight and sufficiency of the evidence, and of the credibility of the witness, and, in determining the weight to be given to the testimony of any witness, you may consider his intelligence, his means of knowledge, his manner of testifying, and the interest, if any, he has manifested for or against the plaintiff or defendant; and if you believe that any witness, either for plaintiff or defendant, has willfully sworn falsely as to any material fact, you are at liberty to disregard his whole testimony."—Approved: Little Rock & Ft. S. Ry. Co. v. Voss (Ark.), 18 S. W. 172.

(b) "The court instructs the jury that you are the sole and exclusive judges of the weight of the testimony and of the credibility of the witnesses; and if you believe that any witness has willfully sworn falsely as to any part of his testimony, you are at liberty to disregard the whole testimony of such witness, or you may consider such parts of his testimony as you believe to be true, and disregard such parts of it as you do not believe to be true."—Approved: Curtis v. State, 89 Ark. 394, 117 S. W. 521.

(c) "The court instructs you that a witness wilfully false in a material part of his testimony is to be distrusted in others."—Approved: People v. Davis (Cal. App.), 111 Pac. 268.

(d) "And the court further instructs the jury that if, after considering all the evidence in this case, they find that any witness testifying on behalf of either side has wilfully and corruptly testified falsely to any fact material to the issue in this case, then they have the right to disregard the testimony of such witness, except in so far as corroborated by other credible evidence or facts and circumstances in evidence. The question of the weight and credit to be given to each and every witness, on either side, is entirely for the jury."—Approved: People v. Scarbak, 245 Ill. 435, 437, 92 N. E. 86.

(e) "If any of the state's witnesses have exhibited malice against the defendant or anger, or have testified to contradictory statements and thereby satisfied the jury that they have not testified truly, and are not worthy of belief, and the jury think their testimony on these accounts should be disregarded, they may discard it altogether."—Approved: Hammond v. State, 147 Ala. 79, 83, 41 South. 761.

(f) "The court instructs the jury, for the state, that they are the sole and exclusive judges of the weight of the evidence and the credibility of the witnesses, and in determining the weight to be given to the testimony of each witness they may take into consideration the interest or lack of interest, the reasonableness or the unreasonableness, of the testimony; and, if they believe from the evidence that any witness has willfully sworn falsely to any material matter in this case, then the jury may disregard the whole testimony of such witness or witnesses, if they believe it untrue."—Approved: Vails v. State (Miss.), 48 South. 725.

§ 3020. And where Palpable that Witness has Deliberately Sworn Falsely.

"It is the duty of the jury in passing upon the credibility of the testimony of the several witnesses, to reconcile all the different parts of the testimony if possible. It is only in cases where it is palpable that the witness has deliberately and intentionally testified falsely as to some material matter, and is not corroborated by other evidence, that a jury is warranted in disregarding his entire testimony. Although a witness may be mistaken as to some part of his evidence, it does not follow as a matter of law that he has willfully told an untruth, or that the jury would have the right to reject his entire testimony. It is the duty of the jury to consider carefully all the testimony in the case bearing upon the issues of fact submitted to them, and, if possible, to reconcile any and all apparently conflicting statements of the witnesses."—Approved: N. C. St. R. Co. v. Fitzgibbons, 79 Ill. App. 632 (636).

§ 3021. Except such Parts as are Corroborated by Other Credible Evidence.

(a) "It is claimed in this case, gentlemen, that some of the witnesses have testified falsely. If you find that any witness has knowingly and

willfully testified falsely as to any material fact, you may reject all of the testimony of such witness except such parts of the testimony as you may find to be corroborated by other credible evidence, or by facts and circumstances that may fairly be inferred therefrom."—Approved: Colbert v. State, 125 Wis. 423, 104 N. W. 61.

(b) "The court instructs the jury that it is a principle of law that if you believe, from the evidence, that any witness has willfully or knowingly sworn falsely to any material element of the case, or that any witness has willfully and knowingly exaggerated any fact or circumstance material to the issues in the case, for the purpose of deceiving, misleading, or imposing upon the jury, either as to the origin of plaintiff's alleged ailments, so far as, from all the evidence, you believe they exist, or as to the nature and extent of the alleged injury, or as to the manner of the alleged accident in question, then the jury have a right to reject the entire testimony of such witness, except in so far as corroborated by other evidence which you believe, or by facts and circumstances appearing in the case."—Approved: Chicago City Railway Co. v. George M. Shaw, 220 Ill. 532, 77 N. E. 139.

(c) "If the jury believe from the evidence that any witness in this cause has willfully sworn falsely on this trial as to any matter or thing material to the issues in the case, then the jury are at liberty to disregard his entire testimony except in so far as it has been corroborated by other evidence, or by the facts and circumstances proved on the trial. The defendant in this case, having gone upon the stand as a witness in his own behalf, subjects himself to all the rules governing the credibility of other witnesses, and this instruction applies equally to him as well as to any other witness."—Approved: State v. Melvern, 32 Wash. 7, 72 Pac. 489.

(d) "The court instructs you that you are the sole judges of the weight of the evidence and of the credibility of the witnesses, and if you believe from the evidence that any witness has willfully sworn falsely as to any material fact in this case, you may, unless the same is corroborated by other credible evidence, or facts and circumstances in evidence, disregard the whole or any part of the testimony of such witness; and in passing on the credibility of any witness or the weight to be given to his testimony you may consider his manner and conduct upon the stand, his means of knowledge, the relationship of the parties, if any, and the interest that he may have in the result of the case."—Approved: Territory v. Garcia, 12 N. M. 87, 75 Pac. 34.

§ 3022. Where Witness Successfully Impeached, Testimony may be Rejected Unless Corroborated.

(a) "If you believe, from the evidence, that any witness has been successfully impeached, either by reason of bad reputation for truth and veracity, or by reason of statements made out of court conflicting with statements made on the witness stand, or you so find that any witness has willfully sworn falsely in regard to any matter or thing material to the issues in the case, you will be justified in disregarding the whole testimony of such witness, except in so far as you may find it corroborated by other credible evidence in the case, or by facts and circum-

stances proved on the trial."—Approved: State v. Ormiston, 66 Iowa, 143, 23 N. W. 370.

(b) "Testimony has been introduced to impeach certain witnesses in this case, tending to show that their reputation for truth and veracity is bad; also that their general moral character is bad. Testimony has also been introduced tending to sustain their reputation for truth and veracity, and their general moral character. You are to consider such testimony as bearing on the credibility of such witnesses, but you should not, for such reason alone, disregard their testimony, especially in those particulars, if any, where they are corroborated by other credible witnesses, or by facts and circumstances proven by the evidence in the case. You are to consider all their testimony in the light of, and in connection with, all the other evidence and circumstances disclosed in the case, and give to the evidence of said witnesses such credibility as you may deem it entitled to receive."—Approved: State v. Olds, 106 Iowa, 110, 76 N. W. 644.

§ 3023. Jury to say if Impeachment is Successful.

(a) "A witness may be impeached by showing he or she has made other and different statements out of court from those made before you on the trial. Amongst the purposes for which such impeaching evidence may be considered by you is to aid you in determining (if it does so) the weight (if any) to be given the testimony of such witness, and his credibility or otherwise; but such impeaching evidence is not to be considered as tending to establish the alleged guilt of the defendant."—Approved: Marek v. State, 49 Tex. Cr. App. 428, 94 S. W. 469.

(b) "A witness may be impeached by various methods known to our law. One way of impeaching a witness is by proof of general bad character, another way is proof of contradictory statements, and a third is by disproving facts testified to by him. If a witness has in the opinion of the jury been successfully impeached, then his testimony should be disregarded entirely, unless supported by other testimony, or by the facts and circumstances of the case. Where an effort has been made to impeach witnesses, the jurors become triors, and it is for them to say whom they will believe—the witness sought to be impeached, or those witnesses by whom the impeachment is sought. You will understand that you are to determine the weight that is to be given to the testimony of witnesses. These are things for you to determine in your search and endeavor to find the truth of the case."—Approved: Summerlin v. State, 130 Ga. 791, 61 S. E. 849.

§ 3024. Expert Testimony is not to be Considered if Hypothesis is not Proved.

(a) "If you find that any of the facts embodied in the questions, submitted to these witnesses, or either of them, has not been proved, then the weight to be given the evidence of each is weakened by so much, at least, as the facts are not proved. If you find that none of the material facts embodied in said questions are proved by a fair preponderance of the evidence, then you may disregard said evidence as worthless."—

Approved: Terre Haute Traction & Light Co. v. Payne (Ind.), 89 N. E. 413.

(b) "These opinions neither established nor tend to establish the truth of the facts upon which they are based; whether the matters testified to by the witnesses in the cause, as facts, are true or false, is to be determined by the jury alone, and you must also determine whether the facts and matters stated and submitted to the experts in the hypothetical questions are true in fact, and have been proven in the case."—Approved: State v. Duestrow, 137 Mo. 44. See also State v. Crane, 202 Mo. 54.

(c) "Where medical expert testimony is received, based upon a purely hypothetical statement of facts,—that is, a statement of facts of which such experts have not personal knowledge, but which they accept as true for the purpose of answering the question or questions propounded to them,—if it turns out that such hypothetical statement of facts is in material and in important particulars incorrect, unfair, impartial, and untrue, a jury in such case should attach no weight whatever to the answers of the medical experts founded upon such hypothetical statement of facts."—Approved: Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072.

§ 3025. Opinions of Experts are not binding on the Jury.

(a) "The court has allowed in this case the introduction of evidence known as expert testimony, and has allowed expert witnesses to testify as to what, in their opinion, was the cause of the death of A. C. Tillman. But, gentlemen of the jury, their opinion so expressed is not binding or conclusive upon you. It is for you to determine from all the facts and circumstances developed in this case, including the opinion of said expert witnesses, what, in fact, was the cause of the death of said Tillman. And you are to give to their opinion such weight and credit as you shall deem it entitled to after taking in consideration their knowledge and skill as disclosed in their testimony, and all the other facts and circumstances shown and developed in their testimony."—Approved: Morrow v. National Masonic Acc. Ass'n, 125 Iowa, 633, 101 N. W. 468.

(b) "The court instructs the jury that they are not bound to accept as true the opinion of expert witnesses, but the jury may give the opinion of expert witnesses such weight as the jury may under all the evidence in the case consider them entitled to, or the jury may altogether disregard such opinions, if the jury from all the facts believe such opinions to be unreasonable."—Approved: Wiley v. St. Joseph Gas Co., 132 Mo. App. 380, 111 S. W. 1185.

(c) "Testimony has been given by certain witnesses who, in law, are termed experts, and in this connection I would suggest to you that, while in cases such as the one being tried, the law receives the evidence of men, expert in certain lines, as to their opinions derived from their knowledge of particular matters, the ultimate weight which is to be given to the testimony of expert witnesses is a question to be determined by the jury, and there is no rule of law which requires you to surrender your own judgment to that of any person testifying as an expert witness,

or to give controlling effect to the opinion of scientific witnesses; in other words, the testimony of an expert, like that of any other witness, is to be received by you and given such weight as you think it is properly entitled to; but you are not bound or concluded by the testimony of any witness, expert or other."—Approved: Moore v. Chicago R. H. P. Ry. Co. (Iowa), 131 N. W. 30.

(d) "That you may take into consideration, and give the opinion testimony that is offered on both sides, such weight as you think it is entitled to. But, after all, opinion testimony, gentlemen of the jury, is not the testimony of persons who testify as to facts, and it is entitled, therefore, only to such weight as you, in your sound judgment and discretion, think that it is entitled to. It is very proper in matters of this kind that require scientific knowledge—that require more knowledge, as far as technical points are concerned, than you or I, being laymen, are expected to have—it is proper to bring in persons who, by reason of long study and knowledge in the technicalities involved, are competent to express their opinions upon the subject. In cases tried in this court we have nice questions in engineering, and nice questions in medicine, and sometimes nice questions in law, and you are entitled, on these technical questions and subjects, to the opinion of persons learned in these sciences; and in this case you have heard the opinions of the two physicians. One physician said in his judgment these injuries were due to an accident received in a street car, and the other physician says in his judgment and opinion the results that were obtained were due, or more likely due, to the injury received from the grasping of this thistle. Now, gentlemen of the jury, study over carefully, therefore, all that testimony, and be guided by the opinion that seems to you to be the most reasonable under all the facts and circumstances as they are offered in testimony in this case."—Approved: Hull v. Detroit United Ry., 158 Mich. 682, 685, 123 N. W. 571.

§ 3026. Opinions of Experts Received with Caution and Considered along with other Proof.

"Expert and nonexpert witnesses have been allowed to testify to you as to the truth or falsity of the plea of defendant of unsound mind. This plea need not be specially written and pleaded, as the same can be set up under the general issue not guilty. In reference to the expert testimony offered you in this case, and which you should weigh and consider along with the other proof in the case, I charge you in regard to it that expert testimony should be received with caution. While expert testimony is sometimes the only means of, or the best way to, reach the truth, yet it is largely a field of speculation, beset with pitfalls and uncertainties, and requires patient and intelligent investigation to reach the truth. You should give just such weight as you do all the other testimony in the case, governed by a rule to arrive at the truth, giving fair and impartial estimation of all the evidence adduced in the case."—Approved: Atkins v. State, 119 Tenn. 458, 105 S. W. 353, 13 L. R. A. (N. S.) 1031.

§ 3027. Opinions Competent Evidence of Facts Not in Ordinary Experience.

"You have heard the testimony of these physicians, who have given evidence upon that point, and testified as experts, giving opinions. That class of testimony is proper and competent concerning matters involving special knowledge or skill or experience upon some subject which is not within the realm of the ordinary experience of mankind, and which requires special research and study to understand. The law allows those skilled in that special branch to express opinions, and, upon a hypothetical state of facts stated to them, to say whether or not, according to their experience and research, a fact may or may not exist. But, nevertheless, while their opinions are allowed to be given, it is entirely within the province of the jury to say what weight should be given to them. Jurors are not bound by the testimony of experts. Their testimony is to be canvassed as that of any other witness. Just as far as their testimony appeals to your judgment, and convinces you of its worth, you should adopt it; but the mere fact that witnesses are called as experts, and give opinions upon a particular point, does not necessarily obligate the jury to accept their opinions as to what the facts are, in the face of the testimony of witnesses claiming to have actual knowledge of the facts."—Approved: Olson v. Village of Manistique, 110 Mich. 656, 68 N. W. 986.

§ 3028. Testimony of Experts in Hand-writing Weak against Positive Testimony of credible Witness.

"Certain witnesses have testified before you as to their opinion respecting the genuineness of the alleged signature of the defendant to one of the papers introduced in evidence in the case; and it will be proper for the jury to carefully consider the testimony of the said witnesses, and to give it such weight and value as it is justly entitled to, taking into account the experience and knowledge of the witnesses about the matter concerning which their opinion has been given. But it is proper here to observe that, evidence of this character being in fact the result only of a comparison of the controverted signature with the genuine signature of the defendant, as the same is remembered and impressed upon the mind of the witness whose opinion is so given, or with the other signatures proven to be those of the defendant, it is regarded by the law as unsatisfactory, and such as ought not to overthrow the positive and direct testimony of a credible witness who testifies from personal knowledge."—Approved: Jackson v. Adams, 100 Iowa, 163, 69 N. W. 427.

§ 3029. Expert Testimony as Corroborative Evidence.

"4. Witnesses have testified as to their opinion respecting the genuineness of their signature to the note in suit, based upon their acquaintance with and knowledge of defendant's genuine signature. You will carefully consider the same, and give it the weight and value it is justly entitled to, taking into account the experience and knowledge of the witnesses about the matter concerning which the opinion is given. Such evidence, however, is regarded as unsatisfactory. It is, in fact, the result of a comparison of the signature in question with the genuine sig-

nature of the defendant, as the same is remembered and impressed upon the mind of the witness whose opinion is so given. Such evidence ought not to overthrow positive and direct testimony of a credible witness, who testifies from personal knowledge. It should not be disregarded in any case without good and sufficient reasons, such as would entitle you to disregard other evidence. In case of a conflict between the evidence of witnesses about the matter on which the opinion is given it is important as corroborative evidence."—Approved: Bruner v. Wade, 84 Iowa, 698, 51 N. W. 251.

CHAPTER LXXXVII.

ACCORD AND SATISFACTION.

A. Accord and Satisfaction.
B. Compromise and Settlement.
C. Payment.

A. Accord and Satisfaction.

§ 3030. Accord and Satisfaction—Facts Constituting.
§ 3031. An Agreed Settlement is Presumptively Full and Complete.
§ 3032. Agreement to Accept Less Sum for Greater, is mere Offer.
§ 3034. Acceptance of Smaller for Undisputed Sum is not Satisfaction.
§ 3035. Aliter where there is a Dispute in Good Faith.
§ 3036. Mistake of Law will not Open Settlement.
§ 3037. Performing Service under Award in Advance forbids Claim for Extra Allowance.
§ 3038. Surrender of Notes upon acceptance of what Debtor Claims is Payment in Full.

§ 3030. Accord and Satisfaction—Facts Constituting.

"The jury are instructed by the court that the only issue before them is the question of settlement between the plaintiffs and the defendant, or, accord and satisfaction as set forth by the defendant in his second plea. Accord and satisfaction is an agreement between a creditor and his debtor, by which the creditor agrees to take and receive nothing from his debtor in lieu and satisfaction of his claim. If the property or thing to be given by the debtor to the creditor is received and accepted by the latter in settlement of his claim, it has the effect of payment, and extinguishes his claim. Anything valuable may be given by the debtor to the creditor, whether specific property or goods, or choses in action, or a transfer of claims or right belonging to the debtor. A transfer or assignment of property or rights belonging to the wife of the debtor, is valid in law, and sufficient to pay a debt of the husband.

"Therefore, if the jury believe, from the evidence, that in the ——— of ———, ———, or at any time since the maturity of the notes declared on in this case, the defendant and A, one of the plaintiffs in this case, agreed upon a settlement by which the defendant B and his wife were to assign and transfer to said A— a certain claim of inheritance belonging to the wife of the defendant, and if they further believe, from the evidence, that this basis of settlement was carried out by the parties—that is to say, that the defendant and his wife executed an assignment and transfer of said claim, and that the same was delivered to and accepted by said A, then they will find for the defendant."—Approved: American v. Rimpert, 75 Ill. 228.

§ 3031. An Agreed Settlement is Presumptively Full and Complete.

"The burden is upon defendant to prove his allegation of settlement and payment by a preponderance of evidence. If there was a reckoning of accounts between them, and a result arrived at, to which both agreed, that would be a full and completed settlement, and binding upon both parties. If there was a settlement, the presumption is that it included all matters of account to the date of such settlement, unless it is alleged and proven that, by agreement, fraud, or mistake, certain items or accounts were omitted. The plaintiff does not so allege or prove, but denies that there was a settlement, and asks to recover upon account. If you find there was a settlement, you will presume it was of all items of account between them to its date; and the plaintiff in such case cannot recover therefor. Receipts reciting a settlement are not conclusive evidence thereof, but are open to be explained or even contradicted by the party against whom they run."—Approved: Thompson v. Maxwell, 74 Iowa, 415, 38 N. W. 125.

§ 3032. Agreement to Accept Less Sum for Greater is Mere Offer.

"You are instructed that if the plaintiff agreed with defendant to accept a less sum than that sued for in this case, and defendant agreed to pay him, but before it made payment it was garnished, and on that account failed to make payment, and that it has never paid anything to plaintiff, this would be no defense to this suit, and plaintiff would not be bound by such agreement."—Approved: North State Fire Ins. Co. v. Dillard, 87 Ark. 561, 115 S. W. 154.

§ 3034. Acceptance of Smaller for Undisputed Sum is Not Satisfaction.

"If the jury finds from the evidence that at the time of the $400 payment there was a larger sum actually due, and that there was no controversy between the parties as to the amount, or that they or either of them was mistaken as to the amount then due, then a release and satisfaction of the whole debt, based upon such mistake, or in the absence of any dispute as to a larger sum being due, would not be a release or satisfaction of the unpaid portion of the debt."—Approved: Byrnes v. Byrnes, 92 Minn. 73, 99 N. W. 426.

§ 3035. Aliter where there is a Dispute in Good Faith.

"And you are further instructed that if you find from the evidence that there was a disagreement in good faith between the plaintiffs and said board of county commissioners with respect of the amount due and owing said plaintiffs under said contract, and that said board proposed to allow and pay to them the sum of ———— in full satisfaction and settlement of said claim, that then it was optional with said plaintiffs to accept said sum or to refuse the same. But, if you further find that said plaintiffs exercised such option by accepting such allowance and receiving such sum, then they would be bound by the condition that such allowance and payment was in full satisfaction and settlement of said claim, to the same extent that they would have been bound had they expressly agreed to such condition; and this would be true even as against any secret or expressed intentions to the contrary, or any pro-

tests then or subsequently made."—Approved: Green v. Lancaster County, 61 Neb. 473, 85 N. W. 439 (441).

§ 3036. Mistake of Law will not Open Settlement.

"The court finds that the failure of the plaintiff to make a claim for his commission sued for, in his statement with the county while he was collector, was because he did not know or believe that, under the law, he was entitled to such commission, and that, therefore such mistake was a mistake of law, and not of fact, and he is not entitled to recover."—Approved: Hethcock v. Crawford County, 200 Mo. 170, 98 S. W. 582.

§ 3037. Performing Service under Award in Advance Forbids Claim for Extra Allowance.

"You are instructed that the claimant in this case having applied to the court in ———, for an allowance and order on the guardian of C. to pay her fifty dollars per month for care, maintenance, support, and clothing, and having obtained such order, to continue until the further order of the court, and having received and accepted said allowance according to said order, she cannot recover any sum or amount against the administrator in this case for the work by her performed in fulfillment of the terms and condition of said order."—Approved: Gibson v. Wild, 124 Iowa, 152, 99 N. W. 569.

§ 3038. Surrender of Notes upon Acceptance of what Debtor Claims is Payment in Full.

"The court instructs the jury that where there is a bona fide dispute between the maker and payee of notes as to the date from which interest is payable under the terms of the notes which are ambiguous; and the maker pays the amount he admits to be due on the express condition that the notes and mortgages securing the same shall be cancelled and surrendered, and the payee accordingly receives the money and cancels and surrenders the mortgages, there is an accord and satisfaction."—Approved: Storch v. Dewey, 57 Kan. 370, 46 Pac. 698.

B. Compromise and Settlement.

§ 3039. Agreement for and Payment of Less Sum in Discharge of Greater.
3040. Note Given in Settlement of Claim in Good Faith.
3041. Diligence to Set Aside—Acquiescence Bars Right.
3042. Striking Balance and Agreeing thereto.
3043. Agreement and Part Performance thereof Accepted.
3044. Burden on Objector to Show Unfairness within Reasonable Time.
3045. Release—Fraudulent Procurement.
3045a. On Rescission for Fraud there must be Return of what was Received.
3045b. Signing Receipt not Binding if Settlement is not.
3046. Threat to Resist Payment by Costly Litigation not Ground for Invalidating Settlement.

§ 3039. Agreement for and Payment of Less Sum in Discharge of Greater.

"If the whole amount of the premiums offered was earned by plaintiff or his assignors, and became due and owing from defendant, then no agreement, if any is shown, on the part of any of said exhibitors with the defendant or his assignors, to accept a less sum than what was so due, without other consideration for such agreement than the payment of such less sum, would be binding upon such exhibitor, and he or his assignors might, notwithstanding the acceptance of said sum, recover the balance still due."—Approved: Murray v. Walker, 83 Iowa, 202, 48 N. W. 1075.

§ 3040. Note Given in Settlement of Claim in good Faith.

"The court instructs the jury, for the plaintiff, that if they believe, from the evidence, that the plaintiff, in the month of ———, 19—, in good faith supposed he had a cause of action against the defendant, on account of personal injuries which he believed resulted from the conduct of the defendant, and thereupon threatened to sue the defendant on account thereof, and thereupon the difference between them was compromised, and the defendant executed the note sued on in consideration that the plaintiff would not sue him for such injuries, and the plaintiff accepted the note in settlement of such claim, such compromise and settlement is a good and lawful consideration for such note."—Approved: Parker v. Enslow, 102 Ill. 272.

§ 3041. Diligence to Set Aside—Acquiescence Bars Right.

"Whether a settlement of a claim is right or wrong, the law holds a party to diligence who proposes to avoid it. If he acquiesces for an unreasonable length of time, he will be bound by it. If he seeks to repudiate it, he must do so at the first opportunity, or account for and excuse the delay. By acquiescence for an unreasonable length of time, without excuse, he affirms the settlement, whether it was originally right

or not. In this case those interested in the claim, if any ever existed, waited for more than fourteen years after, as the defense claim, it had been adjusted. This was an unreasonable length of time to wait. If, therefore, such settlement as is claimed was affected of the claim, you will find for the defense."—Approved: Foote v. Foote, 61 Mich. 181, 28 N. W. 90.

§ 3042. Striking Balance and Agreeing Thereto.

"In order to constitute a settlement, it must appear from the evidence that the parties expressly or impliedly agreed upon a balance due, and although you may believe from the evidence that on or about the 8th day of October, 1889, the parties met together, and looked over their accounts, and struck a balance, this would not be binding upon the parties as a settlement, unless you further find from the evidence that both the parties then agreed or understood that such balance should be regarded as the amount due from the defendant to the plaintiff." —Approved: Loomer v. Thomas, 38 Neb. 277, 56 N. W. 973.

§ 3043. Agreement and Part Performance Thereof Accepted.

"If you believe from the evidence that on or about the 1st day of April, 1903, the plaintiff agreed with the defendant upon a compromise of his claim for the damages sued for in this cause for the sum of $1 and the promise to employ him for one day as a section foreman, and the further promise of the general claim agent of the defendant company to pay to the plaintiff the full time lost by him on account of his injuries, the same to be ascertained by a statement of the attending physicians; and if you believe that the plaintiff then and there accepted said promise and agreement, together with $1, and the employment of him for one day as a section foreman in satisfaction and discharge of his original cause of action on account of his injuries, and that he agreed and expected to look to and demand of the defendant the sum of the time lost by him on account of such injuries when same were ascertained by his physician, under said promise and agreement, and not to demand of defendant damages on account of his original cause of action as it stood before such promise and agreement was made—then you will find a verdict for the defendant."—Approved: Gulf, C. & S. F. Ry. Co. v. Minter, 42 Tex. Civ. App. 235, 93 S. W. 516.

§ 3044. Burden on Objector to Show Unfairness Within Reasonable Time.

"When parties who have had business transactions between themselves, meet and make settlement of such tranactions, the law presumes that such settlement is fair and legal, and one seeking to annul and set aside such settlement by suit, in order to do so successfully, must show by a preponderance of the evidence that a material mistake was made in such settlement to his prejudice or that there was fraud or coercion, violence, or a threat of such, committed on the part of the other party in making such settlement, and such suit should be brought in a reasonable time."—Approved: Russell v. Stewart, 78 Ark. 603, 94 S. W. 47.

§ 3045. Release—Fraudulent Procurement.

"A paper has been put in evidence on this trial, called a 'release.' It is a written declaration by the plaintiff that at the date thereof, April 21, 1888, there was nothing whatever due to him from the defendant by virtue of any past deal or transaction whatever. The language is plain and intelligible, and its meaning and effect could not be misunderstood by any person of ordinary intelligence, and unless the plaintiff was induced to sign it by the fraud of the defendant, or it was wholly without consideration, it is binding upon the plaintiff, and he cannot recover if he signed the paper deliberately, with full knowledge of its contents, or not under the influence of any mistake. If it was induced by fraud, or was wholly without consideration, then it is not binding. The law approves of settlements and compromises of disputed claims, and, when deliberately made, the parties are bound by them. The law upholds and sustains them and will not disturb them, or sanction any interference with them, without the consent of the parties to them, except upon the ground of fraud or mistake. If you find that the plaintiff desired the defendant to buy the property from Mrs. Averill that was conveyed by the bill of sale, which was delivered at the same time as the assignment of the lease containing this release was delivered, and that the defendant would not make that deal unless the plaintiff would sign such a release or declaration, and the plaintiff signed it in order to have that sale of his wife's property consummated, that would be a sufficient consideration for the release, and no promise by the defendant made at the time or subsequently to pay plaintiff, if any such promise was made, can be of any avail to plaintiff in this suit, or relieve him from the binding effect of the settlement. The consideration for the release need not pass to the plaintiff. It is just as binding upon him if the consideration is paid to his wife, if it was a part of the same transaction. The release can only be avoided in case the defendant and his attorney deceived plaintiff as to its contents and effect, and thereby induced him to sign it."—Approved: Averill v. Wood, 78 Mich. 342, 44 N. W. 381.

§ 3045a. On Rescission for Fraud there must be Return of what was Received.

(a) "If a settlement, by way of a compromise of a disputed claim, is made, it cannot be avoided by either party, on a claim of any fraud about it, unless the party who makes such claim and seeks to rescind the settlement returns to the other party what he has received by virtue of it. If he keeps what he receives, he recognizes the settlement, and is bound by it."—Approved: Hart v. Gould, 62 Mich. 262, 268, 25 N. W. 831.

§ 3045b. Signing Receipt not Binding if Settlement is not.

"If the jury find that, when the receipts were signed by plaintiffs, they did not know that G— had sold the land to T— and the timber to A— and F—, and did not compromise and settle the two claims, but signed the said receipts believing that the account rendered to them was a true statement of all the money received by G— for the sale of

lands and timber under the power of attorney, then the signing of said receipts would have no effect on their right to recover in this action."—Approved: Hart v. Gould, 62 Mich. 262, 269, 25 N. W. 831.

§ 3046. Threat to Resist Payment by Costly Litigation not Ground for Invalidating Settlement.

"There is no fraud, in ordinary cases, in refusing to pay or settle without litigation; and if the adjuster disputed the claim and told the plaintiff that he, plaintiff, could not recover against the insurance company, defendant in this case, and gave it as his opinion that he (plaintiff) had no legal rights, as against the company on which he could recover, and the plaintiff had the same means of knowledge with the adjuster, and he believed the agent of the company and he relied upon the representations thus made by the agent of the company, and then and there made a hasty settlement with the agent of the company, and although made under threat that no payment would ever be made without long and costly litigation, is not fraud of such a character as would avoid a settlement thus made, although the amount received by plaintiff was but nominal. Plaintiff was bound by his own interest to inform himself of his rights before acting, and to stand upon those rights, and if he failed to do so and settled at a much smaller sum than he was entitled to, he himself is responsible for his loss and cannot recover an additional sum over and above the sum already received."—Approved: Aetna Ins. Co. v. Reed, 33 Ohio St. 283, 286.

C. Payment.

§ 3047. Where neither Debtor nor Creditor Applies Payments, Jury may.
3048. Whether Payment was, or not, Accepted as in Full, for the jury.
3049. Where Counterclaim Exceeds Mortgage, it should be Deemed Paid.
3050. Receipt Prima Facie Evidence of Payment.
3051. Burden of Proof to Show Payment of Note.
3052. Tender to Constitute Payment, must be Money Actually Offered.
3053. Burden of Proof to Show Note Accepted in Payment.
3054. And so that Mortgage was in Payment of a Judgment.
3055. Where Bond for Title is Given at Time Note is Taken, Burden is Shifted.
3056. Collection and Retention of Money under Agreement to Apply on Indebtedness.
3057. Mutual Accounting as Payment.
3058. Drafts Accepted Conditionally Should be Returned, or Offered to be Returned.

§ 3047. Where Neither Debtor nor Creditor Applies Payments, Jury May.

"The court instructs the jury that if you believe from the evidence that between the 3d of June, 1903, and the 31st of December, 1903, the defendant paid to the plaintiff various sums of money without specifying to what the sums paid should be applied, and that the plaintiff at the time it received said various payments did not apply same to any particular item or account, then the jury may distribute as credits the total amount of money so paid by defendant to plaintiff during said time, between the causes of action set forth in the first and third counts of plaintiff's petition in such proportion as the jury from the evidence may think proper."—Approved: Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co., 210 Mo. 715, 109 S. W. 47.

§ 3048. Whether Payment was, or not, Accepted as in Full, for the Jury.

"Some evidence has been introduced with reference to a check for $356.71 sent by the defendants to the plaintiff, and which was accompanied by a statement of the account, which statement showed that defendants had charged the plaintiff with the amount of the account claimed to be owing defendants by C. F. Allen, and that the $356.71 was the amount remaining due to plaintiff. I instruct you that if you find that such check was so sent plaintiff by defendant, and which was accompanied by such statement of account, and if you find that plaintiff received said matter and used said check, and made no objection to the defendants about the condition of said Allen account on the amount due from defendants and charging plaintiff with said

Allen account for several months afterwards, then said fact should be considered by you as evidence tending to show that an agreement had been made to so credit the same, but it is not conclusive, and you should consider such fact along with all of the other evidence bearing upon the question, and, from the whole of the evidence and every fact and circumstance shown by the evidence, determine whether such an agreement was made with reference to said Allen account at the time the defendant contracted with plaintiff for the purchase of the merchandise sued for by the plaintiff in this action."—Approved: Valley Lumber Co. v. McGilvery (Idaho), 101 Pac. 94.

§ 3049. Where Counterclaim Exceeds Mortgage it should be Deemed Paid.

"In this action the title of the plaintiff to the mules in controversy is based upon the mortgage executed by the defendant to Pruden & Co., to secure the sum of $350 and interest. If there is any part of the debt so secured which remained unpaid and due at the time of the institution of this suit, then the plaintiff is entitled to recover. In ascertaining this fact—that is, whether there is any part of the debt so secured yet due—it becomes necessary for you to consider the state of the accounts existing between the two parties. As to the item to which the defendant claims credit—that is, for work and labor performed by himself and his teams—the burden is on the defendant to show by a preponderance of evidence what the contract was between him and the plaintiff, and how much he is entitled to recover for his services rendered in accordance with that contract. If you find that the plaintiff was to pay the defendant the sum of $4 per day for each team of two mules or horses furnished by him, and his wagon, and his own services as driver, and was to feed the team and the defendant, and that his rate of pay was to be for 'straight time'—that is, for all the time that elapsed—and that there was to be no deduction for the time lost by defendant and his teams by reason of wet weather, or other causes not the willful act of the defendant, and that the amount due defendant under this contract for services so rendered by himself and his teams is equal to, or greater than, the amount of the debt secured, with interest, and any other sums which the defendant may be shown to have owed the plaintiff for goods, moneys, or supplies of any kind furnished him by plaintiff on open account, then you should find for the defendant for the mules in controversy, or their value as shown by the proof, and also for the reasonable value of their use from the time the same were taken away from the defendant under the writ in this case and delivered to the plaintiff up to this date, according to the proof. As to the items charged to the defendant by the plaintiff in his account, the burden is on the plaintiff to show by a preponderance of testimony that he furnished the same, and that the defendant either expressly agreed or was liable to pay therefor under the terms of the contract between them. The plaintiff could not have the right to arbitrarily charge the defendant with anything; it must appear that the item charged was either by virtue of an agreement between the parties or that it was a just and proper charge which the law would imply a promise on the part

of the defendant to pay. In arriving at your verdict you should first consider the amount of the mortgage debt, with interest thereon, as shown by the mortgage, to the beginning of this suit; this much is undisputed; second, you should consider and add to the foregoing all of such sums as you may find that the defendant was legally indebted to the plaintiff for, and liable to pay under the contract existing between them, with six per cent. interest thereon to the same date; adding these two together you should set off against the sum so found whatever sum you may find that the defendant was entitled to receive from the plaintiff under his contract for the services of himself and his team, with interest on such sums from the time they were due at the rate of six per cent. per annum up to said date. If the amount due from the defendant to the plaintiff is larger than the amount due from the plaintiff to the defendant, then the plaintiff is entitled to recover; if the amount due from the plaintiff to the defendant is greater than the sum of all the credits that the plaintiff would be entitled to as aforesaid, the defendant would be entitled to recover the property in controversy, with damages for its detention as heretofore explained."—Approved: Maurice v. Hunt, 80 Ark. 476, 97 S. W. 664.

§ 3050. Receipt—Prima Facie Evidence of Payment.

(a) "As to whether the premiums were paid, the jury are instructed that the receipt issued by the defendant's agent for the payment of the third premium, due under the terms of the policy November 20, 1904, would be prima facie evidence that all the prior payments had been made to the defendant."—Approved: Hanson v. Aetna Life Ins. Co., 78 Neb. 421, 113 N. W. 114.

(b) "You are instructed that the receipts and other writings introduced in evidence in this case are prima facie evidence of the receipt of the money, and are not conclusive, and may be qualified and explained by other competent evidence; and, in determining the truth in relation thereto, you will take into consideration all the evidence introduced bearing upon this point."—Approved: Mills v. State, 53 Neb. 263, 73 N. W. 761.

§ 3051. Burden of Proof to Show Payment of Note.

"The defendant claims that the note in controversy was fully paid, principal and interest, before the action was commenced. The burden of proof is on the defendant to prove by a preponderance of the evidence that he had paid the note before the action was commenced, and, if defendant has so proved, then your verdict should be for defendant." —Approved: Gravert v. Goothard, 81 Neb. 99, 115 N. W. 559.

§ 3052. Tender to Constitute Payment Must be of Money Actually Offered.

"Now, in order to constitute a good tender of money of any amount, there must be an actual tender of money; that is, legal tender, that would be legal in law, and actually offer the money. To constitute a valid tender of money, it must be offered and exhibited to the person to whom it is made, unless it appears from the preponderance of the evi-

dence that such person, by his conduct or words, prevented the tender or exhibition of the money."—Approved: Deering Harvester Co. v. Hamilton, 80 Minn. 162, 83 N. W. 44.

§ 3053. Burden of Proof to Show Note Accepted in Payment.

"By the word 'payment,' as it is used in paragraph three of these instructions, is meant absolute payment; such payment as finally ended the part of debt or debt paid. In the absence of any agreement between the debtor and the creditor, a note, even though signed by another as surety, for the principal debtor and the principal, which is given for a pre-existing debt, is no more than a conditional payment, and the creditor holds both; but if they at the time so agree, or the creditor so accepted the note, the new evidence of debt puts an end to the old, and works and is absolute payment of it; and in such case the creditor is not under obligations to hold, for the benefit of the surety, any security which the creditor may have held for the payment of the debt in its old form, while in the first, or the case of a conditional payment, the creditor is under such obligation. The plaintiff in this case has the burden to show that the note in suit was taken and accepted by it in absolute payment of so much of the Anderson Bros. Mining & Railway Company's pre-existing debt, but, if it does this by the preponderance of the evidence, your verdict will be for the plaintiff for the full amount of the note; as, if the defendant's (Gifford's) note worked an absolute payment to its extent of the old debt, any security held by the plaintiff remained as such for the payment of the unpaid portion, and not for the benefit of the defendant. If, however, the defendant's note worked no more than conditional payment of so much of the old debt, and the plaintiff was thus under obligation to hold securities in its hands for the defendant's benefit, a subsequent payment, although absolute, of that part of the old debt which was not so conditionally paid by the defendant's note, did not release the plaintiff from the duty to hold the security, if any it had, for the defendant's benefit."—Approved: Bank of Monroe v. Gifford, 79 Iowa, 300, 44 N. W. 558.

§ 3054. And so that Mortgage was in Payment of a Judgment.

The burden of showing the ———— mortgage given by the defendant to the plaintiff as trustee was a payment in full of the entire amount due under the judgment against the defendant is upon the defendant, and he must satisfy you by a fair preponderance of the evidence, that the giving and acceptance of such mortgage constituted a payment in full of the ———— dollars sued for in this action."—Approved: Meyer v. Hafemeister, 119 Wis. 538, 97 N. W. 165, 100 Am. St. Rep. 900.

§ 3055. Where Bond for Title is Given at Time Note is Taken Burden is Shifted.

"If you find from the preponderance of the evidence that the note sued on in this action was given by the defendant for part of the purchase money of N. ½ of N. W. ¼ and N. ½ of N. E. ¼ of section 20, township 6 S., range 19 W., and at the time the note was given the plaintiff gave defendant a bond for title, agreeing to convey by warranty

deed the said land upon the payment of the purchase money according to the terms of said bond for title, and you find that on October 18, 1902, the plaintiff did execute and deliver to the defendant a warranty deed conveying said land and acknowledging the receipt of the purchase money, the possession of said deed is prima facie evidence that the note sued on has been paid."—Approved: Dodwell v. Mound City Sawmill Co., 90 Ark. 287, 119 S. W. 262.

§ 3056. Collection and Retention of Money Under Agreement to Apply on Indebtedness.

"The court instructs the jury that if from the evidence they should believe that the saloon property and the accounts belonged to T. at the time of his death, and that there was an agreement between the plaintiff and defendant, as administrator of the estate of T., deceased, that the effects of T. in plaintiff's hands, and the proceeds thereof, collected and to be collected by plaintiff, should be applied to the payment of the note, and they should further find that plaintiff did have in his hands effects of T.'s estate, and that pursuant to such agreement he received, as the proceeds of the sale of the property and collections of said accounts, money sufficient to pay said note, then such receipt and retention of the money under such agreement would amount to a payment of a note."—Approved: Frank v. Thompson, 105 Ala. 211, 16 South. 634.

§ 3057. Mutual Accounting as Payment.

"If the jury believe from the evidence, that the plaintiff and defendant accounted together as to the indebtedness, evidenced by the bond sued on, and so accounted freely and without concealment or fraud by either, and that, as a result the bond was so paid and discharged as that the defendant was then entitled to said bond,—then it is not material to inquire into the consideration so paid and accepted in the discharge thereof; but if they believe from the evidence, that the transaction was not so executed, final and conclusive, that the defendant was then and there entitled of right to said bond, then all pretended payments claimed which are shown to have been paid in Confederate money, or other illegal or unlawful currency, are null and void, and should be totally disregarded by the jury."—Approved: Washington v. Burnett, 4 W. Va. 85.

§ 3058. Drafts Accepted Conditionally Should be Returned or Offered to be Returned.

"If the jury believe from the evidence, that the defendant gave a draft or drafts to the plaintiff, or to any one for him, in part or full payment for said corn, and that said draft or drafts were accepted by the plaintiff upon the condition that he could use it or them to pay his debts, then they will find for plaintiff, unless they believe the plaintiff did or could have used said draft or drafts in the payment of his debts; if they further believe that said draft or drafts have been returned or offered to be returned to defendant, and that plaintiff did not receive any money on such draft or drafts."—Approved: Hodgden v. Latham, 33 Ill. 344.

CHAPTER LXXXVIII.

ALIENATION OF AFFECTIONS.

A. Alienation of Affections.
B. Breach of Promise.
C. Criminal Conversation.
D. Seduction.

A. Alienation of Affections.

§ 3059. Defendant's Conduct Controlling Cause of Alienation.
3060. Alienation with no Intentional Misconduct by Defendant.

§ 3059. Defendant's Conduct Controlling Cause of Alienation.

"The jury are instructed that if the conduct of the defendant was the controlling cause which induced the husband to leave his wife, the plaintiff, and if the jury are satisfied that but for the conduct of the defendant he would not have left the plaintiff, plaintiff is entitled to recover, although there might have been other causes contributing to the same result."—Approved: Rath v. Rath, 2 Neb. Unoff. 600, 89 N. W. 612.

§ 3060. Alienation with no Intentional Misconduct by Defendant.

"Although you may believe from the evidence that plaintiff's husband transferred his affections from plaintiff to defendant, yet if you further believe plaintiff's husband alienated his own affections from plaintiff without any intentional misconduct on the part of defendant, or that such alienation was occasioned by some other cause over which defendant had no control, or exercised no intentional direction or influence, then you will find for the defendant."—Approved: Scott v. O'Brien, 129 Ky. 1, 110 S. W. 260.

B. Breach of Promise.

§ 3061. Constituent Elements of Contract to Marry.
3062. If no Time is set—Performance within Reasonable Time.
3063. Subsequent Sexual Intercourse—No Defense.
3064. Promise in Consideration of Sexual Intercourse is a Defense.
3065. Conditions of Recovery.
3066. Mere Courtesies and Attentions do Not Prove Promise.
3067. Incapacity to Make Binding Contract of Marriage Not Necessarily a Defense.
3068. Postponing Date Set for Marriage from Time to Time as Affecting Statute of Limitations.
3069. Venereal Disease Unknown to Defendant, when Promise Made.

§ 3061. Constituent Elements of Contract to Marry.

"You are instructed that to constitute a contract to marry there must be a meeting of the minds of the contracting parties—that is,

there must be an offer on the part of one and an acceptance on the part of the other. Such contract may be unspoken or unwritten, but enough must appear to show that the minds of the parties met, and fixed the fact that the parties are to marry as clearly as if put in formal words of offer and acceptance."—Approved: Hinckley v. Jewett, 86 Neb. 404, 125 N. W. 1086.

§ 3062. If no Time is Set Performance within Reasonable Time.

"You are instructed that under a declaration charging a promise to marry upon request, or within a reasonable time, such request need not necessarily be made by the plaintiff herself, and in this case, if you find from the evidence that there was a valid subsisting contract of marriage between the plaintiff and defendant, and that no definite time was fixed by the parties in the contract, then the law would presume a contract to marry within a reasonable time; and if you further believe from the evidence that after a reasonable time from the making of said contract, and before the commencement of this suit, the plaintiff herself, or anyone authorized by her for that purpose, called upon the defendant, and requested him to marry the plaintiff, and that he refused and neglected to do so, then you should find the issues for the plaintiff."—Approved: Judy v. Sterrett, 153 Ill. 94, aff'g, 52 Ill. App. 265, 38 N. E. 633.

§ 3063. Subsequent Sexual Intercourse no Defense.

"If you find that such proposal of marriage was made by defendant and accepted by plaintiff, then any illicit relations that may thereafter have occurred between plaintiff and defendant, induced by such promise, cannot justify defendant in refusing to consummate such marriage."—Approved: Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

§ 3064. Promise in Consideration of Sexual Intercourse is a Defense.

"The court instructs the jury that when a man promises to marry a woman on consideration that she should permit him to have sexual intercourse with her, or on the consideration that she would permit him to have sexual intercourse with her and as a result of such intercourse she should become pregnant, the promise is illegal and cannot be enforced in law. And in this case, if you find from the evidence that the defendant did promise to marry the plaintiff, as alleged in the third count of the declaration, and that there was no other consideration for such promise except that alleged in the third count of said declaration, then you should find for the defendant."—Approved: Judy v. Sterratt, 153 Ill. 94, 38 N. E. 633.

§ 3065. Conditions of Recovery.

"If the jury find from the evidence that on or about the ——— day of ———, 18—, plaintiff was single and unmarried, and that at such time defendant proposed marriage to plaintiff, and that plaintiff accepted such proposal, no definite time having been fixed for such marriage; that thereafter defendant failed and refused to marry plaintiff,

abandoned her, and declared to her that he did not intend to marry her, and denied, and still denies, that he made such proposal, then you shall find for the plaintiff."—Approved: Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

§ 3066. Mere Courtesies and Attention do not Prove Promise.

"The mere fact that an unmarried man is gallant to women, and shows to unmarried women courtesies and attentions, is, taken alone, no sufficient proof that he has marriage in his purpose, nor that he is engaged to be married. If, therefore, the jury find from the evidence that defendant was gallant in his conduct to plaintiff, and showed her courtesies and attentions, whether from a spirit of gallantry, or from the motive indicated in instruction No. 3 in defendant's series of instructions, but not for the purpose of marriage, nor from the feelings of marriage engagement, then they must find the issues for the defendant."—Approved: Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

§ 3067. Incapacity to Make Binding Contract of Marriage Not Necessarily a Defense.

"The court instructs you that a mistake or ignorance of the law happens when a person, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect; and if you believe from the evidence in this case that the plaintiff was in full possession of all the facts which have been brought out in evidence with reference to the relations existing between the defendant and his reputed wife, and that such erroneous conclusion, as to the legal effect of such relations, was brought about by the fraud or imposition or misrepresentations of the defendant, and if you further find and believe that the defendant knew the legal effect of the relations which existed between him and his reputed wife, which would incapacitate him from making a lawful marriage contract with the plaintiff, and that he took advantage of her ignorance of such legal effect of the facts known to her, induced her to believe that he could legally marry her, and that she honestly and in good faith believed in the false and fraudulent statements thus made to her, and that she was ignorant of the legal effect of the facts which were known to her, in that event you should find for the plaintiff."—Approved: Davis v. Pryor, 3 Ind. Ter. 396, 58 S. W. 660.

§ 3068. Postponing Date for Marriage from Time to Time as Affecting Statute of Limitations.

"The court instructs the jury that if there was an agreement to marry, and the time for its consummation postponed from time to time by appellant until a period less than (statutory term) years prior to the commencement of this suit, when appellant refused to marry appellee, and the plaintiff was ready and willing to marry him, then this suit would not be barred by the statute of limitations."—Approved: Chamness v. Cox, 131 Ind. 118, 30 N. E. 901.

§ 3069. Venereal Disease Unknown to Defendant, when Promise Made.

"If at the time when the defendant refused to carry out the said alleged contract of marriage on his part the plaintiff was still physically

affected by a venereal disease, which rendered her unfit for the marriage state, and you further so find that the defendant was ignorant of such physical condition of the plaintiff at the time when he entered into the said alleged contract of marriage with her, you should then find that the defendant was justified in refusing to marry the plaintiff. But, if you fail to find from a preponderance of evidence that the plaintiff was afflicted with an ailment of the character charged by the defendant during the said period of the said alleged engagement of marriage between the said parties, and that said condition was unknown to the defendant at the time when he entered into said engagement, or if you believe from the evidence that the plaintiff was during a part of the said time affected with such a disease, but became entirely and permanently cured of the same before the defendant refused to comply with the terms of the said marriage contract on his part, you should then find that the defendant was not justified in refusing to marry the plaintiff on account of her physical condition."—Approved: Beans v. Denny (Iowa), 117 N. W. 1091.

C. Criminal Conversation.

§ 3070. Criminal Conversation—Elements of Claim.
3071. Statements of Wife—Limiting Effect as Evidence.
3072. Conduct of Wife as Bearing upon Damages.
3073. Condonation by Husband is no Bar to Action.
3074. Husband's Cognizance without Effort to Prevent.
3075. Adulterous Disposition and Opportunity for Intercourse.

§ 3070. Criminal Conversation—Elements of Claim.

"The jury are instructed that the law forbids the debauching of a man's wife. And, if a man violates the sanctity of another's household by having carnal intercourse with another's wife, the person so offending is liable in damages to the party injured for such misconduct. And if the jury believe from the evidence that the defendant had carnal intercourse with the wife of the plaintiff, as alleged in the petition herein, then your verdict should be for the plaintiff, in such sum as you believe from the evidence will compensate him for the injury and damage he has suffered, not exceeding the amount claimed in the petition. And, in determining the amount of such damages, you should take into account the shame and ridicule plaintiff is subject to, and the mental anguish and distress he would necessarily suffer by the action of the defendant."

"If you believe from the evidence that the plaintiff was willing, or contributed in any degree to have his wife throw herself in the way of the defendant, and to try to entrap him into having connection with her, the plaintiff cannot recover. If you believe from the evidence plaintiff and his wife tried to entrap the defendant into having improper relations with his wife, for the purpose of blackmailing him or getting money from him, then plaintiff cannot recover."—Approved: Smith v. Meyers, 52 Neb. 70, 71 N. W. 1006.

§ 3071. Statements of Wife—Limiting Effect as Evidence.

"Evidence has been admitted tending to show that the wife of the plaintiff made statements to him respecting her relation with the defendant, and showing the relations between the plaintiff and his wife since the time of such communication. You are instructed that you cannot consider the statements of the plaintiff's wife to him, nor their conduct or relation since that time, in determining the question whether or not defendant has had sexual intercourse with said wife; but, if you find from the other evidence in the case that defendant did have such sexual intercourse, you may consider the relations existing between the plaintiff and his wife since the time it is claimed she made statements to plaintiff, as above suggested, in determining the damage that plaintiff has sustained, if any, by reason of such acts of the defendant, but such damage cannot be increased because of any unreasonable conduct, if any, of the plaintiff."—Approved: Ball v. Marquis, 122 Iowa, 665, 98 N. W. 496.

§ 3072. Conduct of Wife as Bearing upon Damages.

"Evidence has been admitted tending to show that the wife of the plaintiff made statements to him respecting her relation with the defendant, and showing the relations between the plaintiff and his wife since the time of such communication. You are instructed that you cannot consider the statements of the plaintiff's wife to him, nor their conduct or relation since that time, in determining the question whether or not defendant has had sexual intercourse with said wife; but if you find, from the other evidence in the case, that defendant did have such sexual intercourse, you may consider the relations existing between the plaintiff and his wife since the time it is claimed she made statements to plaintiff, as above suggested, in determining the damages that plaintiff has sustained, if any, by reason of such acts of the defendant; but such damages cannot be increased because of any unreasonable doubt, if any, of the plaintiff."—Approved: Ball v. Marquis, 118 Iowa, 740, 92 N. W. 691.

§ 3073. Condonation by Husband is no Bar to Action.

"The fact that the husband, after learning of the wrong that he has suffered, did not break up his home or drive his wife therefrom or apply for a divorce, but condoned her offense, is no bar to his action against the defendant for any wrong committed by him. It may lessen the damages, but it does not take away the right of action, and the damages, if any, are for you to find, if you reach that branch of the case."—Approved: Smith v. Hockenberry, 146 Mich. 7, 109 N. W. 23.

§ 3074. Husband's Cognizance without Effort to Prevent.

"If you find from the evidence that the defendant did have sexual intercourse with the plaintiff's wife, and also find that prior to such intercourse the plaintiff had reason to know his wife was guilty of improper conduct with the defendant, suspected her of it, and yet took no means to prevent an intercourse between them, you may consider such omission on his part in determining what, if any, damage he is

entitled to recover from the defendant for seducing his wife."—Approved: Lee v. Hammond, 114 Wis. 550, 90 N. W. 1073.

§ 3075. Adulterous Disposition and Opportunity for Intercourse.

"In order to establish the charge of adultery, the plaintiff must first prove an adulterous disposition on the part of the defendant toward Mrs. K.; second, an adulterous disposition on her part toward the defendant; and, third, the opportunity for the gratification of this adulterous disposition. If any one of these elements is lacking, the plaintiff must fail. Mere opportunity is not sufficient; neither is the adulterous disposition without the opportunity sufficient; neither would it be sufficient to prove an adulterous disposition on the part of the defendant, coupled with the opportunity, unless the plaintiff goes farther, and proves an adulterous disposition on the part of the plaintiff's wife."—Approved: Knickerbocker v. Worthing, 138 Mich. 224, 101 N. W. 540.

D. Seduction.

§ 3076. Seduction—Elements Constituting.
3077. Seduction as Enhancing Damages in Action for Breach of Promise.

§ 3076. Seduction—Elements Constituting.

"Seduction is the carnal knowledge by a man of an unmarried woman of a previously chaste character, accomplished by means of some false promise, artifice, flattery or deception. It is not sufficient that plaintiff alone show that defendant had sexual intercourse with her, but it must appear that the plaintiff was then an unmarried woman of previously chaste character, and that the defendant accomplished his purpose by some false promise or artifice, or that she was induced to yield to his embraces by flattery or deception. If the plaintiff was not then an unmarried woman of previously chaste character, or if without being deceived, or without any false promise, deceit or artifice, she voluntarily submitted to the defendant's embraces, the law affords her no remedy in a civil action for damages."—Approved: Lauer v. Banning (Iowa), 131 N. W. 783.

§ 3077. Seduction as Enhancing Damages in Action for Breach of Promise.

"In relation to the measure of plaintiff's recovery you are further instructed if you find she is entitled to recover for breach of promise of marriage, as hereinbefore instructed, then, in that event, you will determine whether she is entitled to recover enhanced or additional damages on account of seduction, as alleged by her in her petition; and in relation thereto you are instructed that if you further find from the evidence, by a preponderance thereof, that while the plaintiff and defendant were mutually promised in marriage, if they were so promised, and intending and expecting marriage, the defendant solicited, in con-

sideration of such intention and expectation, and the plaintiff permitted in consideration of such expectation and intention, sexual intercourse with her, such facts may be considered by you in connection with the facts shown in relation to the plaintiff's character, in computing the damages in this case in so far as they tend, if they do tend, to aggravate and increase the disgrace, mortification, pain or distress of mind, which she has suffered by reason of the defendant's breach of contract for marriage alleged by the plaintiff in her petition; provided, however, that the plaintiff cannot, in any event, recover of the defendant damages for seduction unless she was, at the time of such seduction, an unmarried woman of previously chaste character."—Approved: Lauer v. Banning (Iowa), 131 N. W. 783.

CHAPTER LXXXIX.

ANIMALS.

§ 3078. Running at Large Defined.
3079. Caring for Animals Taken up for Trespass.
3080. "Vicious Propensity" Defined.
3081. Keeper allowing Vicious Animal to be at Large.
3082. Viciousness known by or Imputed to Owner.
3083. Harboring Dogs known to be Vicious.
3084. Notice to Agent of Animal's Vicious Propensity.
3085. Defects in Right of Way Fences, and Cattle-guards.
3086. Duty of Railroad as to Animal on Track.
3087. Contributory Negligence of Owner Leaving Right of Way Gate Open.
3088. Duty to Fence Track unless Public Convenience Interferes.

§ 3078. Running at Large Defined.

(a) "I will define what is meant in the law by running at large. Running at large means strolling without restraint or confinement, as rambling, roving, or wandering at will, unrestrained; that is, without any one to hinder or direct them. Of course, in this case, gentlemen, you must understand that this strolling or rambling or roving or wandering must be in the public highway. To be under restraint, it is not necessary that some one be in front of the cattle, and some one following at the heels of the cattle. It is enough if some one, either the owner or some one hired by him, was keeping them in view, and was sufficiently near and ready to restrain them if they were about to do damage. Then, gentlemen, if you find that these cattle were running at large on the 16th day of June in the public highway in front of defendant's premises, that is, that they were strolling along without any restraint or confinement, and that there was no one watching them and keeping them in view who was sufficiently near and ready to restrain them if they were about to do damage, then you will find for the defendant. On the other hand, if you find that these cattle were on this highway for the purpose and intention of in due time taking them on further to pasture, and that they were in plain view of the plaintiff or some members of his family who were watching them for the purpose of taking them to pasture, and that the person who was watching them was sufficiently near and was ready to restrain them if they were about to do damage, then you will find for the plaintiff."—Approved: Donley v. Fowler, 147 Mich. 288, 110 N. W. 1097.

(b) "A dog is to be considered running at large when he is away from the premises of his master, roaming at his will, and out from under the control of his master or owner; if you believe from the evi-

dence that prior to the shooting the dog that was killed was on the defendant's land, that said dog was within calling distance, and in sight of the plaintiff's family and under their control, then, and in that event, the dog was not running at large."—Approved: Brown v. Graham, 80 Neb. 281, 114 N. W. 153.

(c) "The bull was at large unless he was in some proper manner restrained by the owner. But restraint need not be entirely physical. It may depend much upon the training, habits, and instincts of the animal in the particular case. And the sufficiency of the restraint is to be determined more from its effect upon, and controlling influence over, the animal, than from the nature or kind of the restraining acts."—Approved: Conway v. Jordan, 110 Iowa, 462, 81 N. W. 703.

§ 3079. Caring for Animals Taken up for Trespass.

"You are instructed that where stock of any kind is taken up for trespass the owner thereof is not required to look after, feed, water, or care for the same; and, if any portion thereof are milch cows, the owner is not required to milk the same, but is justified in leaving the feeding, watering, and the caring of such stock and the milking of such cows to the party taking up the same. And you are instructed that in this case the plaintiff was under no obligation to feed, water, or care for the stock or to milk her cows while in the possession of the defendant. You are instructed that the fact that the notice was served on plaintiff to pay damages claimed by the defendant by reason of the trespass of the said stock upon the land of defendant, and that damages for the same were paid by the plaintiff, in no way affects the right of the plaintiff to recover such damages from the defendant as you find from the evidence she has sustained."—Approved: Richardson v. Halstead, 44 Neb. 606, 62 N. W. 1077.

§ 3080. "Vicious Propensity" Defined.

"The jury are instructed that what is meant by the term 'a vicious propensity' in an animal is such a propensity that a dog might attack or injure the safety of persons without being provoked so to do."—Approved: Merritt v. Matchett, 135 Mo. App. 176, 115 S. W. 1066.

§ 3081. Keeper allowing Vicious Animal at Large.

(a) "It is the duty of the owner, keeper, or harborer of a ferocious and vicious dog to restrain such dog, and not allow such dog to run at large on the streets of the city, where such dog may have opportunity to attack persons lawfully using the streets; and if you find and believe from the evidence before you that the dog which bit the plaintiff was a dog of ferocious and vicious habits, and that the defendant Clara Barklow, knew it was a vicious dog, and you further find that the said Clara Barklow was, at the time plaintiff was bitten, the owner, keeper, or harborer of the dog, you will find for the plaintiff."—Approved: Barklow v. Avery, 40 Tex. Civ. App. 355, 89 S. W. 417.

(b) "It is the law that the owner or keeper of a domestic animal which is vicious, and which is prone or accustomed to do violence and to attack and bite mankind, having knowledge of such violent disposi-

tion and habit, must safely and securely keep such animal so that it cannot inflict injury. Whether or not there was special negligence in permitting the dog's escape from the premises is not the inquiry. The keeper must, at his peril, after knowledge of such viciousness, safely keep such animal. Such is the consideration on which the ownership or custody of known vicious animals is tolerated. Ownership or custody of such vicious animal is not one of the natural inherent rights of property. It is a qualified or restricted right—qualified by the condition that the animal can be and is safely confined and kept."—Approved: Gordan v. Kaufman (Ind.), 89 N. E. 898.

§ 3082. Viciousness Known by, or Imputed to, Owner.

"If the jury believe from the evidence that prior to the 15th day of August, 1907, that defendant either owned, kept, or harbored a dog of vicious propensities that was disposed to bite or attack or injure a person, and if you believe that the defendant knew, or by the exercise of ordinary care could have known, of the vicious propensities of such dog, prior to August, 1907, and if you believe that the defendant did own, keep, or harbor such a dog, and that on or about the 15th day of August, 1907, the dog so owned, kept, or harbored by the defendant, without provocation, did attack the plaintiff upon her own premises, and if you believe at said time plaintiff was in a pregnant condition, and if you believe that said dog in attacking the plaintiff, so alarmed and frightened her that a miscarriage was thereby prematurely brought on, and that plaintiff was thereby injured and damaged and lost her child, then the jury should find their verdict for the plaintiff."—Approved: Merritt v. Matchett, 135 Mo. App. 176, 115 S. W. 1066.

§ 3083. Harboring Dogs Known to be Vicious.

(a) "In law, it is not necessary that the defendant should be proven to be the owner of the dog or dogs in question. If the jury believe, from the evidence, that said dogs were vicious, and accustomed to bite mankind, and that the defendant knowingly harbored them upon its premises, knowing them to be of a vicious nature, and used to attack and bite mankind, and if the jury further believe, from the evidence, that said dogs did lacerate and bite the plaintiff's legs and arms, as set forth in his declaration herein, then they should find a verdict in the plaintiff's favor."—Approved: Chicago & Alton R. Co. v. Kuckkuck, 197 Ill. 304, 64 N. E. 358.

(b) "The court instructs the jury, that even though you may believe from the evidence that the dogs in question were owned by the daughter of defendant, and that she lived with and made her home with her father, the defendant, and that such dogs were knowingly permitted to be kept on the place and premises of defendant, then in such case the defendant is, within the meaning of the statutes, the keeper of such dogs, and is responsible for any damage they may do."—Approved: Holmes v. Murray, 207 Mo. 413, 105 S. W. 1085.

(c) "The jury are instructed that in order to find for the plaintiff under plaintiff's instruction No. 1, it is not necessary for the jury to believe that defendant was the actual owner of the dog in question;

but, if the jury believe from the evidence that defendant knowingly kept or harbored, or permitted his servant to keep or harbor, the dog about his premises as a watch dog in his store, and knowingly permitted the dog to go with his team and servant, and be in charge of said servant while delivering goods in the conduct of his business, then it makes no difference in this case whether the defendant was the owner of the dog or not."—Approved: Merrit v. Matchett, 135 Mo. App. 176, 115 S. W. 1066.

§ 3084. Notice to Agent of Animal's Vicious Propensity.

"Knowledge or notice to the general manager of the defendant company of the use of the mare for the defendant company, and of her vicious and dangerous propensities, provided you find from a preponderance of the evidence she had such vicious and dangerous propensities, or knowledge or notice to an employe of the vicious and dangerous propensities of said mare over which he had supervision and control at and prior to the accident, would be notice to the defendant company, and it is not necessary that such knowledge or notice be established by direct evidence, if you find from a preponderance of the evidence that such general manager or employe had such knowledge or notice."—Approved: Henry v. Omaha Packing Co., 81 Neb. 237, 115 N. W. 777.

§ 3085. Defects in Right of Way Fences and Cattle-guards.

(a) "If you find from the evidence that defendant, when it fenced its road through plaintiff's land, put in a gate, but so negligently and carelessly kept up and maintained such gateway across its right of way that plaintiff's horses passed through such gateway upon said defendant's right of way and railroad, and were killed or injured in consequence thereof, then you should find for the plaintiff."—Approved: Fremont, E. & M. V. R. Co. v. Pounder, 36 Neb. 247, 54 N. W. 509.

(b) "There is no direct evidence that the stock did open said gate and enter upon defendant's right of way, and hence it is your duty to inquire whether or not the circumstances in evidence in relation thereto are such that, when taken and considered together, that they fairly and naturally lead to the conclusion that said stock did open the gate in question, and thus enter upon the defendant's right of way, and by reason thereof were struck and killed by defendant's train; otherwise you will return a verdict for the defendant."—Approved: Kling v. Chicago, M. & St. P. Ry. Co., 115 Iowa, 133, 88 N. W. 355.

(c) "It was the duty of the defendant at the time and place complained of by the plaintiff to exercise ordinary care to keep and maintain its cattle-guards in reasonably safe condition to keep stock from straying from the public road over the same onto its inclosed right of way, and if you shall believe from the evidence in this case that defendant failed to exercise such care, and that said cattle-guard was insufficient to prevent stock from straying over same and on its inclosed right of way, and that by reason thereof plaintiff's horses did stray from the public highway over the same and onto the inclosed right of way of defendant, and was there struck by one of defendant's engines and

trains, then the law in this case is for the plaintiff, and you will find for him damages for killing the horse sued for not exceeding $175, and damages for the mare sued for not exceeding $135, and damages for the mule sued for not exceeding $60, and in all not exceeding $370. But, unless you shall so believe from the evidence in this case, then the law is for the defendant, and you will so find."—Approved: Nashville, C. & St. L. Ry. Co. v. Russell, 129 Ky. 14, 110 S. W. 317.

(d) "The court instructs the jury that if they find from the evidence that plaintiff's colt went upon defendant's track, and was struck and killed by defendant's train, by reason of the failure of defendant to construct and maintain a lawful fence at a point on its railroad where by law it was required to fence, and that said colt did not pass over a lawful fence in getting to the railroad, then and in that case the verdict should be for the plaintiff in such sum as you may believe from the evidence to have been the market value of the colt at the time it was killed, not to exceed forty dollars."—Approved: Rinehart v. Kansas City Southern Ry. Co., 204 Mo. 269, 102 S. W. 958.

§ 3086. Duty of Railroad as to Animal on Track.

(a) "It was the duty of defendant's engineer to keep a lookout for stock upon its track and to use ordinary care to avoid injury to stock after they had been discovered by him, or after he might have discovered them by the use of ordinary care and diligence."—Approved: Kansas City Southern Ry. Co. v. Ingram, 80 Ark. 269, 97 S. W. 55.

(b) "The court instructs the jury that when a railroad company runs its trains through a city, incorporated town, or village at a greater rate of speed than is permitted by the ordinance of the city, town, or village, and stock is killed or injured by said train while so running, the injury will be presumed to have been done through the negligence of the railroad company."—Approved: Chicago & Eastern Illinois R. Co. v. Crose, 214 Ill. 602, 73 N. E. 865.

(c) "In cases of crossings where persons have a right to be on the railroad track, it is the duty of the railway company to keep a more careful lookout, take greater pains, exercise greater precaution, to avoid the injury; and therefore, if you find from this case that the animal was killed on the crossing, and the animal was using the crossing for the purpose of passing back to Mr. Bishop's barn, then you will require of the railway company greater caution than if the animal was a mere trespasser. I will instruct you further: That even upon the crossing the railway company has the better right to use the track. The right of the railway company is a superior right. A person who has a private crossing over railroad tracks, and he is aware of the times when trains pass, in using the crossing for the purpose of driving stock back and forth there is a duty also upon him to take care that his stock does not interfere with the trains, and he must do the best he can to guard against injury."—Approved: Bishop v. Chicago, M. & St. P. Ry. Co., 4 N. D. 536, 62 N. W. 605.

(d) "You are instructed that a railroad company is not compelled by law to fence in its switching yards located within an incorporated city, and would be liable to the owners for a cow killed within its

switching yards only when said killing was the direct result of the negligence of the employees of said company in operating its cars, or when said injury or killing could have been avoided by the exercise of ordinary care, as these terms have been heretofore defined to you; and in this connection you are instructed that the failure of the employes of the defendant company to ring the bell or blow the whistle of the engine at the time of and before the killing would not of itself alone constitute a want of ordinary care."—Approved: Texarkana & Ft. S. Ry. Co. v. Bell (Tex. Civ. App.), 101 S. W. 1167 (not reported in state reports).

(e) "You are instructed that if you find from the evidence that plaintiff's horse was run into a tressle or culvert by a train on defendant's road and injured, and if you further find, from all the facts and circumstances in proof in the case, that the trainmen in charge of the train could have foreseen as a natural or probable consequence of not stopping the train that the horse would attempt to go on the tressle or culvert and be injured, then it was the duty of the trainmen to stop the train in order to avert the injury to the horse, and, if they failed to do so, they would be guilty of negligence and plaintiff would be entitled to recover."—Approved: Paragould Southeastern Ry. Co. v. Crunk, 81 Ark. 35, 98 S. W. 682.

§ 3087. Contributory Negligence of Owner—Leaving Right of Way Gate Open.

"If you believe and find the defendant company had erected a proper and sufficient gate in its right of way at the plaintiff's farm crossing, and that said gate was by said company kept in repair, then I charge you that it was the plaintiff's duty to keep the gate closed, and if you find that the mule in question entered at said gate while the same was open, and went upon the defendant's railroad and was killed, then I charge you to find a verdict in favor of the defendant."—Approved: Texas Cent. R. Co. v. Jenkins (Tex. Civ. App.), 120 S. W. 948.

§ 3088. Duty to Fence Track, unless Public Convenience Interferes.

"You are instructed that it was the duty of defendant to fence its right of way at the place where plaintiff's colt or horse is alleged to have been killed, unless you find and believe from the evidence that public necessity, convenience, or commerce required that it should be left unfenced. Now, if you find from the evidence that plaintiff's colt or horse was killed by defendant, its agents, or employes as alleged, then you will find for plaintiff against defendant for the reasonable cash market value of said colt or horse at the time and place where he was killed, unless you find for the defendant as hereinafter charged. If you find and believe from the evidence that public necessity, convenience, or commerce required that said right of way be left unfenced at the place where said colt or horse is alleged to have been killed, or if you find and believe that the defendant, its agents or employes, did not kill said colt or horse as alleged, then you will find for the defendant."—Approved: St. Louis S. W. Ry. Co. v. Seay (Tex. Civ. App.), 127 S. W. 908.

CHAPTER XC.

ASSAULT.

§ 3089. Assault—What Constitutes?
3090. Pointing Unloaded Pistol at Another may Constitute Assault
3091. Shaking Fist Angrily in Face of Another.
3092. Assault and Battery—What is?
3093. Assault and Battery—Mutuality no Defence.
3094. Forcibly Ravishing—Elements of Recovery.
3095. Assault and Battery—Negligent Arrest of Wrong Person.
3096. Assault and Battery—Defense of Possession.
3097. Assault and Battery—Defense of Common Property.
3098. Assault—Frightening Horse and Causing Injury.
3099. Frightening Horse by Brandishing Cane in Reasonable Defense.
3100. Assault—Ejection of Trespasser.
3102. Assault and Battery—Self-defense.
3103. Assault and Battery—Beginning Difficulty.
3104. Self-defense—Excessive Force.
3105. Defense of Possession—Excessive Force.
3106. Assault and Battery—Regaining Own Property.
3107. Assault and Battery—Insult to Wife by Words.
3108. Assault—Accidental Injury.
3109. Assault and Battery—Damages.

§ 3089. Assault—What Constitutes.

"I further instruct you that if you find from the evidence that the witness Norris entered the defendant's store and engaged in loud, angry, and profane language, then the defendant had the right to direct him to stop the use of such language and quit the premises; and if you find from the evidence that, upon being requested to stop the use of improper language or to withdraw, the witness Norris made a move to strike the defendant with his hand, then such movement was an assault upon the defendant, although the blow may have been intercepted or failed to reach the defendant."—Approved: Norris v. Whyte, 158 Mo. 20, 57 S. W. 1037.

§ 3090. Pointing Unloaded Pistol at another May Constitute Assault.

"You are instructed that wantonly and recklessly pointing a revolver at another, when but a few feet away, under such circumstances as would instantly lead such other to believe it to be loaded, would be an assault, whether such revolver was in fact loaded or not, if you find from the evidence that the act of the person holding such revolver was such as to cause a reasonable person to believe that he intended to do harm with it."—Approved: Atkins v. Gladwish, 27 Neb. 816, 44 N. W. 37.

§ 3091. Shaking fist Angrily in the Face of Another.

"An assault is an action, or conduct, on the part of the defendant—for instance, if you believe her testimony that he shook his fist in front of her face angrily and unlawfully, when he was in such proximity to

her, as that he could, or might have, struck her, also near enough to produce a feeling on her part that she might be struck, that would be an assault. Then, of course, if he did strike her, that would be an assault and battery. She may recover in case you only find assault, or in case you find assault and battery, if you find it was made unlawfully and under the circumstances I have mentioned." Upon this instruction the first error is assigned. It may well be doubted whether an erroneous definition of the term 'assault' would be prejudicial in this case, for all the testimony on the one side tended to show an actual battery, while the testimony on the other side tended to refute either an assault or a battery. But, regardless of this, we think the definition as given is substantially correct. An assault was formerly defined by our statute as 'an attempt in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution.' Ballinger's Ann. Codes & St. § 7055, (Pierce's Code, § 1572). This section was repealed by the new Criminal Code, and, so far as we are able to discover, the term 'assault' is not defined in the latter act. We must therefore look to the common law for a definition. Cooley defines the terms thus: 'An assault is an attempt, with unlawful force, to inflict bodily injuries on another, accompanied with the apparent present ability to give effect to the attempt if not prevented. Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol at one who is in its range; the pointing of a pistol not loaded at one who is not aware of that fact and making an apparent attempt to shoot; shaking a whip or the fist in a man's face in anger; riding or running after him in threatening and hostile manner with a club or other weapon; and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person—'A right to live in society without being put in fear of personal harm.' Cooley on Torts (3d ed.), 278. See, also, Commonwealth v. White, 110 Mass. 407; Mailand v. Mailand, 83 Minn. 453, 86 N. W. 445; Morgan v. O'Daniel (Ky.), 53 S. W. 1040. The presence or absence of an assault depends more upon the apprehension created in the mind of the person assaulted than upon the undisclosed intentions of the person committing the assault."—Approved: Howell v. Winters, 55 Wash. 436, 108 Pac. 1077.

§ 3092. Assault and Battery—What is?

(a) "The jury are instructed that an assault and battery consists in an injury actually done to the person of another in an angry or revengeful, rude or insolent, manner. Any unlawful beating of another, however slight, is an assault and battery; and the degree of bodily pain and injury, if the assault and battery are proved by the evidence, is only important as affecting the measure of damages. If the jury, from the evidence, believe that the defendant, on or about the 18th day of October, 1887, unlawfully struck the plaintiff, as alleged in the plaintiff's

petition, without any sufficient provocation therefor, as explained in these instructions, and that the plaintiff was injured by such striking, and has suffered any damage therefrom, then the jury should find for the plaintiff."—Approved: McClure v. Shelton, 29 Neb. 370, 45 N. W. 689.

(b) "The jury are instructed that an assault and battery consists in an intentional injury actually done by violence to the person of another in an angry or revengeful, rude or insolent manner; and the degree of bodily pain and injury, if the assault and battery are proved and are without provocation, is only important as affecting the measure of damages. If the jury believe from the evidence that the conductor, Lawrence, was employed by the defendant, and was in charge of one of its street cars on the eighth day of September, 1902; that plaintiff was a passenger upon said car, or that he was boarding said car with the intention of becoming a passenger thereon; that the said conductor, without sufficient cause or provocation therefor, as explained in the other instructions given, kicked the plaintiff in the face, and knocked out his teeth, or any of them, and that by reason thereof the plaintiff has suffered any damage, then the jury should find for the plaintiff."—Approved: O'Donnel v. St. Louis Transit Co., 107 Mo. App. 34, 80 S. W. 315.

§ 3093. Same—Mutuality no Defense.

(a) "If two, in anger, fight together, each is liable to the other for the actual injury inflicted. If you find that the plaintiff and defendant by common consent, in anger, fought together, and that the plaintiff was actually injured in said fight by the defendant, the plaintiff is entitled to recover from the defendant the actual damages resulting from said injury, but not exemplary damages."—Approved: Shay v. Thompson, 59 Wis. 540, 18 N. W. 473.

(b) "You are instructed that, if you believe from the evidence that plaintiff and defendant voluntarily and by agreement entered into a fight, still I charge you that such agreement, if made, was unlawful, for the reason that such agreement, if made, would be in violation of the laws of the state and void, and such agreement, if made, would not be any defense to this action."—Approved: Morris v. Miller, 83 Neb. 218. 119 N. W. 458.

§ 3094. Forcibly Ravishing—Elements of Recovery.

(a) "The court instructs the jury that if you believe from the evidence that the defendant did, on or about the 7th day of June, 1899, forcibly ravish plaintiff and against her will, and as a result thereof plaintiff became pregnant and that there was a child born of said illegal act on the third day of March, 1900, then your verdict will be for the plaintiff."—Approved: Champagne v. Hamey, 189 Mo. 709, 88 S. W. 92.

(b) "It is incumbent upon the plaintiff to prove, not only that the defendant had sexual intercourse with the plaintiff, but also that such intercourse was without her consent and against her will. As has been said to you, it would not be necessary that she should make the utmost resistance of which she was capable, in order to entitle her to maintain

her action, but it would be necessary that the intercourse should be against her will and without her consent; else her action must fail. If she was willing that the intercourse should take place, or if she made no resistance or objection to it, then she should not maintain this action."—Approved: Hart v. Walker, 100 Mich. 406, 59 N. W. 174.

§ 3095. Assault and Battery—Negligent Arrest of Wrong Person.

"That if the jury found that Kopplekom shot and broke the plaintiff's leg, and at the time of doing so, 'had a writ of mittimus for the custody of the escaped prisoner, Clark, but that he had no other process for the arrest of the plaintiff; that the defendant Kopplekom did arrest and take the plaintiff into his custody as such sheriff, and against the wish and consent of the plaintiff; that the plaintiff broke loose from the arrest and custody of the defendant Kopplekom to effect his escape therefrom; that the shooting and injury was done to prevent the plaintiff from escaping and freeing himself from said arrest and custody; that the defendant mistook the plaintiff for the escaped prisoner, Clark; yet if the jury further find that said defendant Kopplekom, by the exercise of due care and diligence, could have ascertained that the plaintiff was not the said Clark, then the jury will find for the plaintiff.' "—Approved: Kopplekom v. Huffman, 12 Neb. 95, 10 N. W. 577.

§ 3096. Same—Defense of Possession.

"The jury are instructed that a person in the actual, peaceable, and exclusive possession of property has a right to guard such possession by using sufficient force, if necessary, for that purpose; and, in this case, if the jury from the evidence believe that at the time of the alleged beating, and for some time before that time, the defendant was in the actual, peaceable, and exclusive possession of the premises upon which the beating and striking took place, and that at the time in question the plaintiff was passing over said premises, then the defendant had a right to prevent the plaintiff from so passing over his premises by using force, and to use so much force as was reasonably necessary for that purpose."—Approved: McClure v. Shelton, 29 Neb. 370, 45 N. W. 689.

§ 3097. Defense of Common Property.

"It is conceded that plaintiff and defendant were the owners in common of an undivided lot of turkey eggs. Under those circumstances, the plaintiff had no right to destroy any of them without defendant's consent. And if, acting under reasonable apprehension that she was about to break some of the eggs, he proceeded in good faith to prevent her from doing so, and used no more force than reasonably appeared to be necessary for that purpose, he was justified in so doing, and is not liable therefor. On the other hand, if he intentionally used more force than was necessary, or did not act in good faith, but, actuated by some other motive, he intentionally inflicted physical violence on the plaintiff without her consent, then he acted unlawfully, and is liable in damages therefor."—Approved: Kellar v. Lewis, 116 Iowa, 369, 89 N. W. 1102.

§ 3098. Assault—Frightening Horse and Causing Injury.

"If the defendant wrongfully and unlawfully assaulted the plaintiff and struck the plaintiff, and thereby frightened plaintiff's horse, and as a result thereof plaintiff's horse ran away with plaintiff's buggy and harness, causing injury to said horse and buggy and harness, or either of them, then the defendant is liable in damage to the plaintiff."—Approved: Hawks v. Slusher (Or.), 104 Pac. 883.

§ 3099. Frightening Horse by Brandishing Cane in Reasonable Defense.

"If plaintiff attempted to ride his horse upon or against the defendant in the highway, and thereupon the defendant, acting as a reasonable man, armed himself with a stick or similar weapon for the purpose of defense against such threatened injury, and that such movement on his part had the effect to frighten plaintiff's horse, and thereby plaintiff was injured, then defendant would not be liable for damages so inflicted."—Approved: Halley v. Tichenor, 120 Iowa, 164, 94 N. W. 472.

§ 3100. Same—Ejection of Trespasser.

"The jury are instructed that, while the keeping of a store for the sale of merchandise is an invitation to the public to visit such store, it is an invitation to visit it only for proper purposes in connection with the business there being carried on, and all persons going to such places are required to conduct themselves in a proper, orderly and quiet manner, free from profane and loud and boisterous language; and where a person, having entered a store, engaged in such loud, boisterous and profane language, or invites a quarrel, he becomes a trespasser upon the premises, and may be requested to withdraw by the proprietor or any person in his employ. And in case such trespasser refuses to withdraw, he may be forcibly removed, using such force as may be necessary for that purpose."—Approved: Norris v. Whyte, 158 Mo. 20, 57 S. W. 1037.

§ 3102. Assault and Battery—Self-defense.

(a) "The right of self-defense is derived from nature. To repel force by force is the common instinct of every creature that has means of defense. Sudden and strong resistance to unrighteous attack is not merely a thing to be tolerated. In many cases it is a moral duty. Municipal law has left to individuals the exercise of this natural right of self-defense in all cases in which the law is either too slow or too feeble to stay the hand of violence, and it is to be considered that a man repelling imminent danger cannot be expected to use as much care as if he had time to act deliberately."—Approved: Norris v. Whyte, 158 Mo. 20, 57 S. W. 1037.

(b) "If you believe from the evidence that on or about the 3d day of August, 1907, the defendant, Barlow, not in his necessary, or to him apparently necessary, self-defense, as defined in instruction No. 2, assaulted, beat, or bruised plaintiff, and thereby injured him, you will find for plaintiff.

"If you believe from the evidence that, at the time defendant as-

saulted the plaintiff, the defendant in good faith believed, and had reasonable grounds to believe, that the defendant was then and there in danger of bodily harm about to be inflicted upon him by the plaintiff, and that the defendant used no more force than was necessary, or appeared to him in the exercise of a reasonable judgment to be necessary, to protect himself from injury at the hands of plaintiff, you will find for the defendant, unless you believe that defendant brought on the difficulty by first striking plaintiff or assaulting him with a lap ring, in which event, you cannot find for defendant on the ground of self-defense."—Approved: Renfrom v. Barlow (Ky.), 115 S. W. 225.

§ 3103. Same—Beginning Difficulty.

"The court instructs the jury that the defendant alleges that he acted in self-defense. You are instructed that the law does not permit a person to voluntarily seek or invite a combat or put himself in the way of being assaulted, so that when hard pressed he may have a pretext to injure his assailant. The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party by any willful act of his, or where he voluntarily and of his own free will enters into it. The necessity, being of his own creation, shall not operate to excuse him. Nor is any one justified in using more force than is reasonably necessary to get rid of his assailant; but if he does not bring on the difficulty, nor provoke it, nor voluntarily engage in it, he is not bound to flee to avoid it, but may resist with adequate and necessary force until he is safe. Now, if you believe from the evidence in this case that the defendant voluntarily sought or invited the difficulty in which plaintiff was injured, if you believe from the evidence that he was injured, or that he provoked or commenced or brought it on by any willful act of his own, or that he voluntarily or of his own free will engaged in it, then and in that case you are not authorized to find for him upon the ground of self-defense. In determining who provoked or commenced the difficulty or made the first assault, you should take into consideration all the facts and circumstances in evidence before you."—Approved: Morris v. Miller, 83 Neb. 218, 119 N. W. 458.

§ 3104. Self-defense—Excessive Force.

"The court instructs the jury that, if you believe from the evidence that plaintiff began the affray and was the aggressor, then you are instructed that the defendant had a right to defend himself from such assault, and he would have the right to use that amount of force which was reasonably and apparently necessary in making his defense. And if you believe from the evidence that the defendant was so acting in self-defense from a real and honest conviction of apparent danger, or what would seem apparent danger to a reasonable man, you will return a verdict for the defendant, unless you further believe from the evidence that the defendant unlawfully used a degree of force and violence upon the plaintiff that was not reasonably and apparently necessary under the facts and circumstances then and there surrounding the defendant."—Approved: Morris v. Miller, 83 Neb. 218, 119 N. W. 458.

§ 3105. Defense of Possession—Excessive Force.

"The jury are instructed that, while the law makes a reasonable allowance for the infirmities of human judgment under the influence of human passion, and does not require men to measure with mathematical precision the degree of force necessary to eject a person from the premises of another, or to repel an assault, still it does require all men under the influence of sudden passion to exercise reasonable discretion and forbearance in the infliction of injuries upon the person of another; and, in this case, though the jury may from the evidence believe that the plaintiff refused to leave and depart from the defendant's premises when ordered so to do, or that the plaintiff resisted, or prepared to strike the defendant, when within striking distance, still, if the jury from the evidence further believe that, in the attempt to eject the plaintiff from his premises, or in repelling the attack of the plaintiff upon him, the defendant used a degree of force and violence toward the plaintiff greater than was apparently and reasonably necessary to eject the plaintiff, or to repel such attack, and thereby caused unnecessary injury to the plaintiff, then the jury should find for the plaintiff."—Approved: McClure v. Shelton, 29 Neb. 370, 45 N. W. 689.

§ 3106. Assault and Battery—Regaining Own Property.

"The jury are instructed that if they should believe from the evidence that defendant had the right to take the said hat from the possession of the plaintiff, yet if they further believe that he used violence more than was necessary to be used, and that she was injured physically thereby, and was caused to suffer physical pain thereby, then plaintiff is entitled to recover."—Approved: Stevens v. Friedman, 58 W. Va. 78, 51 S. E. 132.

§ 3107. Same—Insult to Wife by Words.

"The defendant admits he struck the plaintiff, but undertakes to justify it, as he expressed it, because he called his wife a 'damn liar.' The law requires me to charge you that would not be sufficient justification. No one has the right to take the law in his own hands, and punish some one who has done a real or imaginary wrong. If the wife had been damaged, if the reputation of the wife had been damaged, the courts were open to him, and it was his duty to come to court and seek redress for his grievances. The defendant had no right to measure the amount of punishment he should inflict upon the plaintiff; therefore, if he struck and beat him for having 'called his wife a "damn liar,"' he violated the law, and made himself liable to a civil action. Now, it becomes a question to determine, has he damaged the plaintiff by beating him, and, if so, to what extent? You heard the witness detail the evidence as to the injuries. It is for you to estimate what amount of injury he has received, and for what amount he should be compensated. In estimating that damage, you are at liberty to consider under what circumstances the injuries were inflicted. Was it done with wanton, reckless disregard of the rights of the plaintiff? If so, then you are at liberty to add smart money against the defendant for having in-

flicted the wrong, to hold him up as an example to others, and to compensate the plaintiff for whatever damage he has sustained."—Approved: Hayes v. Sease, 51 S. C. 534, 29 S. E. 259.

§ 3108. Assault, Accidental Injury.

"If you find that the injuries complained of upon the person of Anton Svitka were inflicted by the accidental discharge of a gun, during a melee occasioned by an assault of Joseph Svitka and Anton Svitka, or either of them, upon the person of the defendant, even though the gun was in the hands of the defendant at the time of such accidental discharge, then you will find for the defendant."—Approved: Fostbinder v. Svitak, 16 Neb. 499, 20 N. W. 866.

§ 3109. Assault and Battery—Damages.

"The jury are instructed that if they believe from the evidence that the defendant committed an assault and battery upon the plaintiff, as alleged in the declaration, and that she is entitled to recover, then, in determining the amount of damages, they are authorized to take into consideration any physical injury, if any, caused thereby, as well as any physical suffering, if any, caused thereby, and also such punitive or exemplary damages as they may judge proper and just in the premises, if they find from the evidence that said assault and battery was wanton or willful."—Approved: Stevens v. Friedman, 58 W. Va. 78, 51 S. E. 132.

CHAPTER XCI.

ATTACHMENT.

A. Attachment.
B. Replevin.
C. Trover and Conversion.
D. Trespass.

A. Attachment.

§ 3112. Absence—Absconding.
3113. Temporary Absence from State not Ground for Attachment.
3114. Wrongful Attachment—Measure of Damages.
3115. Negligence of Sheriff—Failure to Perfect Lien.
3116. Sheriff—Duty to Act Promptly.
3117. Collusive Attachment to Secure Prior Lien.

§ 3112. Absence—Absconding.

"The court charges the jury that the absence of a debtor from his home does not subject his property to attachment upon the allegation that he absconds or secretes himself, and his neglect to inform a creditor of his intended absence does not alone authorize the latter to resort to the extraordinary remedy of attachment. If Lowery Waller left his usual place of business and abode with the intention of again returning, and without any fraudulent intent, then his absence was not that of absconding in the meaning of the law."—Approved: W. F. Vandiver & Co. v. Waller, 143 Ala. 411, 39 South. 136.

§ 3113. Temporary Absence from State not Ground for Attachment.

(a) "The court charges the jury that even the temporary absence of a debtor from the state, though he does not inform his creditors, does not authorize an inference prejudicial to his integrity, nor authorize an attachment against him or his property.

§ 3114. Wrongful Attachment—Measure of Damages.

(a) "The court instructs the jury, in case they find for the plaintiff, that in determining the amount of damages which the plaintiff is entitled to recover they are to consider not only the amount, if any, which the evidence in this case shows the goods in question were damaged while in possession of the sheriff, but also the actual loss, if any, which the evidence in the case shows the plaintiff sustained by reason of the suspension of business during the time he was prevented from carrying it on, by reason of the acts of the sheriff if the jury believe from the

evidence in the case that plaintiff was prevented from carrying on his business by the acts of the sheriff."—Approved: Kyd, Sheriff, v. Cook, 56 Neb. 71, 76 N. W. 524.

(b) "If you should find that the writ of attachment in this case was wrongfully sued out, then the measure of defendant's damages on his counterclaim would be the fair cash value in the market of defendant's goods that were levied upon and sold under said writ of attachment, estimated at the time of said levy, with six per cent. per annum interest thereon from that time to the present. But you should exclude from said estimate any goods sold under the foreclosure of the chattel mortgage, and you must also deduct from the sum arrived at any amount in the hands of the sheriff that is ready to be turned over, and that is the proceeds of defendant's goods that were sold under said writ of attachment."—Approved: Blane v. Tharp, 83 Iowa, 665, 49 N. W. 1044.

§ 3115. Negligence of Sheriff—Failure to Perfect Lien.

(a) "If you find that defendant was negligent, and did not use due diligence and reasonable effort in perfecting said lien, and that the plaintiff was damaged thereby, then plaintiff is entitled to recover, and the measure of damages is prima facie the amount of his judgment and costs, with interest thereon from the date of the judgment." —Approved: People ex rel. Springett v. Colerick, 67 Mich. 362, 34 N. W. 683.

(b) "It is the duty of the officer serving the writ of attachment to use reasonable diligence and effort to perfect the lien of the attachment, when lands are seized by virtue of it, by depositing a certified copy of the writ with the register of deeds of the county, together with a description of the lands levied upon and seized, and in the case the officer fails or neglects so to do with reasonable diligence and effort, he is guilty of negligence."—Approved: People ex rel. Springett v. Colerick, 67 Mich. 362, 34 N. W. 683.

§ 3116. Sheriff—Duty to Act Promptly.

(a) "The plaintiff named in any writ of attachment has the right to direct the officer in the performance of his duty in the execution thereof; and if you find that plaintiff at the time of placing said writ of attachment in defendant's hands for service, informed him of such facts as required prompt action, and directed him to use dispatch, then an increased duty to act promptly was laid upon defendant, in the execution of said writ and perfecting the liens of the attachment, and must find him negligent of his duty, unless you find that he did so act promptly and with dispatch in the execution of said writ and perfecting the liens of the attachment."—Approved: People ex rel. Springett v. Colerick, 67 Mich. 362, 34 N. W. 683.

(b) "If you find that the plaintiff in the said attachment suit placed the writ of attachment in defendant's hands for service at one o'clock in the morning, that fact in itself would be sufficient to apprise the sheriff of the necessity of prompt action on his part, and would im-

pose upon him the duty of prompt action in levying and in perfecting the lien, by filing such certified copy of said writ of attachment with the register of deeds, together with a description of the lands levied upon, as soon as the said register's office was open for business, and the failure so to do under such circumstances would be negligence, and such default as would render the defendants liable, unless you find that such neglect is legally excused."—Approved: People ex rel. Springett v. Colerick, 67 Mich. 362, 34 N. W. 683.

§ 3117. Collusive Attachment to Secure Prior Lien.

"If the jury believe that the attachment was sued out as the result of an agreement or understanding with the attaching creditor by which he was to sue out the same and have it levied upon the property of the debtor and thereby acquire a prior lien upon the property of the latter over other creditors, your verdict will be for the plaintiffs.—Approved: Butler v. Feeder, 130 Ala. 604, 31 South. 799.

B. Replevin.

§ 3118. General or Special Property and Right to Immediate Possession.
3119. Fixtures not Subject to Replevin.
3120. Burden on Plaintiff to Establish Every Necessary Element of Recovery.
3122. Where Bailee Refuses to Deliver on Demand Recovery may be Had.
3124. Where Several Things are Sued for, Burden on Plaintiff to Show Number Wrongfully Withheld.
3125. Verdict to be in Alternative for Property or its Value.
3126. Sheriff's Return is Prima Facie Evidence of Delivery under Writ.

§ 3118. General or Special Property and Right to Immediate Possession.

(a) "The court further instructs you that the nature and purpose of an action in replevin is for the recovery of specific property, and that, to entitle the plaintiff to recover, two things are necessary, to-wit: The plaintiff must either be the owner of the property in question, or he must have a special property in the same, and he must be entitled to the possession thereof at the time of the commencement of this action; and the defendants must have either wrongfully and unlawfully taken the property, or they must have wrongfully detained the same after a lawful taking."—Approved: Nicholls v. Barnes, 32 Neb. 195, 49 N. W. 342.

(b) "The court further instructs the jury that if you shall find from the evidence that the plaintiff, at the time of the commencement of this action, was the owner of the goods in controversy or that he had a special ownership in the same, and that he was entitled to the imme-

diate possession of the same, then your verdict will be for the plaintiff. But if, upon the other hand, you shall find from the evidence that the plaintiff was not the owner of the goods in question, nor had a special interest in the same, or that he was not, at the commencement of this action, entitled to the immediate possession of said goods, then you will find for the defendants, and assess their damages at such an amount as you shall find from the evidence was the value of the goods at the time they were replevied and taken from the defendants."—Approved: Nicholls v. Barnes, 32 Neb. 195, 49 N. W. 342.

§ 3119. Fixture Not Subject to Replevin.

"The jury are instructed that property which has been attached to and become a part of the real estate, is not the subject of replevin; and if the jury believe, from the evidence in this case, that, at the time of the issue and service of the writ of replevin herein, the defendants were the owners and in the actual possession of block 18 . . . and that, prior to that time, the property in controversy, or any part thereof, had become attached to and made a part of such real estate, then as to such property so attached and made a part of the real estate, the jury will find in favor of the defendant."—Approved: Hacker v. Munroe & Son, 176 Ill. 384 (395), aff'g 61 Ill. App. 420, 52 N. E. 12.

§ 3120. Burden on Plaintiff to Establish Every Necessary Element of Recovery.

"The jury are instructed by the court, plaintiff brought an action in replevin claiming to have been entitled to the immediate possession of the cattle in controversy at the time of the commencement of this action by virtue of a chattel mortgage which plaintiff claims corresponds with the purported copy given to you in evidence, claiming that said chattel mortgage was a valid existing mortgage remaining unsatisfied at the time of the commencement of this action, and that in the giving of said mortgage it was intended by the makers of said mortgage and plaintiff bank that a lien or mortgage be thereby created upon the cattle in controversy herein to secure the payment of the promissory note given to you in evidence. Defendant denies the right of plaintiff to a lien upon the cattle in controversy for any reason whatever, and denies that the cattle in controversy were mortgaged by the said Reed Bros. to plaintiff bank.

"On the issues formed, to entitle plaintiff to recover, the burden of proof rests upon plaintiff to convince you, by a preponderance of all the evidence, first, that said note given in evidence was given for the loan of money as plaintiff claims, and that said note was unsatisfied at the time of the commencement of this action; second, that the chattel mortgage as claimed by plaintiff was given upon the cattle in controversy or upon any portion thereof for which you might find a verdict for plaintiff, and remained unsatisfied at the commencement of this action. If plaintiff has so made out a case, then your verdict should be for plaintiff that at the time of the commencement of this action it (the bank) was entitled to the immediate possession of the cattle in controversy; if the evidence be equally balanced as to plaintiff's right to

recover, or if it preponderates in defendant's favor, then you could not find for plaintiff, and your verdict should be for defendant."—Approved: Thayer County Bank v. Huddleson, 1 Neb. Unoff. 261, 95 N. W. 471.

§ 3122. Where Bailee Refuses to Deliver on Demand Recovery may be had.

"The court further instructs the jury that if they believe from the evidence that the defendant borrowed the gun in controversy from the plaintiff, the defendant then became the bailee of the plaintiff and cannot set up title in the gun in himself in this action, and if the jury further find that the defendant refused to deliver up possession of the gun after demand being made by plaintiff then they will find for the plaintiff."—Approved: Simpson v. Wrenn, 50 Ill. 222, 223, 99 Am. Dec. 511.

§ 3124. Where Several Things are Sued for Burden on Plaintiff to Show Number Wrongfully Withheld.

"If the plaintiff has so established the allegations of his complaint, then your verdict should be for the plaintiff in so many sheep described in the complaint as you find belong to the plaintiff and are wrongfully withheld by the defendant, whether such number be one hundred or a less number, and you will also find and place in your verdict what you find to be the value of the said sheep so withheld; but if you find that the defendant did not take any of plaintiff's sheep, and that he is not wrongfully withholding any of plaintiff's sheep described in the complaint, then you should return your verdict to that effect and find for the defendant."—Approved: Fox v. Fift (Oreg.), 111 Pac. 51.

§ 3125. Verdict to be in Alternative for Property or its Value.

"You are further instructed that, if you find by a preponderance of the testimony that the defendant agreed to give the plaintiffs $195 for the mules and wagon, and executed to the plaintiffs his mortgage on said mules and wagon, and his crop raised in White county in 1905, to pay for said mules and wagon and for provisions, tools, and implements furnished him by the plaintiffs, and that the said indebtedness has been paid, or that the plaintiffs charged the defendant usurious interest on said indebtedness, in either event you will find for the defendant, and award him possession of said mules and wagon, if to be had, and, if not, then their value and such damages as you may find the defendant is entitled to for the use of said property up to date, not to exceed an amount of 50 cents per day since the defendant was possessed of said property."—Approved: Doyle & Booth v. Kavanaugh, 87 Ark. 364, 112 S. W. 889.

§ 3126. Sheriff's Return is Prima Facie Evidence of Delivery under Writ.

"If the sheriff delivered the logs to Ayres, he was not responsible for their loss. His return states that he did deliver them to Ayres, and his return is prima facie evidence of that fact. Delivery of logs to Ayres does not consist in making a return stating that he delivered them to

him, neither does it consist in merely telling Ayres that he placed him in possession of them, if Roy, or anyone else was in possession of them. But the only way he could have delivered the logs to Ayres so as to relieve himself of responsibility, would have been by placing Ayres in actual exclusive control of the logs."—Approved: Hearn v. Ayres, 77 Ark. 497, 92 S. W. 768.

C. Trover and Conversion.

§ 3128. Conversion Defined.
3130. What Acts amount to Conversion.
3132. Tendering Property after Refusal to Surrender Same.
3133. Demand and Refusal by One in Possession Prima Facie Conversion.
3135. Necessity of Demand may be a Question for the Jury.
3136. Unlawful Conversion to One's Own Use and Benefit.
3137. Refusal to Appoint Arbitrator to Adjust Stock Damage—Right of Action.
3138. Property Taken by Consent of Debtor for Balance of Debt.
3139. Excessive Sale by Mortgagee of Goods where Debt is Usurious.
3140. Retaining without Selling Property Taken under Chattel Mortgage.
3141. Negligently or Intentionally Cutting Timber on Plaintiff's Land.
3142. Difference in Recovery where Timber is Cut in Bad or Good Faith.

§ 3128. Conversion Defined.

"Conversion is defined to be an illegal assumption or claim of ownership of the property of another."—Approved: France v. Gibson (Tex. Civ. App.), 101 S. W. 536 (not reported in state reports).

§ 3130. What Acts amount to Conversion.

"The jury are instructed that the conversion of property may be shown by the exercise or control over the same inconsistent with the right of the owner, and by depriving him of its possession without regard to the intent with which the act is done.

"If you find from the evidence that on the 31st day of May, 1898, the defendant had for shipment sixty-five (65) head of hogs in the stock yards at Liberty, Nebraska, and that the plaintiff had sixteen (16) head of hogs in said yards during said day, and that said hogs became mixed, as defendant was unloading his hogs through the shute into the car, and when separated, only fifteen hogs were in plaintiff's inclosure, and delivered to him in said separation, and that the defendant loaded the hog described in plaintiff's petition with his hogs on the car, and shipped and sold the same with his hogs and converted the money to his own use, then he is guilty of conversion."—Approved: Gore v. Izer, 64 Neb. 843, 90 N. W. 758.

§ 3132. Tendering Property After Refusal to Surrender Same.

"But if the man in charge of the boat knew that the plaintiff was the owner, or if at that time he was so informed by the plaintiff, and if the custodian then forbade the plaintiff to take the property in suit, such denial of the plaintiff's right was a denial by the defendants, and amounted to an assertion on their part of the control or dominion over this property, and was a conversion of it, in the law; and, if you find that such was the fact, then the plaintiff is entitled to recover of the defendants the full value of his property which was removed by them from the houseboat, unless you are satisfied that at a later date they offered to return to him the property, or offered to permit him to take it, and that it was then in substantially as good condition as it was in just before it was removed from the houseboat."—Approved: Lucas v. Sheridan, 124 Wis. 567, 102 N. W. 1077.

§ 3133. Demand and Refusal by One in Possession Prima Facie Conversion.

"The jury are instructed that when one person has property of another whether rightfully or wrongfully, in his possession and the owner is entitled to immediate possession of the property, then a demand for such possession by the owner and a refusal to deliver the property by the one so having it in possession is prima facie evidence of a wrongful conversion of the property to his own use by the latter."—Approved: Neumann v. Neumann, 147 Ill. App. 218.

§ 3135. Necessity of Demand may be a Question for the Jury.

"If plaintiff was the owner of the jewelry in question and deposited same with ——— for safe-keeping merely and without other and further authority, and ——— thereupon pledged or pawned the same to the defendant, intending at the time of such pledge, to convert the proceeds to his own use, such pledge amounted to a larceny by ———; even though the defendant was, in truth, ignorant of ———'s want of authority in the premises, and dealt with him in good faith, defendant nevertheless obtained no title by such pledge; and if at the time of the alleged service of the search warrant, if it occurred, defendant made any declaration to the constable as to the whereabouts of the property or his knowledge thereof, you may consider all that occurred in determining whether a demand of the property, if one had been made, would or would not have been availing; and if you conclude, from the consideration of all the evidence, that the defendant would not have surrendered the property to the plaintiff, if she had demanded it, then the plaintiff may, so far as this point of the case is concerned, recover, notwithstanding you should believe from the evidence, that no demand at all was made." Approved: Gottlieb v. Hartman, 3 Colo. 53.

§ 3136. Unlawful Conversion to One's Own Use and Benefit.

"That, in order for the defendant company to have been guilty of the conversion of the car load of hulls in controversy, it is first neces-

sary that the plaintiff should prove the ownership of the car of hulls, and further prove that at the time they were in possession thereof, or entitled to the immediate possession; and, second, to also prove the allegations in their complaint, that the hulls in question were unlawfully converted by defendant to its own use and benefit."—Approved: Purcell Cotton Seed Oil Mills v. Bell, 7 Ind. T. 717, 104 S. W. 944.

§ 3137. Refusal to Appoint Arbitrator to Adjust Stock Damage—Right of Action.

"You are further instructed that if you shall find from the evidence that the plaintiff went to the defendants and requested them to name an arbitrator to settle the amount they should receive for any injury or damages done by said bull, and then on his part offered and named such an arbitrator, then it was the duty of the defendants, in a reasonable time, to name such an arbitrator, and to submit their said differences to such arbitrators; and that in case you shall further find from the evidence that the defendants failed and neglected to appoint and name an arbitrator on their part to act with an arbitrator named by the plaintiff; or if you shall find from the evidence that the defendants, upon a request to them by plaintiff to name and appoint an arbitrator to act with such arbitrator named by him, wholly refused so to name or appoint such an arbitrator, and demanded that plaintiff should pay them a certain sum fixed by them as such damages and compensation,—then the plaintiff was at once entitled to the possession of said bull. The defendants were not thereafter entitled to hold possession thereof, and you should find thereupon for the plaintiff."—Approved: Dierks v. Weilage, 18 Neb. 176, 24 N. W. 728.

§ 3138. Property Taken by Consent of Debtor for Balance of Debt.

"If you believe from the evidence that the defendant, without plaintiff's consent, seized and carried away the property mentioned and described in plaintiff's petition, then you will return a verdict in favor of plaintiff for the reasonable market value of said property at the time of such seizure, if any, together with interest thereon from the date the property was taken from plaintiff's possession, at six per cent. per annum.

"If you find that defendant did take the property, but you believe that plaintiff agreed with defendant that the same should be taken in full payment and satisfaction of the balance of the unpaid purchase price thereof, then you will find in favor of the defendant, and so say by your verdict."—Approved: Crouch Hardware Co. v. Walker, 51 Tex. Civ. App. 571, 113 S. W. 163.

§ 3139. Excessive Sale by Mortgagee where Debt is Usurious.

"If you find from the evidence that the chattel mortgage under which defendants justify themselves in the sale of the goods in controversy was given to secure a 'usurious note,' as defined in these instructions, and if you further find from the evidence that plaintiff has paid any sum or sums thereon as interest or otherwise, and if, after

deducting said sum or sums of money so paid, if any such there were, from the sum of money which plaintiff actually received upon said note, you find that there was still a balance due upon said note, and if you further find that defendants, in selling said goods under said chattel mortgage, sold the same in parcels, then, upon such a state of facts, the court instructs you that, after having sold such a part of said goods as realized a sum of money sufficient to pay any such balance, if any such there was, together with all costs incurred in keeping, advertising, and selling said goods, then the said mortgage lien was extinguished as to the goods remaining unsold, and the selling of other of said goods under said chattel mortgage was in law a conversion of the same, for the value of which defendants are liable to plaintiff."—Approved Omaha Auction & Storage Co. v. Rogers, 35 Neb. 61, 52 N. W. 826.

§ 3140. Retaining without Selling Property Taken under Chattel Mortgage.

"The defendant, if liable at all, can only be liable for the conversion of the property to his own use. The defendant, under the chattel mortgage, had the right to take possession of the property described therein, and, if the debt had matured, had the right to sell the same in accordance with the law and the terms of said mortgage. He did not have the right to take possession of the property under his chattel mortgage, and, having obtained possession thereof, convert the same to his own use, and deprive the plaintiff of any interest in said property, or the proceeds or value thereof in excess of the amount due on the notes and mortgage; and if you find from the evidence that the defendant did take possession of said property, and that without a sale of said property under the mortgage, as provided by the law and terms thereof, he converted the same to his own use, claimed and exercised acts of ownership thereof, sold a portion, retained the proceeds, and holds the balance thereof as his own property, and denies the right of plaintiff to said property, or any interest therein, then he is held to have converted the property to his own use, and is liable to the plaintiff for the difference in value of the property included in the mortgage and taken by him, and the amount of the indebtedness that was due and owing on the said notes and mortgage, provided said value is in excess of the amount due on the notes and mortgage. The taking of said property under an agreement to and surrender of the said notes and mortgage in payment thereof to the plaintiff would not be such a taking and holding of said property as would constitute a conversion thereof."—Approved: Howery v. Hoover, 97 Iowa, 581, 66 N. W. 772.

§ 3141. Negligently or Intentionally Cutting Timber on Plaintiff's Land.

"If, in fact, the defendants, or any of them, did inform and show such employes the locality of defendants' land, and the boundary line between the plaintiff's and defendants' lands, prior to the committing of such trespass, and such employes did thereafter carelessly or heedlessly cross such line, using no care or pains to observe such line on defendant's or plaintiff's land, and commit such trespass and cut said plaintiff's

timber, then the defendants cannot now claim that such cutting was by mistake.

"If the jury find that the range line between the plaintiff's and defendants' land was plainly blazed or marked, so that the defendants' employes, by the exercise of ordinary care and attention, must or could have seen such marks, and known they were crossing such range line, then they, as well as the defendants, are to be charged with knowledge that they were trespassing, and cannot now claim that the cutting of the plaintiff's timber was by mistake."—Approved: Brown v. Bosworth, 58 Wis. 379, 17 N. W. 241.

§ 3142. Difference in Recovery where Timber is Cut in Bad or Good Faith.

"Applying these rules to the evidence, if the jury shall find from the evidence that defendant through its agents and employes entered upon the land described in the plaintiff's petition and intentionally and wrongfully cut and appropriated the timber thereon to its own use and benefit, knowing or having reasonable grounds to know through the exercise of care and diligence, such as a prudent person would exercise under the same condition, that the timber belonged to plaintiff, and not itself, then return a verdict for plaintiff against defendant company for the market value of the manufactured lumber and cross-ties that you may find were taken. But, if the jury shall find from the evidence that the defendant company entered upon the land described in plaintiff's petition, and cut and appropriated timber therefrom by accident or mistake arising from the belief in good faith that it was the true owner of the timber, and you further find that the defendant company had exercised diligence and care before cutting and appropriating same, as a prudent person would exercise under same circumstances, to ascertain the true ownership of the timber, and acting under such information of ownership wrongfully cut the timber of plaintiff, then return a verdict for plaintiff against the defendant company for the market value of the timber as it stood in the trees at the time such timber as you may find was taken."—Approved: Young v. Pine Ridge Lumber Co. (Tex. Civ. App.), 100 S. W. 784.

D. Trespass.

§ 3143. Burden to Show Cutting by Defendant on Plaintiff's Land and Value of Timber.
3144. Measure of Damages where Cut Willfully and Under Claim of Right.
3145. Willful Trespass Giving Punitive Damages—Jury to Say Willfulness Existed.
3146. Recovery for Cattle Grazing—Sufficiency of Enclosure.
3147. Hay Cut without Permission—No Recovery for Negligent Destruction by Third Party.

§ 3143. Burden to Show Cutting by Defendant on Plaintiff's Land and Value of Timber.

"The court charges the jury that, before you can find for the plaintiff under the last count of the complaint, you must be reasonably satisfied from all the evidence that the defendant cut and removed the wood from lands belonging to the plaintiff described in said count of the complaint, and that without plaintiff's consent; and you must also be satisfied from the evidence of the value of the wood thus cut and removed."—Approved: Wilmer Lumber Co. v. Eisely (Ala), 50 South. 225.

(b) "If the jury believe from the evidence that the trees in controversy or any of them were cut from the land not included in patent No. 6,436 to David Turner, read in evidence, they should find for the plaintiffs the fair market value of the trees so cut, and may in their discretion allow interest from the time of the cutting. But if they believe from the evidence that the land from which the trees were cut is included in patent No. 6,436 to David Turner, they should find for the defendant."—Approved: Burt & Brabb Lumber Co. v. Hurst (Ky), 110 S. W. 242 (not reported in state reports).

§ 3144. Measure of Damages where Cut Willfully and under Claim of Right.

"Now, applying the foregoing rules of law to the evidence, if you find from the evidence that the defendant, through his agents and employes, entered upon the land described in the plaintiff's petition and intentionally and wrongfully cut and appropriated the timber thereon to his own use and benefit, knowing or having reasonable grounds to know, through the exercise of care and diligence, such as a prudent person would exercise under the same conditions, that the timber belonged to plaintiff, and not himself, then you will return a verdict for the plaintiff against the defendant for the market value, at the time when taken, of the lumber manufactured from the timber taken, such value to be of the lumber in its manufactured state.

"But if you shall find from the evidence that the defendant entered upon the land described in plaintiff's petition, and cut and appropriated timber therefrom by accident or mistake arising from his belief in good faith that he was a true owner of such timber, and you further

find that the defendant had exercised diligence and care before appropriating the same, such as a prudent person would exercise under the same circumstances, to ascertain the true ownership of the timber, and, acting under such information of ownership, wrongfully cut the timber of plaintiff, then you will return a verdict for the plaintiff against the defendant for the market value of the timber as it stood in the trees at the time said timber, as you may find, was taken."—Approved: Clevenger v. Blount (Tex. Civ. App.), 114 S. W. 868.

§ 3145. Willful Trespass Giving Punitive Damages—Jury to Say whether Willfulness Existed.

"Now I come to the third question, and the one which is the real issue in the case, and the one which counsel differ most about, and that is, How were these acts done? The complaint charges that it was done willfully, and willfully means just what that word implies. If I were to tell you what a white horse was—start to tell you, you would know what I meant without my attempting to tell you what a white horse is, and you know what a willful man is. I charge you this: That one man cannot go and take another man's property against the other man's will, and simply offer the worth of that property. If one man takes another man's property against his will or carelessly, the jury may assess damages against him, not only for the value of the property, but to punish him for the act. That is the power of the jury. The issue here is, Will the jury do that? I will tell you what the law is, and it is for you to say whether or not the facts warrant you giving such a verdict, and that leads you into the purpose of Mr. Cummings' action when those acts were done. How can you find a man's purpose? I told a jury in a criminal case here you cannot look into a man's heart like a watchmaker looks into his watch, and see what he has in him, for two reasons—first, you cannot see his heart, and secondly, you do not know whether the motive is formed in his heart—but a jury can take all of the circumstances into the case, knowing that an act has been done, and judging other men by themselves, by their own heart and purposes, and find out how the thing is done. Now take all of the circumstances in this case and answer whether or not Mr. Cummings went, either by himself or his agent, and willfully invaded the rights of the plaintiff. If so, you have a right to assess damages against him—punitive damages."—Approved: Moore v. Cummings, 87 S. C. 166, 69 S. E. 154.

§ 3146. Recovery for Cattle Grazing—Sufficiency of Enclosure.

"It is alleged in this case that the defendants turned their cattle in upon the crops of these plaintiffs and destroyed them. If you believe that is true, it will be your duty to find for the plaintiffs and assess their damages at whatever sum you may find they sustained by reason thereof. The defendants deny all this. It devolves upon the plaintiffs to show by the greater weight or preponderance of the evidence that the defendants did turn their cattle in and upon the crops and destroyed them. If you should find that the crops were destroyed by any other means, for want of a lawful fence, or that the cattle came at low

places, over which the defendants had no control or agency, your verdict will be for the defendants."—Approved: Stewart & Hoskins v. Walker, 82 Ark. 603, 102 S. W. 696.

§ 3147. Hay Cut without Permission—No Recovery for Negligent Destruction by Third Party.

"If the jury finds from the testimony, that the plaintiff had cut and stacked the hay, for the burning of which he seeks to recover in this action, upon land which he did not own, and if you further find that the plaintiff had no license or permission to cut the grass upon said land, and stack the hay therefrom thereon, the title to said hay so cut and stacked was not in the plaintiff, and he cannot maintain an action to recover for the destruction thereof by fire which burned over the prairie upon which the same was stacked."—Approved: Murphy v. S. C. & P. R. Co., 55 Iowa, 473, 8 N. W. 320.

CHAPTER XCII.

ATTORNEY AND CLIENT.

§ 3147. Duty of Attorney—Good Faith.
3148. Unauthorized Appearance—Client's Knowledge—Estoppel.
3149. Service Performed by Attorney without Agreement as to Compensation.
3150. Services—Reasonable Value of.
3151. Evidence of Attorneys as to such Value Applied by Jury to Their Own Experience.
3152. Attorney not Responsible for Every Mistake in Practice.

§ 3147. Duty of Attorney—Good Faith.

"Attorneys, in dealing with their clients, are required to exercise the highest order of good faith and to disclose to them all information in their possession as to the material facts of the case which would or might influence the client in entering into or refusing to execute the contract in the issue."—Approved: Weil v. Fineran, 78 Ark. 87, 93 S. W. 568.

§ 3148. Unauthorized Appearance—Client's Knowledge—Estoppel.

"If you find that the defendant knew that the case was pending in Ohio, wherein her name appeared as a party plaintiff, and that she did not make objection, but allowed the case to proceed to judgment without change, so far as her name was concerned, she thereby ratified the action taken in making her a party, is now estopped to deny the same, and your verdict should be for the plaintiff."—Approved: Oxtoby v. Henley, 112 Iowa, 697, 84 N. W. 942.

§ 3149. Services Performed by Attorney without Agreement as to Compensation.

"That if the jury believed from the evidence the defendant employed the plaintiff to represent him as attorney in the several suits mentioned, and that the plaintiff did represent the defendant as attorney in such suits without an express agreement regarding the amount of compensation for his services or the time for paying the same, then the law would imply an agreement on the part of the defendant to pay the plaintiff reasonable compensation therefor."—Approved: Young v. Lanznar (Mo. App.), 112 S. W. 17.

§ 3150. Services—Reasonable Value of.

"In ascertaining the reasonable value of the services of plaintiffs, you will consider the nature of the litigation, the amount involved, and the interests at stake, the capacity and fitness of plaintiffs for the re-

quired work, the services and labor rendered by plaintiffs, the length of time occupied by them, and the benefit, if any, derived by defendants from the litigation; and you are further instructed to look to all the evidence in the case, and to exercise your sound discretion and judgment thereon, and allow plaintiffs such reasonable amount as you may believe they are justly entitled to, not to exceed the amount claimed in their petition."—Approved: International & N. G. R. Co. v. Clark, 81 Tex. 48, 16 S. W. 631.

§ 3151. Evidence of Attorneys as to such Value Applied by Jury to Their Own Experience.

"The court instructs you that the evidence given by attorneys as to the value of the plaintiff's services does not preclude you from exercising your own knowledge upon the value of such services. It is your duty to weigh the testimony of the attorneys as to the value of plaintiff's services, if any, by reference to their nature, the time occupied in their performance, and other attending circumstances, and you may apply to it your own experience and knowledge, if any, of the character of such services."—Approved: Brownrigg v. Massengale, 97 Mo. App. 190, 70 S. W. 1103.

§ 3152. Attorney not Responsible for Every Mistake in Practice.

"The jury are instructed that the defendant was required to possess competent skill, and if there was a want of ordinary care he would be liable; that an attorney is not liable for every mistake, but if there is a want of reasonable care and diligence he is liable; and that if he exercises reasonable care and diligence, he is not liable." Approved: Varnum v. Martin, 15 Pick (Mass.), 440, 441.

CHAPTER XCIII.

BAILMENTS.

§ 3154. Diligence in the Keeping of Cattle.
3155. Innkeeper's Liability for Goods of Guest.
3156. Lessee of Machine Agreeing to Keep Same in Good Order.
3157. Duty of Clerk of Court in Keeping Books of Court—Negligence.
3158. Duty of Livery-stable Keeper—Loss of Horse by Fire.
3159. Duty of Warehouseman to Remove Goods from Threatened Danger.
3160. Agister Neglecting Cattle—Duty of Owner to Prevent Damage.
3161. Measure of Damage for Cattle Neglected by Agister.
3162. Vendor Failing to Care for Property Sold and Awaiting Delivery.
3163. Degree of Care where Possession is Beneficial to Bailee.

§ 3154. Diligence in the Keeping of Cattle.

"Under the terms of the contract herein sued upon the defendant is liable for the value of any cattle delivered to defendant, or any of the increase thereof, which were lost, died, or not returned, if you believe from the evidence that such loss, death, or failure to return such stock could have been prevented by the defendant in exercising reasonable and ordinary care in handling such stock. On the other hand, it is provided by said contract, and the law is, that he would not be liable to plaintiff on account of the death of any of the forty-one head of cattle, or the increase thereof, resulting from disease, old age, or other causes which the defendant by reasonable and ordinary care could not have prevented."—Approved: Mattern v. McCarty, 73 Neb. 228, 102 N. W. 468.

§ 3155. Innkeeper's Liability for Goods of Guest.

"The liability of an innkeeper, gentlemen, is this: Whenever a guest goes to an inn or hotel, and becomes the guest of the hotel, and leaves his property with the hotel-keeper, the hotel-keeper is responsible for the baggage or goods so deposited. It is not necessary that anything should be said between the guest and the landlord as to the liability. It is not necessary that the guest should say to him, 'You take these goods of mine and keep them.' If he goes into the office of the hotel, and deposits his goods there, his valise, or whatever he has accompanying him as a guest, and deposits it there, in the presence of the landlord, in the office, in the customary place where things were ordinarily deposited, so that the landlord sees it, and there receives him as his guest, the landlord's liability is then fixed for these goods, and it is then his duty to take care of them. If he seeks to escape liability in

case they are lost, then the burden of proof is upon him. Mere proof that the goods are lost—mere proof even that they are stolen, without showing by whom—would not release the innkeeper from liability. Although they were stolen from his office, from the place where the guest had left them, without any negligence on the part of the guest, the innkeeper in that case would be liable. In other words, the burden of proof is entirely upon him. So, gentlemen, if you find in this case that the plaintiff went to the hotel of the defendant, it being admitted that he was an innkeeper; that he went there as his guest; that he deposited the goods which he had with him with the landlord, the defendant in the case, or in his presence, in the office of the hotel, in the customary place where such things were deposited, and the goods were lost, I charge you that the defendant would be liable for the goods so lost, unless there was some contributory negligence, or some other agreement on the part of the plaintiff."—Approved: Rubinstein v. Cruikshanks, 54 Mich. 199, 19 N. W. 954.

§ 3156. Lessee of Machine Agreeing to Keep Same in Good Order.

"You are instructed that if you find from the evidence in this case that the defendant leased the machine under the contract, and that the said machine was in accordance to this contract, you will find for the plaintiff. If, upon the other hand, you find that the machine was unfit for the use for which it was bought, and was not such a machine as was contemplated, you will find for the defendant unless you find that said machine became unfit for use by reason of some negligence on the part of the defendant. If you should fine defendant received the machine, it devolves upon the defendant to show said machine was not in accordance with said contract. If defendant agreed to keep said machine in order, it was their duty to do so."—Approved: J. T. Stark Grain Co. v. Automotic Weighing Mach. Co., 81 Ark. 609, 99 S. W. 1103.

§ 3157. Duty of Clerk in Keeping Books of Court—Negligence.

"The jury are instructed that the said Spear in the care and custody of the books and records in question, was required to use ordinary care in keeping them safe from damage and destruction. If a fire-proof vault was by the county provided for or furnished him, to safely keep said books and records in, and if it was reasonably suitable and convenient for him in the exercise of ordinary care, and in performing the duties of his office, to keep said books and record in said vault, then it was the duty of said Spear in the night season to keep said books and records in said vault, when not in use by him in his office; and if from the evidence in this case the jury believe that said Spear, at the time in question, failed to exercise such ordinary care for the safe-keeping of said books and records, then he was guilty of negligence in relation to that matter; and if from the evidence in this case the jury believe that it was the duty of said Spear, in the exercise of ordinary care, to have placed said books and records in said vault at the time in question, and that he failed to do so, and that, on account of the failure of said Spear to place said books and records in said vault at the time in question, the said books were damaged or destroyed by said fire, then the said Spear, and

also the other defendants, would be liable for the damage to or destruction of said books or records on account of said fire."—Approved: Toncray v. Dodge County, 33 Neb. 802, 61 N. W. 235.

§ 3158. Duty of Livery-stable Keeper—Loss of Horse by Fire.

"The defendant in this case could not be held liable unless the loss of the horses was caused by the failure of the defendant company to exercise the ordinary care which I have said the law requires it to exercise, and if you should find from the evidence that the horses in this case were destroyed in consequence of fire which was not started by the defendant through any act of negligence on its part, or through any act of negligence on the part of any of the servants of the defendant intrusted with the care of this stable—I say, if you should find the horses were destroyed by a fire for the starting of which the defendant was not responsible, then the plaintiff cannot recover, unless you are satisfied by the evidence that by the exercise of ordinary care on the part of the defendant company the horses would have been saved, notwithstanding the fire."—Approved: Weaver v. Montana Stables, 46 Wash. 65, 89 Pac. 154.

§ 3159. Duty of Warehouseman to Remove Goods from Threatened Danger.

"The court instructs the jury that though they may find from the evidence that the damage to plaintiff's cotton was caused by the high water or flood mentioned in the evidence, yet if they believe from the evidence that the cotton of plaintiff might have been saved from any damage by the exercise of ordinary care by the defendant or its employes, then the defendant is liable for the damage done or the loss suffered by the plaintiff, and the jury are instructed that the degree of care or effort required of the defendant was such as could be reasonably expected of persons of ordinary common sense and prudence engaged in the same or similar business as defendant, and under the same or similar circumstances, as shown by the evidence."—Approved: Prince & Co. v. St. L. C. C. Co., 112 Mo. App. 49, 86 S. W. 873.

§ 3160. Agister Neglecting Cattle—Duty of Owner with Knowledge to Prevent Damage.

"If you believe from the evidence that the defendant delivered a large number of cattle for pasture to the plaintiff, and there was no definite or certain agreement between the parties as to how long plaintiff should keep said cattle, then defendant had the right to take possession of said cattle at any time; and if you further believe from the evidence that, during the time plaintiff had said cattle in his pasture, the defendant frequently saw said cattle, and knew that plaintiff was neglecting to water and properly care for said cattle, and knew that by reason thereof said cattle were being injured, or that the defendant was being damaged thereby, then the law imposes upon the defendant the active duty of making reasonable exertions to prevent the damages, and render such injuries or damages, if any, as light as possible; and if, by his own negligence or carelessness, defendant per-

mitted said damages to be unnecessarily enhanced, the increased loss, if any, must be borne by the defendant."—Approved: Loomer v. Thomas, 38 Neb. 277, 56 N. W. 973.

§ 3161. Measure of Damages for Cattle Neglected by Agister.

"If you find from a preponderance of the evidence that the defendant is entitled to recover damages on account of negligence of the plaintiff in looking after and caring for defendant's cattle, if any such is proved, then the measure of the defendant's damages would be what said cattle are impaired and depreciated in value, if any such you find, and the value of the cattle lost or that died, if any such you find, on account of the negligence of the plaintiff, provided you further find from the evidence that such loss or damages occurred without any fault or neglect on the part of the defendant."—Approved: Loomer v. Thomas, 38 Neb. 277, 56 N. W. 973.

§ 3162. Vendor Failing to Care for Property Sold and Awaiting Delivery.

"If they believed from the evidence that the defendant Walker, after selling his hemp to the plaintiff, failed to use such diligence in caring for same as the jury might believe from the evidence was reasonably necessary, in order to preserve the hemp, and bring it to a reasonably suitable condition for stacking, or fail to haul and stack same as soon as it was in a suitable condition to stack, or that he failed to stack said hemp in such manner that met the approval of plaintiff, and if the jury further believe from the evidence that by reason of defendant's failure to so care for said hemp, or to so haul same, or to so stack same, said hemp was damaged and rendered less valuable, the jury should allow the plaintiff such a sum in damages as they may believe from the evidence will fairly and reasonably represent the depreciation, if any, in the value of the hemp, due to the defendant's failure, if any, to use such diligence as is above defined to preserve said hemp, and bring it to a reasonably suitable condition for stacking or to defendant's failure, if any, to so haul same, or to his failure, if any, to stack said hemp in the manner that met the approval of plaintiff, not exceeding $1,000, the amount claimed by plaintiff on that account. But, if the jury believe from the evidence that the plaintiff kept said hemp in the stack for an unreasonable length of time after it was delivered to plaintiff, the jury should not allow the plaintiff any damages which they might believe from the evidence occurred to said hemp, if any, by its being kept in the stack for an unreasonable length of time."—Approved: Summers Fiber Co. v. Walker (Ky.), 109 S. W. 883 (not reported in state reports).

§ 3163. Degree of Care where Possession is Beneficial to Bailee.

"The jury are instructed that, if you believe, from a preponderance of the evidence, that the defendants held the bonds of the plaintiff exclusively for the benefit of the plaintiff, then the only obligation resting upon them was to exercise reasonable and ordinary care over the same. What constitutes such reasonable and ordinary care is a

question of fact for the jury to determine from the evidence in the case. It will vary with the nature, value and situation of the property. The person who holds or has the charge of the property of another under such circumstances is required to exercise the care usually and generally deemed necessary in the community for the security of a similar property under like circumstances, but nothing more. It is for you to say what the evidence is, what it proves, tends to prove or fails to prove, and the court has no right to, and must not be understood to, intimate any opinion as to any question of fact. If, from all the evidence, you find and believe that the defendants did not exercise over the bonds of the plaintiff reasonable and ordinary care, but were guilty of gross negligence in their keeping, and that by reason thereof the bonds were lost to the plaintiff, then you will find the defendants guilty."—Approved: Gray v. Merriam, 148 Ill. 183, 35 N. E. 810, 32 L. R. A. 769, 39 Am. St. Rep. 172.

CHAPTER XCIV.

BILLS AND NOTES.

A. Bills and Notes.
B. Alterations of Writings.

A. Bills and Notes.

§ 3167. Delivery upon Condition Precedent Unperformed.
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3177. Gambling Consideration.
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3211. Usury as Defense to Note.
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§ 3167. Delivery upon Condition Precedent Unperformed.

(a) "The defendants Beem, Weaver and Sell say that they never delivered said note, and never authorized any person to deliver it for them, but allege that they signed it and placed it in the hands of one Stoller, upon the express condition and understanding that said Stoller should retain the same until one Blajok should sign it with them, and that Blajok did not sign said note, and that it was delivered by Stoller to one Roach, without the knowledge and consent of these defendants, who delivered the same to said Gower, from whom it was obtained by plaintiffs; and that said defendants had no knowledge of such delivery, and never gave their assent thereto or ratified the same.

"On this subject you are instructed that if you believe from the evidence that defendants Beem, Weaver and Sell signed and delivered said note to Stoller; that said Stoller was not the agent of the plaintiffs; that it was delivered to Stoller with the agreement and understanding that it should be retained by him, and not delivered until signed by Blajok; and if you further believe that it was not signed by Blajok; but was delivered to Roach by Stoller, without the knowledge or consent of the defendants, or any of them, and by him delivered to Gower without the knowledge or consent of the defendants, then the defendants, or such of them as signed and delivered said note under such circumstances, and with such understanding and agreements, will not be liable, and you will so find by your verdict."—Approved: Daniels v. Gower, 54 Iowa, 319, 3 N. W. 424.

(b) "If you believe from the evidence that the defendant delivered the note in suit to plaintiff, under an agreement that he was signing the same as one of the stockholders of the South Side Driving Park Association, and that the same was to become binding only upon condition that other stockholders of said association should sign the same, then plaintiff cannot recover in this case. Or if you believe from the evidence that there was no consideration for said note, then the plaintiff cannot recover. The only claim of consideration in the pleadings is that said note was given for the purpose of securing an extension of time for the South Side Driving Park Association, and you are told that, if this was the consideration, it was sufficient. The note, being a written instrument, and in the possession of plaintiff, purports a delivery and a consideration, and the burden is upon the defendant to show, by a preponderance of the evidence, either that there was no delivery or no consideration. On the other hand, if you believe that the defendant was a stockholder and officer of the South Side Driving Park Association, and that said association was without funds, and in order to extend the time of payment of said claim, and prevent the plaintiffs from immediately enforcing their claim against the South Side Driving Park Association, the defendant delivered the note to the plaintiffs, intending the same as his obligation, but that it was understood and agreed that the defendant might have the privilege of securing other names to share the liability, then the note would be a binding obligation upon him, and the plaintiff would be entitled to recover. You are told that if the defendant delivered the note to the plaintiffs without an agreement that other names should be secured to the same before it should be binding, then the law presumes he intended it as his own obligation."—Approved: Zimbleman & Otis v. Finnegan, 141 Iowa, 358, 118 N. W. 312.

§ 3168. Signing After Delivery Requires New Consideration.

"That where one becomes a party to a note, after it has once been delivered, and the consideration passed, he will incur no liability, unless there is some new consideration and a re-delivery of the note."—Approved: Williams v. Williams, 67 Mo. 661.

§ 3169. Want of Consideration.

(a) "I charge you, as matter of law, that if you believe the defendant signed such promissory note without receiving consideration therefor, or without understanding the same to be a promissory note, your verdict must be for the defendant."—Approved: Trombly v. Trombly, 106 Mich. 227, 64 N. W. 56.

(b) "You are next to determine whether there was anything owing from the defendant to Maggie Gillespie at the time they (the notes) were taken. If there was nothing owing to her at the time on account of what had been loaned by her to the defendant and others at any time, because she had been fully paid, no matter whether she had been paid by the defendant or by some one else liable with him, then your verdict should also be for the defendant."—Approved: Gillespie v. Salmon, 2 Cal. App. 501, 84 Pac. 310.

§ 3170. Failure of Consideration.

(a) "If, however, you find from the testimony that as a part of the consideration of the notes herein sued upon Carter & Mullaly agreed to furnish said defendant on demand and at all times for use in his undertaking business suitable horses and hearses as might be required and requested by said defendant on demand, and at all times for use in his undertaking business suitable horses and hearses as might be required and requested by said defendant in the conduct of his said business, and furnish drivers for hearses or cars, to keep and store, free from all charges for rent, and ready for use at all times, one hearse, one black funeral car, one white funeral car, and one undertaking wagon, for a period of twenty-five months from the date of the purchase of said undertaking establishment, and you further find that at the time H. D. Kampmann purchased the said notes herein sued upon any of said notes were overdue and unpaid, and that at said time of said purchase the consideration of such overdue and unpaid note, if any, had failed, as claimed by defendant, then you are charged to find for defendant."—Approved: McCormick v. Kampmann (Tex. Civ. App.), 109 S. W. 492 (not reported in state reports).

(b) "The only questions for you to pass upon are whether or not these notes were given with this express understanding that Mr. Duffy should not pay them if he was dissatisfied with this creamery, and if you find that they were given with that express understanding, and that these plaintiffs took these notes under that express agreement, and that Mr. Duffy did express himself as dissatisfied with this factory or creamery, then your verdict will be no cause of action."—Approved: Sherrod v. Duffy, 160 Mich. 488, 125 N. W. 366.

§ 3171. Burden on Defendant to show.

"It is contended on the part of the defendants that, if the said A. executed said note to the plaintiff, he did it upon consideration that the plaintiff would quit the patent-right business, go home and stay with his family, and sell no more patent-rights or gates as long as A. lived; but the defendants further contend that the consideration of said note has failed, and that the plaintiff after the making of said note sold patent-rights and gates, and therefore said note is void. The burden of proof is on the defendants to prove this contention by a preponderance of the evidence. In order to defeat the collection of said note under this branch of the defendants' contention, the defendants must prove by a preponderance of the evidence that all said consideration failed. If all the consideration of said note did not fail, then the note is valid, so far as the consideration is concerned."—Approved: Ray v. Moore, 24 Ind. App. 480, 56 N. E. 937.

§ 3172. Consideration—Agreement not to Divorce Wife.

"If you believe the facts to be that plaintiff's wife was pregnant by some person other than plaintiff at the time when he married her, and that he was ignorant of this fact at the time of the marriage, that the defendant either by reason of the woman having been brought up in his family, or by reason of his being the father of her child, was de-

sirous that plaintiff should condone the said offense, and retain the woman as his wife, and maintain and provide for the child as his own, and the note in suit was made by defendant in pursuance of an agreement between plaintiff and defendant to the effect that plaintiff should retain the woman as his wife notwithstanding such pregnancy, and should maintain and provide for her child as his own, and that defendant should give to plaintiff the note in suit, this state of facts would show a good and legal consideration on plaintiff's part for the execution of the said note."—Approved: Brannum v. O'Connor, 77 Iowa, 632, 42 N. W. 504.

§ 3173. Illegal Consideration Agreement not to Resist Divorce.

"If you find from a preponderance of the evidence that the sole consideration for the original $1,000 note was the promise of the plaintiff not to resist the granting of the divorce which defendant was seeking to obtain from him, you are instructed that such consideration was what is termed an incompetent consideration, which in law is no consideration at all."—Approved: Robinson v. Robinson (Iowa), 125 N. W. 216.

§ 3174. Note Given for Shortage—Agreement not to Prosecute.

(a) "You are further instructed that if you should find from a preponderance of the evidence that there was some sheep stolen from the said Donaldson, and that the said Smith was connected with the larceny of the said sheep, and that the said Donaldson did not recover all of his sheep, and was damaged by reason of the larceny, such damage might form a legal consideration for a promissory note; but you are further instructed that if you find from the evidence that there was connected with the same transaction a promise, either expressed or implied, on the part of Donaldson, not to prosecute or have the defendant, Smith, arrested, then such promise, whether expressed or implied, would vitiate and render null and void the entire transaction, and the note would then be the valid legal consideration, and it would be your duty to find for the defendant."—Bullard v. Smith, 28 Mont. 387, 72 Pac. 761.

(b) "A note given to settle an embezzlement or a shortage of an agent is valid and good, if it was given to settle the indebtedness or shortage, and if there is no agreement to stiffle the prosecution for the embezzlement."—Approved: Wolf v. Troxell's Estate, 94 Mich. 573, 54 N. W. 383.

§ 3175. Consideration Collusion in Divorce Proceeding.

"If you find from a preponderance of the evidence that the sole consideration for the original $1,000 note was the promise of the plaintiff not to resist the granting of the divorce which defendant was seeking to obtain from him, you are instructed that such consideration was what is termed an incompetent consideration, which in law is no consideration at all."—Approved: Robinson v. Robinson (Iowa), 125 N. W. 216.

§ 3176. Illegal Consideration Renewal Note Defense Valid.

"If you find from a preponderance of the evidence that the two $1,000 notes were given without consideration, the mere fact, if it be a fact, that the note sued on was given as a renewal of one of the $1,000 notes, would not by that fact alone impart a consideration to the note sued on in this case, and in such cause your verdict should be in favor of the defendant."—Approved: Robinson v. Robinson (Iowa), 125 N. W. 216.

§ 3176a. But if Extension is Obtained on Note whose Validity is in Dispute this Validates it.

"If you find from a preponderance of the evidence that at the time the $——— were paid on the $——— note the validity of the $——— note was in the minds of the parties either as a valid claim, or it was a question in their minds whether or not it was a valid claim, and in order to get an extension of time to avoid litigation, and in order to settle the supposed or claimed rights of the parties in the $——— note, the defendant executed and delivered the note in suit, then in such case you would be warranted in finding that the note sued on is supported by a valid consideration."—Approved: Robinson v. Robinson (Iowa), 125 N. W. 216.

§ 3177. Gambling Consideration.

"Under the law of this state, all bills, notes, bonds, mortgages, and other securities, the consideration of which was money or other articles of value, won by gambling, are null and void and of no effect, as between the parties to the same, and to all other persons, except holders thereof in good faith without notice of the illegality of such contract; and in this case you are instructed, as a matter of law, that the checks in suit were invalid in the hands of Green, the original holder thereof, and if the plaintiff, at the time he claims to have purchased them, knew the circumstances under which and the consideration for which they were given, he cannot recover, and your verdict in this case must be in favor of the defendants. On the other hand, if you find that, at the time the plaintiff claims to have purchased these checks, he did not know the circumstances under which they were given, nor the consideration for which they were given—in other words, that he was an innocent purchaser in good faith—then your verdict must be for the plaintiff, for the full amount from the date you find that the claims were presented, as suggested by the court in previous instructions."—Ash v. Clark, 32 Wash. 390, 73 Pac. 351.

§ 3178. Consideration—Compromise of Disputed Right.

(a) "If you find from a preponderance of the evidence that at the time the $200 were paid on the $1,000 note the validity of the $1,000 note was in the minds of the parties either as a valid claim, or it was a question in their minds whether or not it was a valid claim, and in order to get an extension of time to avoid litigation, and in order to settle the supposed or claimed rights of the parties in the $1,000 note, the defendant executed and delivered the note in suit, then in such

case you would be warranted in finding that the note sued on is supported by a valid consideration."—Approved: Robinson v. Robinson (Iowa), 125 N. W. 216.

(b) "You are instructed that the abandonment and discontinuance of a suit or action brought to enforce a doubtful right or claim is a sufficient consideration for a promise, and so is the compromise of a disputed claim made bona fide, even though it ultimately appears that the claim compromised was wholly unfounded. If, therefore, you should believe and find from the evidence that the note sued on in this case was given in consideration of a compromise of the suit instituted by plaintiff on the $5,000 note, and that said suit was dismissed by plaintiffs, and that said agreement of compromise was carried out by the parties thereto, then you are instructed that said agreement forms a sufficient consideration for the note sued on."—Approved: Hunter v. Lanius, 82 Tex. 677, 18 S. W. 201.

(c) "If you believe and find from the evidence that Phil Lanius, defendant herein, together with Cyrus Eakman and J. D. Orton, in 1885 executed and delivered to Hunter, Evans & Co. the $5,000 note introduced in evidence, and that plaintiffs had brought suit on said note in the district court of Clay county, Texas, and had in such suit attached certain property of said defendants, or either of them, and that Phil Lanius, after the institution of said suit, and while the same was still pending and undisposed of, agreed with plaintiffs on the amount that was still due on said note for $5,000, and that in order to and for the purpose of procuring the dismissal of the suit then pending, and a release from the attachment of property which had been levied on, or in order to and for the purpose of procuring an extension of the time of payment of the amount still claimed to be due by plaintiffs on said $5,000 note, agreed with plaintiffs or with their attorneys on a settlement of the differences existing between them as to the amount still due on said note, and in pursuance of said agreement the defendants in this suit executed and delivered to the plaintiffs the note herein sued on, and the plaintiffs thereupon in consideration of the execution of said note did in fact dismiss their suit on said $5,000 note, and release the property which had been levied on in that case, and accepted in lieu of said note the note herein sued on, then you are instructed that said agreement, and the subsequent compliance therewith by the parties thereto, is a sufficient consideration for the note sued on, and you will find for plaintiffs."—Approved: Hunter v. Lanius, 82 Tex. 677, 18 S. W. 201.

§ 3179. Part Payment and Promise of Forbearance Make New Consideration.

"If you find from a preponderance of the evidence that at the time the $200 were paid on the $1,000 note the validity of the $1,000 note was in the minds of the parties either as a valid claim, or it was a question in their minds whether or not it was a valid claim, and in order to get an extension of time to avoid litigation, and in order to settle the supposed or claimed rights of the parties in the $1,000 note, the defendant executed and delivered the note in suit, then in such case you would be warranted in finding that the note sued on is sup-

ported by a valid consideration."—Approved: Robinson v. Robinson (Iowa), 125 N. W. 216.

§ 3180. Consideration—Advancing Money for Defendant's Share in Worthless Patent.

"If the jury find that the plaintiff's testator (E. Urquhart), the defendant, and W. H. Hiller, entered into an arrangement to buy the right to the state of Missouri in a patented invention known as the 'Huennekes System' for manufacturing sand lime brick, by which the said Urquhart was to advance the defendant's part of the purchase money, that he did advance the money to pay for said patent, taking an assignment thereof in his own name, and afterward executed assignment to the defendant for a fourth interest in said patent right as of the same date as the assignment to him, and the note sued on was executed for such advance, they will find for the plaintiff.

"You are instructed that the letters and telegrams that passed between W. H. Miller acting as the agent of E. Urquhart and the defendant while the said Miller was in New York in October, 1903, evidenced an agreement that the defendant would join the said Miller and Urquhart in the purchase of the patent right of making sand lime brick in the state of Missouri jointly, and that the said Urquhart would advance the money to pay for the interest of the defendant, the same being one-fourth interest, in said patent right for the state of Missouri, and if you find that the note sued on was executed for the money advanced by said Urquhart to pay for the defendant's part in said patent right, you are instructed that the statute requiring a note given to a vendor for a patented machine or patent right shall be executed on a printed form, and show on its face that it was executed in consideration of the patented machine or patent right, does not apply to said note.

"If the jury find that said note was executed for money advanced by E. Urquhart to pay for a one-fourth interest in a patent right in the state of Missouri to manufacture sand lime brick purchased for the said Urquhart, the defendant, and one W. H. Miller, they will find for the plaintiff, although they may believe that the patent was of no value."—Approved: Mann v. Urquhart, 89 Ark. 239, 116 S. W. 219.

§ 3181. So where Defendant Induced Plaintiff to Purchase Note Procured by Fraud.

"If you believe from the evidence that the defendant, T., induced the plaintiff to buy or purchase the note or bond described by the defendant in his testimony, then your verdict must be for the plaintiff, notwithstanding the note may have been without consideration, notwithstanding the note may have been procured by fraud and misrepresentations, and notwithstanding the fact that there may have been irregularities in the transfer of the note from R. to S."—Approved: Tapscott v. Gibson, 129 Ala. 503, 30 South. 23.

§ 3182. Innocent Holder—Who is?

(a) "That an innocent holder of a negotiable promissory note, as meant in these instructions, is one who in good faith buys the same

for a valuable consideration, before its maturity, from one having the right to sell and deliver the same, and without his (the buyer) having notice or knowledge of any lawful defenses the maker may have against it."—Approved: Merrill v. Hole, 85 Iowa, 66, 52 N. W. 4.

"An innocent purchaser of a negotiable paper, entitled to protection as such, is one who has acquired the paper in good faith, for value, without notice of facts and circumstances of such kind and character that to disregard them would show bad faith, or want of good faith and honesty, in the purchase."—Approved: Canon v. Farmers' Bank of Cook, 3 Neb. Unoff. 348, 91 N. W. 585.

§ 3183. Where Execution Admitted, Burden on Maker to Show Holder Acquired Note in Bad Faith.

(a) "The notes sued on in this case are negotiable instruments, the execution of which is admitted by the defendant. You are instructed that a holder of negotiable paper who takes it before maturity, for a valuable consideration, in the usual course of trade, without knowledge of facts which impeach its validity between antecedent parties, holds it by a good title. To defeat his recovery thereon, it is not sufficient to show he took it under circumstances which ought to excite suspicion in the mind of a prudent man. To have that effect, it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part. The burden is on the defendant to establish, by a preponderance of evidence, that plaintiff is not a *bona fide* holder of the note sued on, as defined in this instruction."—Approved: Crosby v. Ritchey, 56 Neb. 336, 339, 76 N. W. 895.

(b) "The court instructs the jury that, although they shall believe from the evidence in this case that said Webb and Dickey did procure from the defendant the note declared on herein, by fraud and misrepresentations of the value of the stock of said company, or that they agreed with the defendant to purchase of him the same amount of stock in said company at the expiration of one year, that he had bought in said company, for the sum of $3,750, they cannot find for the defendant unless they shall further believe from the evidence that the plaintiff, R. H. Childers, or his agent, Robert Childers, before or at the time he purchased said note, had knowledge or notice of the said fraud or misrepresentations, if any, of said Webb or Dickey in regard to the value of said stock or the conditions, if any, upon which said note was executed."—Approved: Childers v. Billiter, 144 Ky. 53, 131 N. W. 795.

(c) "To constitute notice of an infirmity in said note, or defect in the title of said Webb, the plaintiff, or his agent, must have had actual knowledge of the infirmity or defect in same, or knowledge of such facts in relation thereto that his action in taking said note amounted to bad faith upon his part."—Approved: Childers v. Billiter, 144 Ky. 53, 131 N. W. 795.

(d) "The court instructs the jury that Robert Childers was the agent for the plaintiff, R. H. Childers, in the purchase of said note sued

on herein, and if the jury believes he, at the time he purchased said note, had actual knowledge of infirmity in said note, or defect in same or its title by reason of false representations or statements of said Webb or Dickey, or knowledge of such facts in relation thereto as that his act in taking said note amounted to bad faith on his part, in that case they shall find for the defendant."—Approved: Childers v. Billiter, 144 Ky. 53, 131 N. W. 795.

§ 3184. Collateral Security Held in Same Way as by Purchase in Good Faith.

"The court instructs the jury that if you find from the evidence that the plaintiff bank received the note in good faith and before it was due, as a collateral security for a loan made to —— ——, and that said loan is still unpaid, then plaintiff will be entitled to a verdict; that is, the holder of a note as collateral security for the payment of a loan made at the time the collateral security is deposited is to be treated as a purchaser, and if he receives such collateral in good faith, and before due, he holds it free from the defenses to which it would be liable in the hands of original holders to the same extent."—Approved: Mahaska County State Bank v. Crist, 87 Iowa, 415, 54 N. W. 450.

§ 3185. Bona Fide Holder—Right of.

(a) "The court instructs the jury that even though they believe from the evidence that the note in controversy was given to Dines by Hall, for the sole purpose of using it as collateral in securing a loan for a smaller amount, yet if they also believe from the evidence that plaintiff purchased said note from Dines before its maturity for a valuable consideration, they must find their verdict for the plaintiff, unless they shall further believe from the evidence that, at the time plaintiff purchased said note, it had notice or knowledge of the circumstances and conditions under which Dines secured and held said note."—Approved: Wright Investment Co. v. Friscoe Realty Co., 178 Mo. 72, 77 S. W. 296.

(b) "Touching this twelfth instruction, you are further instructed that by it is meant only that if the plaintiff should get notice that the defendant claimed that the note was obtained by fraud, and that he had a defense to that note, before he had completed the purchase of the same, then it would become his duty not to complete the purchase. If, however, on the other hand, the evidence should show that at the time he learned of the defendant's defense to the note he had already purchased the same, so that as between the plaintiff bank and the owner of the note, Laune, the bank was then holden for the payment of the consideration, then in such case the bank would still be an innocent or bona fide purchaser. If at the time of receiving the notice the sale was so far completed by giving Mr. Laune credit on his passbook for that amount by the Columbia National Bank, so that as between Laune and the Columbia National Bank the purchase was completed, then in such case the plaintiff, being liable for the amount, although the draft was not yet cashed, and he must stop its payment,

would be an innocent holder."—Approved: First State Bank of Pleasant Dale v. Borchers, 83 Neb. 530, 120 N. W. 142.

§ 3186. Assignee without Notice Assigning to One with Notice.

"The court instructs the jury, that if a note is assigned before maturity, for value, to a bona fide purchaser, without notice, the assignee will be protected against any defense by the maker; and a subsequent purchaser of the note from such assignee, even with notice, will succeed to his rights in the same condition he held them. A defense to the note having been once cut off by its transfer to an innocent holder, will not be revived by a subsequent assignment to a person with notice of such defense."—Approved: Woodworth v. Huntoon, 40 Ill. 131.

§ 3188. Note Procured by Fraud—Burden on Holder to Show Want of Notice.

(a) "If you find that at the time the note in question was procured from defendant it was represented to him that the Crawford, Henry, and Williams County Bohemian Oat Association was a corporation having its principal office and headquarters at Napoleon, in the state of Ohio, and the defendant, relying upon the truth of such representations, gave the note, and would not have given it but for such representations, and such representations were false, then the note was fraudulently procured, and plaintiff cannot recover, unless he shows himself or Fred Sims to be a bona fide holder for value."—Approved: Mace v. Kennedy, 68 Mich. 389, 36 N. W. 187.

(b) "He must ordinarily show under what circumstances and for what value he became the holder. The reason of this rule is, where there is fraud, the presumption is, he who is guilty of it will part with the note thereby acquired for the purpose of enabling some third party to recover on it, and such a presumption operates against the holder, and suspicion follows the note into his hands, and fastens to his title."—Approved: First Nat. Bank of Decorah v. Holan, 63 Minn. 525, 65 N. W. 952.

(c) "If you find from the evidence that the note was procured by fraud, then the plaintiff would not be entitled to recover a verdict in this case unless you find from the evidence that it bought said note before maturity, for value, in good faith, in the usual course of business, and without notice of any defenses against it, and the burden of proof is upon the plaintiff as to this; but, if you find the note was so purchased, then the plaintiff is entitled to recover a verdict for the full amount of the note and interest, even though you are satisfied the note was procured by fraud."—Approved: Canon v. Farmers' Bank of Cook, 3 Neb. Unoff. 348, 91 N. W. 585.

(d) "The deposition does not give details of the transaction, nor does it state which member of the firm of Rollins, Perry & Co. negotiated the purchase from Kingsland Bros. It is incumbent on the plaintiff to show want of notice of fraud in the inception of the note as to all the members of the firm of Rollins, Perry & Co., unless they show that some particular member or members of the firm had ex-

clusive charge of that transaction."—Approved: First Nat. Bank of Decorah v. Holan, 63 Minn. 525, 65 N. W. 952.

(e) "The plaintiff cannot recover in this case unless he is a bona fide holder; and if you find from the evidence that, at the time plaintiff purchased this note, he knew the circumstances impeaching its validity, then plaintiff cannot recover. This note is void as between the parties thereto, that is, as between defendant and C. H. Williams, for the reason that it was given for an illegal consideration, and plaintiff cannot recover unless he is a bona fide holder. If the jury find that the consideration upon which the note was given was the bond of a company whereby the company agreed to sell ordinary wheat under the fictitious name of Red Lyon wheat, at the speculative value of $15 per bushel, whereas its real value was not to exceed $1 per bushel, then such notes are void, and plaintiff cannot recover if, at or before the time he purchased it, he had knowledge or notice that this note was given on such consideration. If the plaintiff had notice or knowledge of such facts and circumstances, in relation to what the note was given for, as to make his purchase of it an act of bad faith, then he cannot recover. The fact that plaintiff paid value for the note is not sufficient of itself to make him a bona fide holder. Although he may have paid value, still he is not entitled to recover if he had notice or knowledge of facts or circumstances impeaching its validity. If the jury find that, at the time plaintiff purchased this note, he did not know the exact terms or consideration upon which it is given, yet from circumstances of which he had notice he knew that it was tainted with fraud or illegality, then he cannot recover. Unless the plaintiff has satisfied you by a preponderance of proof that, at the time he purchased this note, he did not know or have notice that it was tainted with fraud or illegality, and did not know or have notice of facts or circumstances impeaching its validity, he cannot recover."—Approved: Davis v. Seeley, 71 Mich. 209, 38 N. W. 901.

(f) "As the court has said, the presumption is that the holder is deemed prima facie to be a holder in due course; but if the defendant has shown that the title in the person who negotiated the instrument was defective, the burden is on the holder to prove that some person under whom she claims acquired the title as holder in due course. The title of a person who negotiates an instrument is defective within the meaning of the law when he obtained the instrument or any signature thereto by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration; or when he negotiates it in breach of faith, or under circumstances that amount to a fraud."—Approved: Hawkins v. Young (Iowa), 114 N. W. 1041.

§ 3189. Forbearance in Pursuance to Request as Waiver of Defense.

"If you shall find from the evidence in the case, that after the defendant A learned that the notes on which this suit is brought had not been given for goods and merchandise sold by plaintiffs to the defendant B at or about the time of giving the notes, he requested plaintiffs to give him time to pay the notes, and the plaintiff, in pur-

suance of such request, gave him time to pay the notes, he thereby waived the alleged fraud, and will be liable on the notes, although at the time he asked for time to pay the votes and promised to pay them, he did not know that the facts alleged in his answer herein, would make a defense in law to the notes."—Approved: Rindskopf Bros. & Co. v. Doman et al., 28 Ohio St. 516, 518.

§ 3190. And so a Note Procured by Duress May be Subsequently Ratified.

"It is claimed by the defendant that the plaintiff, after the execution of said note, ratified the execution of same in the summer of ..... A contract that is fraudulent by reason of same having been procured by means of duress may be ratified and confirmed by the maker thereof if his subsequent acts, with knowledge of all of the facts, are such as to fully indicate that he intends to then agree to and confirm said contract. If it appears from the evidence, by the letter written by plaintiff to his daughter concerning the note in question after same was executed, and by plaintiff's statements concerning the note and its payment by him to the officers of the R. N. Bank, that the plaintiff intended at the time of making said statements to assent to and confirm the contract made in said note, and pay the defendant, then such state of fact would amount to a ratification of said note by plaintiff, and would prevent plaintiff from subsequently claiming that said note was obtained from him by duress. But, to amount to a ratification of said note, the plaintiff's acts must have been such as to fully indicate an intention on his part at that time to assent to and confirm the contract contained in said note. If the plaintiff's purpose in writing to his daughter and in making statements to the officers of said bank was to get and keep the note within the jurisdiction of this court, so that he could replevin same from defendant, and not to confirm the contract contained in said note, then said acts and statement would not, in any event, amount to a ratification of the note. If said note was obtained by duress, to overcome such duress the burden rests with defendant to show that plaintiff ratified said note, by a preponderance of the evidence."—Approved: Kennedy v. Roberts, 105 Iowa, 521, 75 N. W. 363.

§ 3191. Fraud in Procuring Execution—Negligence.

"Touching this, you are instructed that it is the duty of one signing his name to an instrument to read it, if he can read it, or to bring such ability to read as he possesses into use, so far as it may enable him to identify the character of the instrument, or, if he cannot read at all, to otherwise learn the contents of the instrument he is signing, so that he may not be imposed upon by fraud, or sign a note that may cause innocent purchasers thereof to suffer. He is chargeable with any neglect in failing to perform this duty. Whether or not the defendant was guilty of any neglect in signing the note the way he did is a question of fact for you to determine from all the facts and circumstances of the case, taking into consideration the evidence as it may bear upon the question to what extent the defendant was illiterate, and whether or

not he was without negligence in the care exercised by him to know the contents of the instrument before he signed it."—Approved: First State Bank of Pleasant Dale v. Borchers, 83 Neb. 530, 120 N. W. 142.

§ 3192. Where no Negligence is Imputable to Signer Note Void in Hands of Innocent Holder.

"If the signature of the defendant to the note was obtained by fraud as to the amount thereof, he believing it to be for the sum of $100, when in fact it was for $180, and the defendant was ignorant of that fact, and he had no intention of signing a note for $180, and was guilty of no negligence on his part, and he being ignorant of the true character of the note, and had no intention of signing a note for $180, then he is not liable therefor, and the note is void, even in the hands of a holder for value before maturity and without notice."—Approved: Bowers v. Thomas, 62 Wis. 480, 22 N. W. 710.

§ 3193. Where Illiterate Person is Asked to Sign Note, He Should Apply to Disinterested Person for Information.

(a) "Where one voluntarily signs a promissory notes supposing it to be an obligation of a different character, but has full means of information in the premises, and neglects to avail himself thereof, relying on the representations of another, he cannot set up such ignorance and mistake as defense against an innocent holder for value before maturity. If, however, his signature was procured without negligence on his part, and through artifice or fraudulent representations, the rule is different and the jury should be left under appropriate instructions to determine these facts."—Approved: Decamp v. Hamma, 29 Ohio St. 467.

(b) "Touching this twelfth instruction, you are further instructed that by it is meant only that if the plaintiff should get notice that the defendant claimed that the note was obtained by fraud, and that he had a defense to that note, before he had completed the purchase of the same, then it would become his duty not to complete the purchase. If, however, on the other hand, the evidence should show that at the time he learned of the defendant's defense to the note he had already purchased the same, so that as between the plaintiff bank and the owner of the note, L—, the bank was then holden for the payment of the consideration, then in such case the bank would still be an innocent or bona fide purchaser. If at the time of receiving the notice, the sale was so far completed by giving L— credit on his pass book for that amount by the ——— Bank, so that as between L— and the ——— Bank the purchase was completed, then in such case the plaintiff, being liable for the amount, although the draft was not yet cashed, and he must stop its payment, would be an innocent holder."—Approved: First State Bank of Pleasant Dale v. Borchers, 83 Neb. 530, 533, 120 N. W. 142.

§ 3194. Endorsement without Recourse of Forged Note.

"1. The vendor of a promissory note before maturity is responsible thereon if the note is fraudulent, fictitious, or forged, even if he in-

dorsed the note, 'Without recourse.' "—Approved: Palmer v. Courtney, 32 Neb. 773, 49 N. W. 754.

§ 3195. Renewal Note—Failure of Consideration as to Original.

(a) "If the jury believe from the evidence that the note sued on was given in renewal for the balance remaining unpaid of the amount originally promised to be paid by the defendant by a note signed by him, and made payable to R. D. Johnston, and that the only consideration for said original note was that $10,000 of the stock of the Coal City Coal & Coke Company, an Alabama corporation, should be issued to the defendant after the signing and delivery of said note by him, and that said original note was for the sum of $5,000, then the jury should find for the defendant, if they find from the evidence that said original note was acquired and held by the plaintiff, and the renewal notes afterwards given for the amount thereby represented were made payable to the plaintiff, unless they are satisfied from the evidence that the plaintiff became the holder of said original note before the maturity thereof, for a valuable consideration, and without notice or knowledge of the true consideration for said original note, or of any infirmity therein or defense thereto."—Approved: Alabama Nat. Bank v. Halsey, 109 Ala. 196, 19 South. 522.

(b) "If the jury find from the evidence that the note sued on is a renewal note for the balance remaining unpaid of the amount promised by the defendant to be paid by a note made payable to R. D. Johnston; and that the only consideration for said note to R. D. Johnston was that twice the amount thereof in the stock of the Coal City Coal & Coke Company, an Alabama corporation, should be issued by said corporation to the defendant; and that the plaintiff acquired said original note to R. D. Johnston with knowledge of the consideration thereof; and that the note sued on represents the balance remaining unpaid of said original amount promised to be paid by said note to R. D. Johnston, then the jury should find for the defendant."—Approved: Alabama Nat. Bank v. Halsey, 109 Ala. 196, 19 South. 522.

§ 3196. Renewal Notes Defined.

"That it is not necessary, in order to one note being a renewal of a former one, that it should be of the same amount, or time to run, or made or indorsed by the same parties; nor that the note given in renewal should be given, or bear date upon the day of the maturity of the former note; and that it need not appear that the identical proceeds of the new note were actually applied to take up the note for which it was a renewal. That a new note may be a renewal of a former one, although the new note passes through the regular course of discount in a bank; in other words, that, because a note is discounted, it does not necessarily follow that it is not a renewal of a former note; and that, if the jury believe that the several series of notes testified to by William H. Maurice, formed one continuous transaction in the loan of money by the bank to Maurice, of which loan the notes in question are the evidence, the verdict must be for the plaintiffs, notwithstanding any new note, in any one or more of the series, may have

been discounted prior or subsequent to the maturity of the preceding note. You are to determine whether the notes now held are securities for the same debt."—Appeal of the Bank of Commerce, 44 Pa. St. 423, 430.

§ 3197. Indorsee of Check to Make Effort to Collect Same before Suing Drawer.

"Unless the jury believe from the evidence that the plaintiffs, when they became the indorsees of the check in the declaration mentioned, used due diligence to collect the same by presentation for payment at the bank, and if dishonored, gave immediate notice thereof to the defendant, then they will find for the defendant; and the fact that the effects of the bank were removed from the banking house, at the time they obtained the check, would not excuse them from the duty of presentation of the check for payment, nor from giving notice of its dishonor, unless it was notoriously known that the effects had been removed; then such presentation was not necessary."—Approved: Ford v. McClung, 5 W. Va. 158.

§ 3198. Notice of Protest—How Given.

(a) "Unless the jury find from the evidence that notice of the non-payment of the note in question was delivered to the defendant Boernstein personally, or to some person in his employ, at his usual place of business, within a reasonable time after the same note became due, then they will find for the said defendant Boernstein."—Approved: Kleinman v. Boernstein, 32 Mo. 314.

(b) "That an indorser of a promissory note is a proper and competent person to give notice to any prior indorser of a demand, and the dishonor of payment of a promissory note."—Townsend v. Chas. H. Heer Dry Goods Co., 85 Mo. 503, 508.

§ 3199. Conduct of Indorser Amounting to Waiver of Notice of Protest.

"If you find from a preponderance of the evidence that * * * the defendant made statements and declarations to the plaintiff that were of such a character as to indicate that the former intended the latter to believe that no notice of the non-payment of the note when due need be served on him, and the plaintiff, acting as an ordinarily prudent man, so believed him, and, being induced thereby, abstained from serving notice of dishonor on the defendant after the note became due, * * * which he otherwise would have done, then such acts and declarations constitute a waiver of notice by the defendant, and he is liable on the note sued upon."—Approved: Porter v. Moles (Iowa), 131 N. W. 23.

§ 3200. Variance in Description in Notice of Dishonor.

"In the notice of dishonor of a promissory note, an unintentional variance in the description of the note will not vitiate the notice, if, under all the circumstances of the case, the notice is not misleading and identifies the note with reasonable certainty."—Townsend v. Chas. H. Heer Dry Goods Co., 85 Mo. 503, 507.

§ 3201. Consideration of Note Moving to Co-maker.

"If the jury believe from the evidence that the defendant Hopper signed said note at the request of one of the other signers, Huntington, then in that case the consideration received by the other signer, Golder, would be a sufficient consideration for the defendant Hopper for signing said note, and the defendant Hopper in that case would be liable for the full amount of said note and interest thereon."—Approved: First Nat. Bank v. Golder (Neb.), 131 N. W. 600, 602.

§ 3203. General Denial—Burden of Proof.

"The court here instructs this jury that in an action on a promissory note in this court an answer on the part of the defendant in such an action, consisting of a general denial, is a denial of the execution and delivery of the said note, and throws back upon the plaintiff the duty and burden of proving by a preponderance of the evidence, and that the note is genuine, and was executed and delivered by said William C. Bissell to the said plaintiff, and unless you believe from the evidence before you that the said William C. Bissell did make and deliver the said note to the said plaintiff, your verdict should be in favor of said defendant and against the plaintiff."—Approved: Gandy v. Bissell's Estate, 5 Neb. Unoff. 184, 97 N. W. 632.

§ 3204. Notes Uncancelled are Presumptively Unpaid.

"The jury are instructed as a matter of law that the possession by the plaintiff of uncancelled promissory notes, is prima facie proof that such notes remain unpaid, and the burden of proving the payment of such notes is upon the person alleging they have been paid; and unless the jury believe defendant has proven by a preponderance of the evidence, the payment of the notes offered in evidence therein, verdict must be for the plaintiff."—Approved: Connelly v. Sullivan, 119 Ill. App. 469.

§ 3205. Payment of A's Note by B's—Burden of Proof.

"If you find from the evidence in this case that Charles Grissel understood that R. J. Grissel was to be released from his liability from the note he gave said bank, and, by reason of such understanding, he gave the note and mortgages in evidence, this fact alone will not entitle this plaintiff to a verdict, unless you find as a fact, by a fair preponderance of the evidence, that the understanding to release R. J. Grissel was mutual; that is, that Mr. Hinds also understood that R. J. Grissel was to be released from his liability on said note by the giving of the Charles Grissel note and mortgages.

"The burden of proof is on the plaintiff to show, by a fair preponderance of all the evidence, that it was the mutual understanding of the parties at the time of the giving of the new note that R. J. Grissel was to be released from the old note."—Approved: Grissel v. Bank of Woonsocket, 12 S. D. 93, 80 N. W. 161.

§ 3206. Check—Right to Countermand.

"You are instructed, as a matter of law, that J. T. Bend, after giving said check, could not arbitrarily countermand the payment of the

same."—Approved: First State Bank of Overton v. Stephens Bros., 74 Neb. 616, 105 N. W. 43.

§ 3207. Usury—Instruction under Nebraska Statute.

"You are instructed that under the laws of this state, as provided by statutory enactment, where a note is given for a loan of money, and for the use thereof a sum of money is received, reserved, or contracted for by the lender, exceeding a rate of $10 per year upon $100, then such a note is a usurious contract, and the lender can only recover the principal without interest, and, if any interest shall have been paid by the borrower thereon, then the sum or sums so paid are to be credited upon the principal."—Approved: Omaha Auction & Storage Co. v. Rogers, 35 Neb. 61, 52 N. W. 826.

§ 3208. Note Given Wholly for Usury.

"The court instructs the jury that a note given wholly for usury is an unlawful consideration, and if the jury believe, from the evidence, that the note in question was given wholly for usury, then they should find for the defendant, if they also believe, from the evidence, that the defendant had notice before he purchased the same, that it was given wholly for usury."—Approved: Harvey v. Ellithorpe, 26 Ill. 418.

§ 3209. Notes of Corporation Signed by Officers in Regular Course of Business.

"The jury are instructed that if they believe and find from the testimony in this case that Obert, at the time of making the notes sued on in this case, was the secretary of the North End Building and Loan Association, and as such entrusted with the custody of its seal and the general management of its business, and in such capacity was either authorized by express resolution of the board of directors, or, with their knowledge and assent permitted, to borrow money for the purpose of said building and loan company, and to issue for such loans the notes of said company, executed by its president and secretary and attested by its seal; and you believe that under such circumstances said Obert, as such secretary, obtained of plaintiffs, for the purposes of said association, sums of money, and issued in equal amounts and delivered to plaintiffs therefor, the notes sued on in this case, as and for the notes of said association, and that this was done by Obert, in the regular course of his business as such secretary, and at the office of said association; and you further find, from the evidence, that plaintiffs are now the holders of such notes, and that they are unpaid by said association,—then your verdict must be for the plaintiffs, as to such notes, and it is immaterial to such verdict under such circumstances whether said Obert after so obtaining such money, properly accounted therefor to said association or not."—Approved: Sanders v. Chartrand, 158 Mo. 352, 59 S. W. 95.

§ 3210. Action on Lost or Destroyed Note—Burden on Plaintiff.

"The jury are instructed that in an action on a promissory note which is not produced, if the note is alleged to have been lost, and if

the note was indorsed when it is alleged to have been lost, so that the note was actionable in the hands of any holder, then there can be no recovery on said note without proof of the note being lost or destroyed. So in this case, if you believe that the note in evidence was endorsed by the payee, then, the note not being produced, it must be shown to your satisfaction that the note is actually lost or destroyed before there can be any recovery on such note."—Approved: Heartt v. Rhodes, 66 Ill. 351.

§ 3211. Usury as Defense to Note.

"It is conceded that S. P. Southwick, signed said note, and delivered the same to plaintiff, and he is liable thereon, unless you find that said note was given for balance on previous notes, and that said notes were usurious; and if you so find, then the note in suit is tainted with usury; but if you find that the note was given to plaintiff for money to be applied in payment of other notes which were usurious, then it would not be usurious, and such defense would fail."—Approved: Cottrell v. Southwick, 71 Iowa, 50, 32 N. W. 22.

§ 3212. Usury under Cover of Commissions.

"You are instructed that if the plaintiff, by himself or his agent, contracted for, received, or reserved $10, or other sum in excess of ten per cent. per annum, upon the pretense that the same was a commission, or collection or attorney's fee, then the promissory note for $175 would be usurious; and the plaintiff would not be entitled to recover or receive any sum greater than the sum shown to be due at the time of the execution of the said $175 note."—Approved: Anderson v. Vallery, 39 Neb. 626, 58 N. W. 191.

§ 3213. Recovery in Double the Amount Paid as Usury.

"The legal rate of interest by contract in this state is ten per cent. per annum, and any contract or agreement which stipulates for a greater rate of interest than ten per cent. is by law declared to be usurious. You are therefore charged that if you believe from the evidence the plaintiff entered into a contract with the defendants whereby he was to receive a greater rate of interest on the note sued on than ten per cent. per annum, and if you further believe from the evidence that the defendants have made any payment or payments upon said notes since the 12th day of July, 1907, which, together with payments theretofore made, were in excess of the principal and interest thereof, calculated and applied as instructed under the preceding paragraphs hereof, then you are instructed that the defendants would be entitled to recover of and from the plaintiff as a penalty double the amount of any and all such sums so paid by them under said contract as interest after July 12, 1907, and, if you find from the evidence that any such sums of money were so paid by defendants to plaintiff under such circumstances since the said date, then you will find for the defendants against plaintiff for a sum equal to double such amount."—Approved: Greenberg v. Taub (Tex. Civ. App.), 120 S. W. 556.

B. Alterations of Writings.

§ 3214. Written Contract—Material Change.
3215. Where Erasure is Apparent and Makes Material Change.
3216. Erasure Leaving no Sign of Alteration.
3217. Material Alteration of Note after Delivery.
3218. Where Note is Endorsed in Blank.
3219. Party Alleging Alteration Has the Burden of Proof.
3220. Writing Note Above Signature on Blank Paper.
3221. Filling Blank Space in Note—Material Alteration.

§ 3214. Written Contract—Material Change.

"The plaintiff has offered in evidence a certain contract in writing signed by the defendant. If from the evidence in this case you find that the defendant signed this contract and delivered it to the plaintiff as it now appears that no material change has been made in said contract since its execution, that the defendant signed it fully understanding its meaning and import, and that no fraud whatever has been practiced upon the defendant, and if you further find from the evidence that the plaintiff has fully complied with its part of the contract, that it duly shipped the goods to the defendant and furnished a man to assist the defendant as therein agreed upon, then the plaintiff is entitled to a verdict in this case, and your verdict should be for the sum of $90.64. On the other hand, if you find from the evidence that this contract has been materially changed since its delivery without the knowledge or authority of the defendant, that a blank note has been filled so as to convert a mere blank into a promissory note, such change would defeat all right to recover upon said contract, and if you so find the fact to be from the evidence your verdict should be for the defendant. The defendant is bound by his written agreement, unless some fraud has been committed upon him. In the absence of fraud the defendant cannot enlarge or prove any different agreement than the one into which he entered in writing. When parties have entered into a written agreement, they are bound by it, and no other or different contract can be proven, unless some fraud has been committed in the making of such contract. If this contract is just as it was when executed by the defendant, and he fully understood it, then the defendant cannot now escape its terms and consequences; and, if the plaintiff has done its part, then the defendant must do his part and pay this debt."—Approved: Acme Food Co. v. Tousey, 148 Mich. 697, 112 N. W. 484.

§ 3215. Where Erasure is Apparent and Makes Material Change.

"If you so find these facts that the defendants in this case were originally, by agreement with John Crawford, only to pay the sum of $100 under this note, that before the delivery of the note, or even after its delivery but before it passed into the hands of the purchaser, they, the defendants, by agreement and pursuant to the original agreement, paid the sum of $100 in full of their obligation, and had indorsed on a note the following: 'Received payment in full from Hodges and Glidden

on the third of July on the within note'—that this indorsement was actually made as claimed by them, and later it was changed by erasure made by Mr. Hodges without the knowledge of Mr. Glidden, and made to read, 'Received $50 from Hodges and Glidden on the within note,' and the erasure was apparent to any one observing the note, then I charge you that the plaintiffs cannot recover in this case, and your verdict must be for the defendants."—Approved: Custard v. Hodges, 155 Mich. 361, 119 N. W. 583.

§ 3216. Erasure Leaving no Sign of Alteration.

"Although the jury may believe from the evidence that the note at the time it was executed by the defendant, had the words, 'after the sale of fourteen mills,' and although the jury may believe from the evidence that the said words had been erased; yet, if the jury further believe from the evidence that those words were put upon the paper with such light material that they could be erased without leaving any trace upon the paper which could be detected by a prudent and careful man; and if they further believe from the evidence that said words were erased from the paper without leaving any traces behind them to show that they had ever been upon the paper, and that said erasure was made without the knowledge of the plaintiff and before he purchased the same,—then the law is for the plaintiff, and the jury should so find."—Approved: Harvey v. Smith, 55 Ill. 225.

§ 3217. Material Alteration of Note After Delivery.

(a) "It is claimed by Brooks (defendant) that, after he signed a note similar in all respects to the one sued on, excepting that the written words, 'with interest at ten per cent.' were not then in the note, but that the printed words, 'with interest at ten per cent. per annum after maturity,' were in the note, and that, since he signed the note, without his knowledge or consent, the said printed words were stricken out, and the said written words inserted. If such an alteration of the note was made by any holder of the note, or made with the knowledge of any holder of the note, without the knowledge of Brooks, it would be a material alteration, and would release him from all liability on the note, and if the defendant Brooks, proves this, by a fair preponderance of the evidence, the verdict must be in his favor; and it would make no difference whether John Allen, the plaintiff, was or was not the owner of the note at the time of the alteration, if he made the alteration after Brooks signed it."—Approved: Brooks v. Allen, 62 Ind. 405.

(b) "The court instructs the jury that, if they believe from the evidence in the cause, that the promissory note, dated 13th September, 1873, read and shown to the jury in this case, was made by the defendant, Murdock, and indorsed by the defendant Armstrong, and delivered by him to his co-defendant, Murdock, for the purpose of enabling Murdock, the maker, to raise money thereon for his own use; and if they shall further believe from the evidence that, after the defendant Armstrong, had so indorsed and delivered said note to said Murdock, the words and figures, 'with interest at 10 per cent. per

annum after maturity,' now appearing in said note, were written therein without the knowledge, consent or authority of the defendant Armstrong, by said Murdock, or by any agent or clerk of his, whether done in the presence of any officer or agent of plaintiff, or not, and whether with or without the knowledge of the plaintiff, the verdict should be for the defendant Armstrong, on the second count. * * * The court instructs the jury that, if they believe from the evidence in this case, that the promissory note, dated 17th September, 1873, read and shown to the jury in this case, was made by the defendant Murdock, and indorsed by the defendant Armstrong, and delivered by him to his co-defendant Murdock, for the purpose of enabling the maker to raise money thereon for his own use; and if they shall further believe that, after the defendant Armstrong, had so indorsed and delivered said note to said Murdock, the words and figures, 'with interest at 10 per cent. per annum after maturity,' now appearing in said note, were written therein, and without the knowledge, consent or authority of the defendant Armstrong, by said Murdock, or by any agent or clerk of his, whether done in the presence of any officer or agent of the plaintiff or not, whether with or without the knowledge of the plaintiff, the verdict of the jury should be for the defendant Armstrong, on the first count. * * * The court instructs the jury that, if they believe from the evidence that the provisions as to interest now contained in the notes read in evidence, and now sued on, were not contained in them at the time they were made by Murdock & Dickson, and indorsed and delivered by defendant Murdock, but were inserted afterwards,—then the burden of proof is not upon defendant Armstrong, to prove that said provisions were inserted without his authority; but it is upon the plaintiff to prove that they were so inserted with his authority; and that, therefore, if they believe from the evidence in the case, that said provisions were not contained in said notes at the time of their said indorsement and delivery by Armstrong to Murdock, but were inserted afterwards,—then, unless the plaintiff has further established to their satisfaction, by a preponderance of the evidence in the case, that said provisions were so inserted by the direction, or with the authority of Armstrong, they should find against the plaintiff and for the defendant Armstrong."—Approved: Capital Bank v. Armstrong, 62 Mo. 59, 62, 63, 64.

§ 3218. Where Note is Indorsed in Blank.

"The jury are instructed that, where a note has been indorsed in blank, the holder of the same may fill the blank with the name of the indorsee; that the indorsement of the note is said to be in blank when the name of the indorser is simply written on the back of the note, leaving a blank over it for the insertion of the name of the indorsee, or of any subsequent holder; and that in such a case, while the indorsement continues blank, the note may be passed by mere delivery, and the indorsee or other holder is understood to have full authority personally to demand payment of it, or make it payable, at his pleasure, to himself or to another person."—Approved: Palmer v. Marshall, 60 Ill. 292.

§ 3219. Party Alleging Alteration Has the Burden of Proof.

"The jury are instructed that the plaintiff sues these defendants to recover upon a promissory note which it alleges they signed, and which the plaintiff alleges was in the following language, words and figures, at the time the defendants signed it, to wit: '$1000.00. Stuart, Nebraska, July 8, 1903. On July 1, 1905, after date, for value received, we jointly and severally promise to pay McLaughlin Bros., or order, one thousand dollars, at the Stuart Bank of Stuart, Nebr., with interest at six per cent. per annum, payable annually. Gill Bros., Charles Vollmer, Joe Versal, E. Jacobs, Pling Kingsbury, J. F. Root, J. O. Root, A. L. Thomson, C. B. Parrish, Calvin Allyn, Louis Brodie and P. H. Mulford.' The jury are instructed that the burden of proof is on the plaintiff to prove that the note which they signed contained the words and language above stated. The plaintiff must prove by a preponderance of the evidence that, at the time the defendants signed and delivered the three notes which they say they signed, the words 'or order' were actually therein, and had not been marked out."—Approved: Ohio Nat. Bank of Columbus, Ohio, v. Gill Bros., 85 Neb. 718, 124 N. W. 152.

§ 3220. Writing Note Above Signature on Blank Paper.

"I charge you as matter of law that if you believe the defendant signed his name to a blank piece of paper, and the body of the promissory note in question was filled in without his knowledge or consent, or without defendant's receiving any consideration for the same, your verdict must be for the defendant."—Approved: Trombly v. Trombly, 106 Mich. 227, 64 N. W. 56.

§ 3221. Filling Blank Space in Note—Material Alteration.

"The jury are instructed that if you believe from the evidence that the note in question was signed and indorsed by the defendant ——— ——— and one S., and delivered by defendant to S. to negotiate, and that, at the time said note was so signed and delivered to said S. only the word 'hundred' was written therein, and that a space was left blank before the word 'hundred' sufficient to write therein the word 'thirteen,' and that said S. wrote, or caused to be written, in said blank space the word 'thirteen,' so that the body of said note read 'thirteen hundred dollars,' and then sold or caused to be sold the said note to the said plaintiff, and that said plaintiff purchased said note in the due course of business before maturity for value in good faith and without notice of such change, then the defendant ——— ——— is liable in this case for the face of said note and interest thereon, and you should so find by your verdict."—Approved: Merritt v. Boyden & Son, 191 Ill. 136, aff'g 93 Ill. App. 613, 60 N. E. 907, 85 Am. St. 246.

CHAPTER XCV.

BROKERS.

§ 3222. Actual Services Bringing About a Sale.
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3223. Procuring Purchaser, Ready, Able and Willing to Buy.
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3233. Misrepresentation by Broker Defeating Sale.
3234. Mere Middlemen—Commissions from Both Parties.
3235. Procuring Agent where Property is Listed with Several.
3237. Sale of Cotton for Less than Market Price.
3238. Broker not Actively Participating in Purchase of Land.
3239. Purchase of Real Estate—Commissions.

§ 3222. Actual Services Bringing about a Sale.

(a) "If you believe from the evidence that the defendant placed his land in the hands of J. H. Moore for sale, agreeing to allow him all in excess of $2,000 he sold the land for as his compensation, and if you further believe that the plaintiff, Moore, carried the purchaser to the owner of the land, and showed and priced same to him, and introduced him to the owner, and through such introduction and exertions on the part of Moore negotiations were begun between the purchaser and the owner of the land, and a sale thereof was made by the owner of the land for the sum of $2,200, then Moore would be the procuring cause of said sale, and would be entitled to recover of the defendant all in excess of

$2,000 said lands sold for, unless you further believe that the agency was terminated in good faith before the sale."—Approved: Branch v. Moore, 84 Ark. 462, 105 S. W. 1178.

(b) "The court instructs the jury that if you find from the evidence that the defendants employed the plaintiffs to sell for them the Joplin Brewery Co. property, and agreed to pay them ten per cent on whatever sum it sold for, and the plaintiffs procured F. W. Keasbey and other parties to whom said property was sold, either direct or by transfer of the capital stock of the stockholders of said company, then you should find the issues in favor of the plaintiffs, and assess their damages at ten per cent of whatever sum said stock was sold for, together with six per cent interest thereon from the time demand was made, if any demand was made, and if not, then from the time of the institution of this suit."—Approved: Morgan v. Keller, 194 Mo. 663, 92 S. W. 75.

(c) "You are instructed that it is only necessary, in order to recover in this case, for plaintiffs to have found or procured the purchaser for the brewery, after the same was placed in their hands for sale. It was not necessary for them to have conducted the sale; this may be done by the sellers themselves without the aid or presence of the plaintiffs, or any of them."—Approved: Morgan v. Keller, 194 Mo. 663, 92 S. W. 75.

§ 3222a. Solicitation by Broker Procuring Purchaser.

"The word 'solicit,' as used in the contract sued upon, means to seek for, to endeavor to obtain. It is therefore incumbent upon the plaintiff to prove by a preponderance of the evidence that he sought for and endeavored to obtain as purchasers from the defendant the said C. G—, J. G—, and P. G—, or some one of them. It is not necessary for the plaintiff to show that the purchasers of the engine made a trip to ——— solely upon the solicitation of the plaintiff, but, if you find from the evidence that the sale of said engine was made by the defendant to the G— Bros. on account of the former dealings of the defendant with the said G— Bros. through their B— agency, and that the plaintiff aided and assisted in bringing the buyer and seller together, and encouraged or endeavored to induce the purchasers, or one of them, to make a trip to ———, to the place of business of the defendant, then this would constitute a solicitation on the part of plaintiff and would entitle him to commission on said sale, provided he afterwards complied with the conditions of the contract."—Approved: Curlee v. Reeves & Co., 85 Neb. 358, 123 N. W. 420.

§ 3223. Procuring Purchaser Ready, Able and Willing to Buy.

(a) "When property has been listed with a real estate agent for sale, and he procures a purchaser, ready, able, and willing to buy upon terms agreed to by the owner of the property, the agent is then entitled to his commission, although a sale may never be made, owing to the inability of the owner of the property to complete the contract."—Approved: Baldwin v. Smith (Tex. Civ. App.), 119 S. W. 111.

(b) "The court instructs the jury that if they believe from the evidence

that the plaintiff, Irvin, employed the defendant, Moore, to sell his farm for him at a designated price, and the defendant procured a purchaser who was willing and ready, to purchase upon the terms of plaintiff, and who did enter into a written contract with plaintiff, expressing the terms of the sale, defendant, Moore, was then entitled to his commission, although the purchaser may afterwards refuse to perform his part of the contract without any fault on the part of the plaintiff, and your verdict will be for defendant.

"The court instructs the jury that if they believe from the evidence that the plaintiff, Irvin, employed the defendant, Moore to sell his farm for him, under written contract, whereby defendant's commissions were to be paid out of the first money paid by the purchaser, and the defendant did procure a purchaser who made a cash payment, and then entered into a written agreement with the plaintiff for the purchase of his farm, and that plaintiff paid the defendant his commission and took up the option given the defendant for the sale of said land, your verdict will be for the defendant."—Approved: Moore v. Irvin, 89 Ark. 289, 116 S. W. 662.

§ 3224. If Purchaser is Rejected, Burden on Broker to Show Full Services.

"a. If the principal rejects the purchaser, and the broker claims his commission, he (the broker) must show that the person furnished by him (the broker) to make the purchase was willing to accept the offer precisely as made by the principal, and that he was an eligible purchaser, and such a one as the principal was bound in good faith, as between himself and the broker, to accept.

"b. When an agent or broker, in good faith, has produced a purchaser who is acceptable to the owner, and able and willing to purchase on terms satisfactory to the owner, or as offered by the owner, he has performed his duty; and if, from any failure of the owner to enter into a binding contract, the sale is not completed, the agent may recover his commission."—Approved: Buckingham v. Harris, 10 Colo. 455, 15 Pac. 817.

§ 3226. Refusal of Seller's Wife to Sign Deed no Defense.

"If you believe from the evidence that the defendant employed plaintiff to sell his land, and agreed to pay him therefor all in excess of $2,000 he sold the land for, defendant would not be relieved from said contract by the fact that his wife refused to sign the deed for $2,000."—Approved: Branch v. Moore, 84 Ark. 462, 105 S. W. 1178.

§ 3227. No Right of Seller to Withdraw Land from Broker After Purchaser Procured.

"You are instructed that if you find from the evidence that the plaintiff procured a purchaser, introduced him to the defendant, and that he, the plaintiff, was the procuring cause of the sale, then the defendant could not withdraw his land from the hands of the plaintiff and defeat the collection of the commission, unless the contract between the plaintiff and defendant was by mutual assent abrogated with a full understanding of all the facts."—Approved: Branch v. Moore, 84 Ark. 462, 105 S. W. 1178.

§ 3227a. Seller's Inability to Comply with Terms of Sale no Defense against Broker.

"When property has been listed with a real estate agent for sale, and he procures a purchaser, ready, able, and willing to buy upon terms agreed to by the owner of the property, the agent is then entitled to his commission, although a sale may never be made, owing to the inability of the owner of the property to complete the contract." —Approved: Baldwin v. Smith (Tex. Civ. App.), 119 S. W. 111.

§ 3228. Right of Owner to Take up Negotiation After Abandonment by Broker.

"I instruct you further, gentlemen of the jury, that if you believe from the evidence in this cause that B. was unable to bring a purchaser, ready able and willing to accept the terms of purchase laid down in his contract with the owner of the property, and if you further believe that his own efforts to procure a purchaser had been abandoned, or if you believe that the broker's authority had been terminated in good faith by the defendant, and that subsequent to such abandonment or termination the defendant itself opened negotiations with the final purchaser of the property, and consummated that purchase on account of its own efforts, or on account of the efforts of the persons other than B., that under those circumstances your verdict would have to be for the defendant in this cause."—Approved: Von Tobel v. Stetson & Post M. Co., 32 Wash. 683, 73 Pac. 788.

§ 3229. Right of Revocation Pending Negotiations if Done in Good Faith.

(a) "Plaintiff further claims that the revocation was not in good faith, and was made for the purpose of defeating or preventing plaintiff from procuring his commission for the sale of said property. On this branch of the case you are instructed that the owner of real estate who has placed the same in the hands of a broker for sale has the right at any time prior to the procuring of a purchaser for the property by the broker to revoke and cancel the authority of the broker to sell the same, if he acts in good faith, without any intention on his part to defeat pending negotiations between the broker and the proposed customer, and thereby defeating the broker in earning the commission upon the sale. But, if the broker having authority from the owner to sell real estate has pending negotiations with a prospective purchaser, with prospects of success, and the owner subsequently carries on the negotiations started by the broker, and sells said real estate to the customer furnished by the broker upon the terms upon which it is given to the broker to sell the same, the owner cannot by so doing defeat the broker's commission earned in procuring the customer."—Approved: Benton v. Brown, 145 Iowa, 604, 124 N. W. 815.

(b) "You are instructed that where property is listed with a broker for sale, and the broker procures a customer for the purchase of said property, to whom the owner sells the property during the existence of the agency at the terms upon which it is listed with the broker, he is entitled to his compensation, and in this case it is admitted by the pleadings that

the property was listed with the plaintiff for sale at the sum of $3,000, and the uncontroverted evidence shows that the plaintiff called the attention of the Sioux City Stockyards Company through its agent, J. D. Gilmore, to said property, and subsequently the defendant sold the property to the Sioux City Stockyards Company at the price at which it was listed with the plaintiff. But defendant claims that prior to the sale of said property by him to the Sioux City Stockyards Company, the authority of the plaintiff to sell the property was revoked and canceled, and that he negotiated the sale without aid of the plaintiff. Evidence has been introduced of the revocation of the authority to sell. But the plaintiff claims that said revocation was not intended by the defendant as a revocation of the authority, but as a subterfuge to conceal from other parties the existence of the agency, and that there at all times existed an agreement between the plaintiff and the defendant that the plaintiff should be the agent for the sale of said property. You are instructed that the burden of proof is upon the plaintiff to prove such an agreement, and that the revocation of the authority was not intended by the defendant to be a revocation, but was a subterfuge to conceal the agency of the plaintiff from other parties. And, if plaintiff has so proven to you by a preponderance of the evidence, then your verdict should be for the plaintiff."—Approved: Benton v. Brown, 145 Iowa, 604, 124 N. W. 815.

§ 3229a. Right to Revoke in Good Faith is at any Time before Broker Makes or begins a Sale.

"If from the evidence you believe that, though plaintiff may have been employed by defendant to make sale of the property described in plaintiff's petition on the terms therein stated (if you so find), yet you are charged that defendant would have the right to revoke such employment at any time before plaintiff made or began such sale. If, therefore, you find from the evidence that, before plaintiff submitted such property for sale to one C— (if you find he did so), the defendant B— had refused to accept the price offered by said C— (if you find said C— made such an offer to defendant B—), then you will find for the defendant."—Approved: Brady v. Maddox (Tex. Civ. App.), 124 S. W. 739.

§ 3230. Owner Selling During Agency to Purchaser not Procured by Agent.

(a) "The jury are instructed that if you believe from the evidence that the defendant employed the plaintiff to sell his farm, and to procure a purchaser thereof, and if you further believe from the evidence that the purchaser, Hutchins, received his information which led to the purchase of said farm from other parties than the plaintiff, and that plaintiff did not procure the purchase of said farm, and the sale thereof, then plaintiff cannot recover, and you will find for defendant."—Approved: McMurtry v. Madison, 18 Neb. 291, 25 N. W. 85.

(b) "If you find from the evidence that the defendant employed the plaintiff to sell the farm and procure a purchaser therefor, and if you fur-

ther believe that the purchaser, Levi Cox, received the information which led to the purchase of said farm from other parties than the plaintiff, and that the plaintiff did not sell said farm, or obtain or procure the purchaser for the same, then the plaintiff cannot recover, and you will find for the defendant."—Approved: Burkholder v. Fonner, 34 Neb. 1, 51 N. W. 293.

§ 3231. Listing Property with Several Agents—One Completing Negotiations Attempted by Another.

"Where the owner of real estate has listed his property with more than one real estate agent, and one of the real estate agents with whom said property is listed attempts to interest a certain person in said property by endeavoring to effect a sale to such person, but does not succeed in inducing said person to negotiate with the owner for the purchase of the property or to make an offer for said property, and thereafter another real estate agent, with whom the property has been listed, by his efforts succeeds in interesting the same person in the purchase of the same property, and by his efforts effects a sale of said property to such person, then the agent who succeeds in bringing about the sale is entitled to commission. If, then, you find from the evidence in this case that the defendants listed the property mentioned in the evidence in this case with the plaintiffs, and also with George M. Noble & Co., real estate agents, and the plaintiffs tried to induce Mrs. McCandless and Mrs. Kipp to purchase said property, but failed to do so; that thereafter George M. Noble & Co. showed this property to Mrs. McCandless and Mrs. Kipp, entered into negotiations with them, and were instrumental in effecting a sale to them through their efforts—then plaintiffs cannot recover in this action, for in that event the commission would be earned by Noble & Company."—Approved: Votaw v. McKeever, 76 Kan. 870, 92 Pac. 1120.

§ 3232. To Recover Commission Broker Must be the Procuring Cause of a Sale.

"But if you believe from the evidence that some person other than the plaintiff performed the service that the plaintiff claims to have performed, which was the procuring cause of the contract made between the defendants and the L. Imp. Co., and that there was no agreement by the defendants to pay the commissions claimed, or, in other words, if you are not satisfied that the plaintiff did perform the service he claims to have performed, and do not believe the defendants agreed to pay the plaintiff the said commissions, he would not be entitled to recover anything in this case, and your verdict should be in favor of the defendants. We say to you that, in order for the plaintiff to recover at all in this case, you must be satisfied from a preponderance of the evidence that he is entitled to recover.

"If you find the evidence conflicting upon any material point, it is your duty to reconcile it if you can, and if it is irreconcilable you should accept as true such evidence as you believe most entitled to credit, taking into consideration the character of the witnesses, their apparent fairness and accuracy, their disinterestedness, and all the other circum-

stances of the case as disclosed by the evidence."—Approved: Richards v. Richman (Del.), 64 Atl. 238.

§ 3232a. **Or when Property has been Exchanged.**

"The jury is instructed that, before a judgment can be rendered for the plaintiff in this case, said plaintiff must establish by a fair preponderance of the credible testimony that the defendant employed this plaintiff to sell or exchange his property, and that through the exertions, skill, and services of the plaintiff, one H— was induced to exchange certain property for the property of this defendant."—Approved: Russell v. Poor (Mo. App.), 119 S. W. 433.

§ 3233. **Misrepresentation by Broker Defeating Sale.**

"As you have been instructed, the plaintiff was not authorized to make a written contract for the defendant with Ross. Therefore such contract was not binding upon the defendant, unless he was afterwards informed of it, in the terms in which it was made, and of all the facts under which it was made, and then ratified it by accepting the agency under which it was made and approving and adopting plaintiff's acts. In order to bind the defendant by ratification of the contract such ratification, if any there was, must have been made by him with the full knowledge of all the material facts.

"In this connection you will inquire whether Ross was induced to enter into the contract of sale by a misrepresentation of the plaintiff to him as to the net price required by the owner or seller. It is contended on the one side that Akin told Ross that $55 an acre was the lowest price that the seller Poffenberger would take, and that he (Akin) would get nothing at that price, and that thereby Ross was induced to pay Akin two and one half per cent. commission. On the other hand, it is contended that Akin told Ross that $55 an acre was the lowest price that Ross could get the land at, and the contract in evidence shows that that was the price fixed to Ross.

"What the representations Akin made to Ross were upon this point is for you to determine from the evidence, and determine whether Akin made a fraudulent misrepresentation to Ross about the matter, and if you find that he did, and find such fraud or deception, if any you find there was, induced Ross to enter into the contract of sale, and also contributed as material inducement to his refusal to carry out the sale, you will find for the defendant, however you may decide the other issues, and although you may find that defendant's inability to convey all the land was also an inducing cause for the refusal on Ross' part, or even his principal motive or reason.

"The defendant had the right to disclose to Ross the truth of the authority he had conferred upon the plaintiff if the alleged fraudulent misrepresentation was made; and, if you believe there had been a fraudulent misrepresentation made to Ross by Akin, and that such statement of the truth of the authority that defendant had given to the plaintiff, Akin, was revealed by the statement made to him by Poffenberger, and that

thereby Ross was led or induced to refuse to carry out the original contract of sale, that fact would not make the defendant liable on the ground that he caused or procured Ross to refuse to carry out the sale. * * *

"If you believe that Akin advised or informed Poffenberger that he was to receive two and one half per cent. from Ross, the defendant was not obligated at once to declare his approval or disapproval of that action, nor to consent or refuse to consent thereto immediately, but he had a reasonable time in which to advise himself of his rights in the premises in view of that statement; and, if you believe he was merely silent without objection, and that he intended thereby to reserve the matter in abeyance until he could advise himself of his rights, the law will not hold him to have consented to the receipt of such per cent. from Ross by his mere silence, but he had a right to a reasonable time in which to determine what he would do. If you find for plaintiff, you will find as hereinbefore instructed. If you find for defendant you will so say, and no more."—Approved: Akin v. Poffenberger (Tex. Civ. App.), 116 S. W. 615.

§ 3234. Mere Middlemen—Commissions from Both Parties.

"If Mr. Sweet did not act as an agent for or in the interest of either party, but was a mere middleman to bring the parties together, they then to make their own contract in relation to the exchange of property, then such employment was legal, and Mr. Sweet could recover from both parties commissions or pay for his services."—Approved: Orton v. Scofield, 61 Wis. 382, 21 N. W. 261.

§ 3235. Procuring Agent where the Property is Listed with Several.

"You are instructed, where real estate is listed for sale with several real estate agents, acting independent of each other, the one who succeeds in bringing the seller and purchaser together and induces them to enter into a contract of sale is the one who has earned the commission; and this is true regardless of the fact that some other real estate man may have introduced the purchaser to the seller, or may have been discussing the sale with him. Therefore, if you find from a preponderance of the evidence that the plaintiffs, the Southwestern Land Company, were the agents who succeeded in bringing together M. H. Kilgore, the seller, and W. N. Pruitt, the purchaser, of the Kilgore ranch, and actually induced them to enter into a valid contract of sale for said property, then the plaintiffs would be entitled to recover the commission sued for in this case, and you should so find by your verdict. On the other hand, if you find from a preponderance of evidence in this case that the defendants B. F. McDaniel and G. F. Worden, and the said B. F. McDaniel, with the assistance of the said Worden, actually brought together M. H. Kilgore, the seller, and W. N. Pruitt, the purchaser, and induced them to enter into a valid contract of sale of the said Kilgore ranch, then the defendants would be entitled to recover the said commissions, and you should so find by your verdict.

"If you find from the evidence that Pruitt, the purchaser of the land in question, had Kilgore's land first brought to his notice by the plain-

tiffs, and further find from the evidence that said plaintiffs, at said Pruitt's solicitation, disclosed the owner's name of the said land, and that said Pruitt, by reason of said information received from said plaintiffs, was the original and primary cause of him afterwards finally buying the land, then you will render your verdict for the plaintiffs, even though you may find that defendant Worden showed said Pruitt the said land, and even finally assisted in closing the trade with the said Pruitt.

"If the jury find from the evidence that the plaintiff were originally and first the parties to bring Kilgore's land to said Pruitt's notice, and further find that said Pruitt promised the said plaintiffs to take it, if it suited, and find that this was before Worden had brought said land to Pruitt's notice, and further find that Kilgore had been notified by plaintiffs of that fact, and further find that said Worden or McDaniel, or either of them, afterwards took Pruitt to show him the land, then in such case you will find a verdict for plaintiffs, even though you find that the plaintiffs did not bring said Pruitt and Kilgore together, or did not close the trade for the land."—Approved: Painter v. Kilgore (Tex. Civ. App.), 101 S. W. 809 (not reported in state reports).

§ 3237. Sale of Cotton for Less than Market Price.

"Defendant by way of defense claims that the plaintiffs sold his cotton for less than the market price. Before you could find for him on this issue he must show by a preponderance of the evidence, either that plaintiffs failed to use care and skill in the sale of the cotton, or that they corruptly sold it for less than its value, and, the fact, if proved, that defendant sold cotton in Pocahontas so that he realized more for it than for cotton shipped to and sold by plaintiffs, or that he sold cotton in Memphis otherwise than in the customary manner, for more than he realized for cotton sold by plaintiffs would be no defense in this action."—Approved: Wynne, Love & Co. v. Schnabaum, 78 Ark. 402, 94 S. W. 50.

§ 3238. Broker not Actively Participating in Purchase of Land.

"The court instructs you that, although you may find from the evidence that the defendant employed the plaintiff to assist him in procuring title to the Doctor and Chief mining properties for the purposes of consolidation, still if you further find from the evidence that the titles to such properties were acquired by some one other than the defendant herein, and that the defendant did not actively participate, or take part in acquiring the title to such properties, then your verdict must be for the defendant."—Approved: Bailey v. Carlton, 43 Colo. 4, 95 Pac. 542.

§ 3239. Purchase of Real Estate—Commissions.

"Although the jury may find and believe from the evidence that the defendant did employ the plaintiff to assist him in securing the title to said lode claims, and did agree to pay the plaintiff five per cent. on the purchase price at which said lode claims should be taken into a consolidated company, and that plaintiff did render services in an at-

tempt to procure said lode claims to be put into said consolidated company, yet if you further find and believe from the evidence that plaintiff and defendant were unable to agree with Robison and Cone in the purchase of said claims, and that other persons, not co-operating with defendant, thereafter initiated negotiations with said Robison and Cone for the purchase of said lode claims and put them into a consolidated company, you will return a verdict for the defendant, even though you may further find and believe from the evidence that the defendant on request, contributed to the purchase of said lode claims."—Approved: Bailey v. Carlton, 43 Colo. 4, 95 Pac. 542.

CHAPTER XCVI.

COMMON CARRIERS.

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B. Carriers of Live Stock.

A. Carriers of Ordinary Freight.

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§ 3240. When Relation Begins.

"If you find from the evidence that Burrow & Co. tendered the cotton to defendant for immediate shipment and deposited the cotton on defendant's platform for loading into cars, and that defendant, through its agents, assented to such delivery and received the cotton into its care and custody upon its platform in preparation to loading it into cars for transportation after it had been checked over and bills of lading had been issued for it, then the delivery of the cotton was complete, and it is immaterial whether or not defendant's agents had actually

signed the bills of lading for the cotton; and defendant became liable as a common carrier to Burrow & Co. for the cotton."—Approved: St. Louis, I. M. & S. Ry. Co. v. C. C. Burrow & Co., 89 Ark. 178, 116 S. W. 198.

§ 3241. Bill of Lading Prima Facie Evidence of Good Order of Goods.

(a) "The bill of lading produced as evidence in the case is *prima facie* evidence that the box of goods was in good order at the time it came into the hands of the railroad company, and it is incumbent on the company to show it was otherwise, and that they were deceived or defrauded when they signed the bill of lading; and unless the jury believe from the evidence that they were thus deceived or defrauded, they will find a verdict for the plaintiff for the amount of his loss."—Approved: Great Western R. R. Co. v. McDonald, 18 Ill. 172, 173.

(b) "When a carrier by its bill of lading has received goods as in 'good order' or in 'apparent good order,' the burden is upon the carrier to show that they were not so."—Approved: Central of Ga. Ry. Co. v. Dowe & Co., 6 Ga. App. 658, 65 S. E. 1091.

§ 3242. Act of God—Known Snow Fall—Obstruction when Freight Accepted.

"The court further instructs you that if you find from the evidence that an obstruction of the defendant's road by a snow blockade or otherwise existed at any point at the time these sheep were loaded, which would interfere with the prompt and safe carrying and delivery of these sheep, and which was known to the defendant, and the sheep were accepted by the defendant for shipment without informing the plaintiff of the state of affairs, the defendant cannot offer the obstruction as an excuse for failure to deliver promptly, even though the obstruction was the act of God. Having undertaken to take the shipment with full knowledge of the facts, its liability as a common carrier attached. It was bound to take notice of the signs of approaching danger if any were known to it, and, if the danger was of such a character as reasonably to awaken apprehension at a time when the facilities and means of escape from danger were within their control, they were bound to use such means for the safety of the property intrusted to their care."—Approved: Nelson v. Great Northern Ry. Co., 28 Mont. 297, 72 Pac. 642.

§ 3243. General Rule as to Act of God or Public Enemy.

"Under our law one who pursues the business constantly or continuously for any period of time or any distance of transportation is a common carrier and as such is bound to use extraordinary diligence. On cases of loss the presumption of law is against the common carrier, and no excuse avails the common carrier, unless it was occasioned by the act of God or the public enemies of the state."—Approved: Central of Ga. Ry. Co. v. Manchester Mfg. Co., 6 Ga. App. 254, 64 S. E. 1128.

§ 3244. Delay as Occasion of Goods Being Exposed to Extraordinary Flood.

"The court instructs the jury that if the jury find from the evidence before them, that the defendants, its agents or employees, received the (car load of wheat) testified to in this case at (Shenandoah Junction) on (Wednesday, May 29th), to be transported by defendant over its road from said (Shenandoah Junction) to (Washington in the District of Columbia) and at said (Washington) to be delivered by the defendant for the plaintiffs, to W., subject to the terms and conditions of the printed contract offered in evidence, and further find that said defendant, its agents or employees, transported said (car load of wheat) from said (Shenandoah Junction), to (Washington Junction), and at said (Washington Junction) side tracked said (car load of wheat), and further find that while said (car load of wheat) was standing upon said side track, said defendant, its agents or employees, had warning of the approaching flood, whereby the (wheat) was damaged, and further find that said defendant, its agents or employees, notwithstanding such warning of danger, did not exercise ordinary skill, prudence, diligence and foresight to save said (car load of wheat) from being injured and damaged by flood, and further find that by reason of said failure upon the part of said defendant, its agents or employees, to exercise said ordinary skill, prudence, diligence and foresight, said (car load of wheat) was caught and submerged by the flood, and injured and damaged on (June 1st), then the plaintiffs are entitled to recover to the extent of the injury sustained."—Approved: Baltimore & O. R. Co. v. Keedy, 75 Md. 320, 23 Atl. 643.

§ 3245. Discrimination in Furnishing Cars.

(a) "The plaintiff claims to have given defendant an order on or about the 26th day of September, 1905, for two cars for shipment of plaintiff's hay over defendant's road to C. & O. and N. & W. points, and that the defendant refused to deliver said cars, in consequence of which plaintiff claims damage. The court instructs you that before plaintiff can recover in this action he must satisfy you by a preponderance of the evidence, first, that such order was given to defendant; second, that defendant had the cars of the kind ordered, and facilities for furnishing the same during the period of which plaintiff complains; and, third, that defendant discriminated against the plaintiff in favor of other shippers in the delivery of cars for the transportation of hay and straw."—Approved: Toledo & O. Cent. Ry. Co. v. Wren, 78 Ohio St. 137, 84 N. E. 785.

(b) "If the general freight traffic was congested at Wynne and upon the railway therefrom to Memphis, embracing the station at Crawfordsville, and if such congestion of traffic was such that cars could not be furnished for plaintiff to transport the logs and timber in question, without discriminating against various other shippers and persons interested in shipment in such congested conditions, then your verdict should be for the defendant."—Approved: St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperage Co., 81 Ark. 373, 99 S. W. 375.

§ 3246. Failure to Furnish Cars—Duty not Absolute.

(a) "The duty on the part of defendant as a common carrier to furnish plaintiff with cars sufficient to transport timber was not an absolute one; but its only duty was to furnish with reasonable promptness after demand made therefor and to exercise reasonable diligence and care to provide transportation facilities to meet such requirements as might be made in the usual course of its business, considering the general demand for such cars, and the general condition of freight traffic. Defendant was not obliged to discriminate against any other shippers or other places nor supply plaintiff with any sudden demand for cars."—Approved: St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperage Co., 81 Ark. 373, 99 S. W. 375.

(b) "If it was the custom of plaintiff to accumulate logs or timber upon or near the railway right of way for shipment, and if this was not a delivery of such logs or timber to the defendant, and if, after the demand for cars was made, the defendant used such diligence as an ordinarily prudent person would have done under the circumstances to procure cars for such shipment, considering the general demand for cars and the general freight traffic, then your verdict should be for the defendant."—Approved: St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperage Co., 81 Ark. 373, 99 S. W. 375.

§ 3247. Duty to Furnish Cars under Contract—Excuses.

"You are instructed that, in order for the Midland Valley Railroad Company to avail itself of a defense that it could not furnish plaintiff cars because there was a great congestion of traffic, it must appear to your mind by a preponderance of evidence that there was such an unprecedented and extraordinary amount of freight offered for transportation as that it could not have been reasonably anticipated by the defendant company. And you are further instructed in this connection that it is the duty of the defendant company to keep in touch with natural conditions and with the usual natural developments of the country."—Approved: Midland Valley R. Co. v. Hoffman Coal Co., 91 Ark. 180, 120 S. W. 380.

§ 3249. Limitation of Liability—Gross Negligence not Permitted.

"You are instructed that a carrier of property for reward must use at least ordinary care and diligence in the performance of all its duties, and while its obligations may be limited by special contract, yet it cannot be exonerated by any agreement made in anticipation thereof from liability for the gross negligence of itself or its servants; and, if you find from the evidence that the injury to the cattle of plaintiff, Copeland, was caused by the gross negligence of the servants or employes of defendant, you should, notwithstanding the special contract, find for the plaintiff, unless you should also find that the injury to said cattle was contributed to by the negligence of plaintiff, Copeland, or his agents."—Approved: St. Louis & S. F. R. Co. v. Copeland, 23 Okl. 837, 102 Pac. 104.

§ 3250. Limitation of Liability to Own Line.

(a) "You are instructed that said agreement or contract which was signed by plaintiff, providing against any liability by the railway com-

pany for any loss or injury to the horses beyond its own line of railway, is a valid and proper contract, and binds the parties. And if you should find from the evidence that the horses of the plaintiffs, which were shipped by them over the defendant's railway under said live stock contract, were in any way, or from any cause whatever, delayed or otherwise injured after said horses had passed beyond the line of the defendant's railway, and if you further find that the defendant company was not responsible for such delay or injury, then the defendant would not be liable herein to plaintiffs, and your verdict should be accordingly." —Approved: Wisecarver & Stone v. Chicago, R. I. & P. Ry. Co., 141 Iowa, 121, 119 N. W. 532. This and the instruction next following would not be correct, under the Cormack amendment, as to an interstate shipment.

(b) "The defendant in this suit had the legal right to limit its liability in the shipment of said car of cabbage to its own line of railroad, as set up in said defense and proven by bill of lading. The uncontroverted evidence in this suit shows that defendant, availing itself of this right, limited its liability for damages occurring on its own line of railroad. Therefore, unless you believe from the evidence that said injury, if any, did occur while said car was in transit on said I. & G. N. R. R., and before it was delivered to the connecting carrier at Longview, Tex., and that said misrouting, if any, was caused by the said I. & G. N. R. R. Co., its agents, servants and employes, and unless you so believe, you will find for the defendant."—Approved: International & G. N. Ry. Co. v. Wilbourne (Tex. Civ. App.), 115 S. W. 111.

§ 3251. Connecting Carriers—Injury to Goods—Burden of Proof.

"After the goods have been received by the defendant it is the duty of the defendant to show by a preponderance of the evidence that, after it has received the goods in question, it safely shipped them and delivered them to the succeeding carrier uninjured; that is, in the goods going down. If it received them, as shown by the evidence here, it must further show that he delivered them uninjured to the succeeding carrier. The burden of proof is upon the defendant to show that fact, but, upon their theory, then the burden changes again, and the plaintiff must show by a preponderance of the evidence that the goods were in good condition; that is, if they were to charge the defendant with the liability on their return back, and the goods were in good condition when they were received by the defendant on its journey back. In order to enable the plaintiff to recover in this suit, you must find by the evidence in this case that the goods in question were injured after they were delivered to defendant and while they were yet under defendant's custody or control, and, if you do not so find by the evidence, then and in such case it will be your duty to render a verdict for the defendant; but if you find by the evidence in this case that the goods were injured after they were delivered to defendant and while under its care and control and before the goods were delivered to any other railroad, or after it had received it or after the railroad company had received it on its return to Corunna, then it will be your duty to find for the plaintiff such damages to the

goods as he had suffered by reason of such injury, with this limitation: That, when the goods were returned and offered to plaintiff, then it was his duty to accept them. And in this case they can only recover such damages as the difference between what the goods were actually worth when they were delivered by the plaintiff to defendant—that is, on the 4th and 8th days of May—and when they were returned and offered to him. By that, gentlemen, I mean that, if you find for the plaintiff as I have stated in the declaration, your verdict must be limited to the difference between their value at the time the company received them and at the time that the goods were returned and offered to be returned to the plaintiff."—Approved: Reason v. Detroit G. H. & M. Ry. Co., 150 Mich. 50, 113 N. W. 596.

§ 3253. Failure of Owner to Prevent Damage to Freight.

"You are charged that there was a delivery and acceptance of the fruit to plaintiff, and if the plaintiff, after he acquired knowledge of the defective condition of the car, if he had acquired such knowledge, then and in that event, if you find he had knowledge of defects in the car, it devolved upon plaintiff to take such steps as an ordinarily prudent person would have taken under the circumstances to prevent damage to the fruit. And if you find that plaintiff failed to exercise such care, and that this was the proximate cause of damage to plaintiff, then plaintiff cannot recover."—Approved: Missouri, K. & T. Ry. Co. v. Tripis (Tex. Civ. App.), 117 S. W. 199.

§ 3254. Delay in Carrying Perishable Freight—Duty of Consignee.

"In arriving at your conclusion on the subject as to what was a reasonable time within which to unload the onions, you should consider their condition when they reached Omaha, and were placed in position so as to be unloaded; and, if you find that when they reached their destination they were what is called in the evidence 'heated,' and this was known to the consignee, then more care and diligence would be required on the part of the consignee than if they were in good condition when they were received. Should you conclude that the onions were in such condition when they reached Omaha that the consignee thereof could have saved them by unloading them on Sunday, and that, by reason of his failure to unload them on that day, they were spoiled, then plaintiff could not recover; for the rule is that ordinarily a person is not compelled nor allowed to unload freight on the Sabbath day. But, if the goods are perishable, and on account of their condition will be lost unless unloaded on Sunday, then the law requires the consignee to take such steps as are reasonably necessary to unload and save the goods, and requires him to work on Sunday, if by that means he can save the goods."—Approved: St. Clair v. Chicago, B. & Q. Ry. Co., 80 Iowa, 304, 45 N. W. 570.

§ 3256. Carrier must Know or have Reason to Know Speedy Delivery Necessary for Special Damages to be Recovered.

"You are instructed, that in order to make the defendant liable for the special damages claimed, that is, the price which divers persons

had contracted to pay for said trees upon their delivery at ———, sought to be recovered in this case, the facts of the sale of said trees by plaintiff should have been brought to the attention of the defendant at the time said trees were delivered to it for shipment and unless you find that defendant was so notified, or knew at the time said trees came into its hands of the special circumstances which make a quick delivery necessary, or unless from the nature and character of the freight, the defendant was charged with knowing that a quick and speedy delivery thereof was important and necessary, you should not allow plaintiff the special damages claimed by him."—Approved: St. Louis S. W. Ry. Co. v. Cates, 15 Tex. Civ. App. 135, 139.

§ 3257. Carrier's Liability in Delivering Car of Grain—Position of Car.

"You are instructed that it was the duty of the railroad companies, defendants, as common carriers, to place the car at Independence where it could be unloaded without a greater expense or risk than is usually incident to the unloading of cars containing like freight at said place, or to place said car at Independence in a position where a reasonable and prudent man, knowing the custom and rules governing the handling of freight at said station, and diligent in removing his property from the railroad, would not decline to receive it; and if you find that at any time after the car of wheat reached Independence, on September 8, 1885, it was placed so that the defendants complied with the rule of law laid down in this instruction, then the defendants are not liable in this action, and you will so find."—Approved: Independence Mills Co. v. Burlington C. R. & N. R. Co., 72 Iowa, 535, 34 N. W. 320.

§ 3258. Loss of Goods—Misaddress as Contributory Negligence.

"If the jury find from the evidence that the box in controversy was marked 'Nashville, Tenn.,' instead of 'Nashville, Ark.,' and that, but for it being marked 'Nashville, Tenn.,' it would have gone to 'Nashville, Ark.,' or that the fact of it being marked 'Nashville, Tenn.,' contributed to the miscarriage or going astray of the package, then, and in that event, the plaintiff cannot recover. And this is true whether the operating or concurring fault was the act of the plaintiff or his agent, provided you find there was such concurring fault or negligence."—Approved: Southern Express Co. v. Hill, 81 Ark. 1, 98 S. W. 371.

§ 3259. Special Limitation of Time to Sue—Contract.

"If you find from the evidence that the claim of plaintiffs was declined or turned down by the letter of J. E. Leith, freight claim agent, of date of March 17, 1903, that the letter was mailed post paid to Pearce & Puckett on or about the 17th of March, 1903, and was received by Puckett, a member of the firm, and if you find that either of them were notified prior to that time that the claim had been refused or declined, and you find that the complaint was not filed in this court until the 10th day of September, 1903, this cause of action would be barred by the stipulations of the parties and you should find for the defendant."—Approved: St. Louis & S. F. R. Co. v. Pearce, 82 Ark. 339, 101 S. W. 763.

§ 3259a. Liability as Carrier Ceasing and that of Warehouseman Succeeding.

"The court instructs the jury that if from the evidence you find and believe that the defendant received from the ——— Co. on the ——— day of ———, a package of money containing ———, and for a consideration agreed to transport the same from ——— to plaintiff at ———, and there to deliver to plaintiff or its representatives and that it failed to so deliver the same. Then your verdict will be for the plaintiff in the sum of ———, together with ——— per cent. interest from the time it should have been delivered to this date. Unless you further find that plaintiff or its representatives knew of the arrival of said money at the point of destination in time to have received same before its loss, in that event defendant became a warehouseman and ceased to be an insurer of the goods and is not liable as a carrier, but you are further directed that, if you find and believe from the evidence that defendant was a warehouseman, then it was bound to exercise ordinary care in the safe-keeping of said money until it was received by the bank or returned to the consignor; and, if you find that defendant did not exercise that ordinary care, your verdict will be for the plaintiff as above."—Approved: Bank of Van Duser v. Wells-Fargo Co. (Mo. App.), 120 S. W. 678.

§ 3260. Merchandise Carried as Baggage—Notice of Nature of Goods—Liability for Loss.

"If a passenger ships merchandise in his trunk, without notice to the railroad company or knowledge on its part of the contents of the trunk, the company it not responsible for its loss. It is the duty of the passenger to give the carrier notice that his trunk contains merchandise, or things which cannot be included as baggage, unless the carrier has knowledge that the contents of a trunk are not baggage but merchandise. For the purpose of showing that the defendant had notice, you have heard the testimony of the plaintiff as to his conversation with the baggageman Smith, at Ludington, when he checked the baggage. You have also heard the testimony of Baggageman Smith in regard to what took place, and it is for you to say whether the baggageman, Mr. Smith, was notified or had sufficient knowledge from the facts surrounding the case that the contents of this telescope was merchandise or not. The notice to the railroad or its agent need not be an express notice if the agent or the company had sufficient notice or knowledge of the facts to put a person on inquiry it is equivalent to notice. If you find, by a fair preponderance of the evidence, that the plaintiff was a passenger as claimed, and that he informed the defendant's agent, the baggageman at Ludington, when he checked the baggage and telescope, that they contained samples or merchandise, and that they had notice in any way, and that the goods in question while in transit were lost by the defendant's negligence, such information is sufficient notice to render the defendant liable for such negligent loss; but if, on the other hand, you do not find, by a fair preponderance of the evidence, that the plaintiff

informed the baggageman, the agent at Ludington, when he checked the baggage, or that he and the company did not know the character of the baggage, that the telescope in question contained samples or merchandise, I say, if you do not find that to be the fact, that would be the end of the case, and your verdict would have to be no cause of action. But the passenger cannot require the railroad company to carry as baggage to be checked on his ticket articles of merchandise which the passenger carries to sell or exhibit as samples. The articles of women's wearing apparel which the plaintiff claims to have lost were not such articles as he was entitled to have checked as his personal baggage; but unless, as I have said, you find that the agent of the defendant who received such articles at Ludington as plaintiff's baggage was notified, or the company had knowledge, that the satchel or telescope which the plaintiff claims to have lost contained articles of merchandise not intended for the personal use of the plaintiff on his journey, your verdict must be for the defendant."—Approved: Dahrooge v. Pere Marquette R. Co., 144 Mich. 544, 108 N. W. 283.

§ 3261. Loss of Baggage—Liability as Warehouseman—Negligence.

"You are instructed that under the evidence in this case the liability of the defendant, if any, is that of warehouseman only, and to entitle plaintiff to recover you must find by a preponderance of the evidence, first, that the baggage sued for was not delivered to plaintiff, nor to any one authorized by her to receive it; second, that the general and usual course of dealings on the part of the defendant company in the handling of baggage at the station of the Union Pacific Railroad Company, used by the defendant at South Omaha, was such as to make the baggageman and employes employed at said station the agents of the defendant company in retaining possession of plaintiff's baggage, if you find defendant did retain possession thereof, and in placing the same in the baggage room of said station; and, third, that the loss of said baggage was caused by the want of ordinary care on the part of such agent or agents of the defendant company."—Approved: Campbell v. Missouri Pac. Ry. Co., 78 Neb. 479, 111 N. W. 126.

B. Carriers of Live Stock.

§ 3262. Contract for Shipping Cattle—Breach.
3263. Carrier Does not Guarantee Delivery within a Time Certain.
3264. Negligent Delay—Damages.
3265. Delay in Delivering to Connecting Carrier.
3266. Unreasonable Delay—Subsequent Consequences.
3267. Harmless Delay.
3268. Necessary Delay Required by Law Making Certain Further Delay Harmless.
3269. Connecting Carriers Apportionment of Damages for Delay.
3270. Injury on Connecting Line—No Liability.
3271. Delivery to Connecting Carrier—What Constitutes.
3271a. Burden of Proof on Last Carrier.
3272. Injury from Inherent Condition of Cattle's Weakness.
3273. Shipper's Negligence in not Caring for Stock.
3274. Shipper's Negligence in Overloading.
3275. Loading on Wrong Car—Injury from Removal.
3276. Delay from Act of God—Unloading in Unsafe Yards.
3276a. Injury from Unnecessary Switching of Cars.
3277. Fright—Proximate Cause of Injury.
3278. Injury from Viciousness of Stock not Ground for Recovery.
3279. Injury to Live Stock—Burden of Proof.
3280. Injury from Defective Car.
3281. Failure to Feed within Time Limited by Law.
3282. Failure to Furnish Cars—Contract.
3283. Written Notice of Claim for Damages.
3284. Necessity for Making Claim in Proper Time.
3285. Inspection of Stock, Waiver of Notice of Claim.

§ 3262. Contract for Shipping Cattle—Breach.

(a) "If you believe from the evidence in this case that on or about the time alleged by plaintiff the defendant, through its agent at Cameron, Tex., entered into a verbal contract with the plaintiff, by which defendant undertook and agreed to ship the plaintiff's cattle to St. Louis, and that by the terms of the contract plaintiff had the privilege of stopping the cattle at Ft. Worth, Tex., and if you further believe from the evidence that defendant agreed in such contract to transport said cattle to Ft. Worth in time for the market at that place on the 31st of December, 1904, and if you further believe from the evidence that defendant failed to convey said cattle to Ft. Worth in time for the market at that place of December 31, 1904, and that as a direct and proximate result thereof it became reasonably necessary, in the exercise of ordinary prudence, for plaintiff to ship his cattle on to St. Louis, and to sell the same at that place, and that the cattle were sold in St. Louis for a lower price that he could have procured for the same on the market at Ft. Worth on the 31st of December, 1904, then you will find for plaintiff,

unless you find for defendant under further instructions herein."—Approved: Gulf, C. & S. F. Ry. Co. v. Looney (Tex. Civ. App.), 115 S. W. 268.

§ 3263. Carrier does not Guarantee Delivery within a Time Certain.

(a) "The court instructs the jury that a common carrier does not guarantee the delivery of live stock received by it for transportation on any particular market, that is, on any particular market day."—Approved: Norfolk & W. R. Co. v. Reeves, 97 Va. 291.

(b) "Now, if you find and believe from the evidence that on said date the plaintiffs and the defendant entered into a contract, and if you find that the defendant contracted and agreed and undertook, in consideration of the payment of freight charges which were then and there paid, to transport said mules to Waco within a reasonable length of time, and if you further find from the evidence that said stock were not transported and delivered by the defendant to Waco until Friday morning, January 25th, and if you further find that there was a delay in the shipment of said stock or mules, and if you further find that said delay, if any, was unreasonable, and if you further find that in consequence of said delay, if there was any delay, said mules were deprived of and denied water, and if you further find that, when said animals arrived at Waco, they were in an unsaleable condition, and if you further find that they were gaunt, lean, lank, and in a weakened condition, and if you further find that they presented a bad appearance, and if you find that, when they arrived at Waco, there was no sale for such stock in the condition they were in, and if you further find that the plaintiffs were unable to sell or dispose of their said stock on said market, and if you further find that the plaintiffs were thereby injured as claimed in the petition, and if you further find that the defendant in failing to deliver said stock to Waco, if there was any such failure, in a reasonable length of time, was guilty of negligence, as that term is defined, in the first paragraph of this charge, and that such negligence, if any, was the direct cause of plaintiffs' injuries, if any, then you will find for the plaintiffs."—Approved: Missouri, K. & T. Ry. Co. v. Hood (Tex. Civ. App.), 120 S. W. 236.

§ 3264. Negligent Delay—Damages.

"If you find and believe that the plaintiff shipped the horses in controversy over the lines of the defendant and connecting carriers from Jacksboro, Tex., to La Junta, Colo., and if you believe from the evidence that the defendants, their agents, or employes, by reason of negligence, failed to transport the horses with proper dispatch, and if you believe that by reason of the negligence of the defendants, their agents, or employes the horses were on the cars longer, on the way to La Junta, than they should have been, and if you believe, by reason of the horses being longer in the cars on the way than they should have been, and that thereby the horses were damaged as charged in the plaintiff's petition, without fault or negligence on the part of the agent of the plaintiff, who went with said horses, you will find for plaintiff such damages as you find plaintiff sustained. And on the measure of damages you are

charged that, if the horses were damaged, as charged, by the negligence of the defendants in transporting the horses from Jacksboro, Tex., to Pueblo, Colo., where they were delivered to the connecting carrier, and if by reason of such negligence on the part of the defendants some of the horses died, the plaintiff would be entitled to recover, on account of the horses that died, what would have been the market value of such horses at La Junta in the condition they should have been in had there been no negligent delay in transporting the horses from Jacksboro to Pueblo."—Approved: Chicago, R. I. & G. Ry. Co. v. Jones (Tex. Civ. App.), 118 S. W. 759.

§ 3265. Delay in Delivering to Connecting Carrier.

"If you find from the evidence that the customary delivery of stock from Winterset, Iowa, over the defendant company to the Wabash Company at Des Moines, Iowa, required that the horses should first be taken to the stockyards, and there fed and reloaded, and then delivered to the Wabash Company before its duty attached, and the defendant became relieved of any duty thereto, and if you find further that the ordinary course of transportation required all this to be done at a time before and sufficient to allow of said car going out on the first regular train on the Wabash, and if you further find that the defendant's negligence in these respects caused or contributed to an unreasonable delay in the arrival of said horses at the St. Louis stockyards, then the defendant would be liable for all approximate damages the plaintiffs may have suffered in consequence of said negligence, if such negligence has been established."—Approved: Wisecarver & Stone v. Chicago, R. I. & P. Ry. Co., 141 Iowa 121, 119 N. W. 532.

§ 3266. Unreasonable Delay—Subsequent Consequences.

"If plaintiffs have established that there was an unreasonable delay in the arrival of the horses in question at the St. Louis stockyards, and if you find that the said horses were injured through neglect in the course of transportation, and that both this unreasonable delay and injury to the stock in the transportation was caused, or materially contributed to, by the defendant, by acts of omission or commission, before there had been a proper and sufficient delivery of the horses by the defendant to the Wabash Company, then the defendant would be liable for the damages sustained by such unreasonable delay, and for any injury the horses sustained, even though such injury may not have developed until after said horses had passed into the hands of the Wabash Company, or after their arrival at their destination."—Approved: Wisecarver & Stone v. Chicago, R. I. & P. Ry. Co., 141 Iowa, 121, 119 N. W. 532.

§ 3267. Harmless Delay.

"The court instructs the jury that any delay in the shipment of the cattle in question at any one or more points along the route of shipment would not, in itself, be sufficient to entitle the plaintiff to recover, even though caused by the negligence of the defendant, if said cattle did in fact arrive in Chicago in time for the same market upon which

said cattle could have been offered or sold as they would have arrived for had no such negligence nor delay occurred; and if only such delay or negligence is shown the plaintiff cannot recover."—Approved: Tiller & Smith v. Chicago, B. & Q. R. Co., 142 Iowa, 309, 120 N. W. 672.

§ 3268. Necessary Delay Required by Law Making Certain Further Delay Harmless.

"The court instructs the jury that if the time for which the defendant was required to keep the cattle in question off of the cars at Galesbury, Ill., including the time necessarily consumed in unloading, feeding, and reloading said cattle, expired so late that defendant could not reach Chicago by carrying said cattle upon its first available regular train thereafter from Galesbury to Chicago, Ill., in time for the market upon the 12th of September, then it was not negligence for defendant to hold said cattle in Galesbury longer than was made necessary by reason of the federal statute requiring the unloading and feeding of said cattle, providing same arrived in Chicago in due time for the opening of the market upon the morning of the 13th of December."—Approved: Tiller & Smith v. Chicago, B. & Q. R. Co., 142 Iowa, 309, 120 N. W. 672.

§ 3269. Connecting Carriers—Apportionment of Damages for Delay.

"If you find for the plaintiff, you will apportion the amount of damages found by you, if any, between the defendants according to, and in proportion to, their respective liability, if any, as indicated by the instructions which have already been given you, and you will apportion the damages, so found by you against the defendants only, if any, that you may find from the evidence were guilty of negligent delays, if any, in the transportation of said cattle or were guilty of negligent handling, if any, of said cattle, and in thus contributing to their injury, if any, and you will find in favor of such defendant, if any, as you may find from the evidence did not contribute to the injury of said cattle by unreasonable delays in the transportation of same, or by the negligent handling of such cattle over its own line of railway, and you are instructed that you must in no case find againt any defendants any damage, if any, accruing to said cattle by reason of unreasonable delays or negligent handling, if any, or any other cause, if any, arising while said cattle were being transported over the line of the said Chicago & Alton Railway before said cattle were delivered to the Chicago, Rock Island & Pacific Railway Company at Kansas City, for none of the said defendants can be held liable for any damage arising to said cattle, if any, by reason of negligent delays, if any, or negligent handling, if any, or any other cause, before the said cattle were actually delivered to the Chicago, Rock Island & Pacific Railway Company at Kansas City, and you are further instructed that, if you find for the plaintiff, you will not, in apportioning the damages so found by you, apportion any damage against either of the defendants resulting to plaintiff from delays, if any, or negligent handling, if any, occurring beyond the terminus of its own line of railway, or before said shipment reached its line, for, under the law, each defendant is only liable for damage if arising from such negligence, or unreasonable delays, if any, or negligent handling, if any,

as occurred upon its own line of railway, and not for delays of negligent handling, if any, of other defendants occurring on other lines of railway."—Approved: Chicago, R. I. & P. Ry. Co. v. Gillett (Tex. Civ. App.), 99 S. W. 712 (not reported in state reports). This and the next succeeding instruction would be erroneous in the case of an interstate shipment.

§ 3270. Injury on Connecting Line—No Liability.

"That if you believe from the evidence that said cattle, or any of same, were injured by being down and trampled upon by other cattle, then, and in that event, you cannot find any judgment against the lines between Pecos and Bazaar, by reason of the cattle being delayed and being down between Marfa and Pecos, Tex., or at Marfa, nor any judgment for the ill effect, if any, which accrued to such cattle in either train by reason of the same having been delayed at Marfa, if they were delayed, or by reason of any being down and trampled between Marfa and Pecos; but if you believe from the evidence, that said cattle, or any of same, were injured by delays, if any, at Marfa, or between Marfa and Pecos City, or by reason of rough handling, if any, between Marfa and Pecos City, yet you are further instructed that as to such cattle, if any, so injured as were delivered by the Texas & Pacific Railway Company at Pecos City to the Pecos River Railway Company, it became the duty of the said Pecos River Railway Company, and its connecting carriers beyond, handling said shipments, to exercise ordinary care to transport same with reasonable dispatch and to exercise ordinary care in handling of same, and if such defendants, or either of them, was guilty of negligent delays in the transportation of same or negligent handling, proximately resulting in injury, such defendant, if any, so guilty of negligence, would be liable for the injury caused by its negligence, although the result may have been more disastrous than they would have been had the cattle been in good condition when delivered by the Texas & Pacific at Pecos City.

"And you are further instructed that you must not find against any of the defendants for any of the damages occurring to, or any loss by death of said cattle by reason of any unreasonable delays, if any, or negligent handling, if any, or from any other causes, if any, arising while said cattle were being transported over the line of defendant, the Galveston, Harrisburg & Antonio Railway Company, or over the line of the said Texas & Pacific Railway Company and before said cattle were delivered to the Pecos River Railway Company at Pecos City, for none of said defendants can be held liable for any damage of any character arising to said cattle, if any, by reason of negligent delays, if any, or negligent handling, if any, or any other cause, before the said cattle were actually delivered by the Texas & Pacific Railway Company to the Pecos River Railway Company at Pecos City, Tex., for, under the law, each defendant is only liable for negligence and unreasonable delays, if any, or negligent handling, if any, occurring on its own line of railway and not for delays or negligent handling of other defendants occurring on their line of railway. You are further instructed that you cannot find in favor of the plaintiffs against any of the defendants for

any cattle that may have been dead at the time of the delivery by the Texas & Pacific Railway Company, to the Pecos River Railway Company, at Pecos City, nor against any of the defendants for any damage that may have been caused to said cattle by reason of anything that transpired before such delivery at Pecos City."—Approved: Atchison, T. & S. F. Ry. Co. v. Nation & Slavens (Tex. Civ. App.), 92 S. W. 823 (not reported in state reports). See note to next preceding instruction.

§ 3271. Delivery to Connecting Carrier—What constitutes.

(a) "It appears from the evidence that the horses in question were delivered to the defendant at Winterset, Iowa, for shipment to Des Moines, Iowa, and to be delivered in said city to the Wabash Railroad Company, and to constitute such delivery of the car and horses in question, they must have been passed by the defendant into the control of said Wabash Railroad Company, and so long as any essential act remained to be done by the defendant company to complete said delivery, the same could not be said to be complete. Hence, if you find from the evidence that the customary delivery, as between the defendant and the Wabash Railroad Company, constituted, among other things, the delivery of a copy of the waybill of such shipment, and if you further find that the delivery of a copy of the waybill constituted a part of such delivery, and until it was presented and passed to the Wabash Company, there was no complete delivery of the car in question in behalf of the defendant, and if the delay, if any, in the delivery of the waybill was the cause of the unreasonable delay, if any, of said stock, then the defendant would be liable for any damages the plaintiff may have sustained thereby, growing out of the fact that said horses were unreasonably delayed, if they were, in their transportation to their destination." Approved: Wisecarver & Stone v. Chicago, R. I. & P. Ry. Co., 141 Iowa, 121, 119 N. W. 532. This instruction would be immaterial and misleading in interstate shipment. See notes to two next preceding instructions.

(b) "On the other hand, if you find from the evidence that it was the custom of the defendant company and the Wabash Railroad Company that delivery from defendant to said Wabash Company was done by delivering said car upon the transfer track between the defendant company and the Des Moines Union Railroad, and that said delivery was completed by such delivery upon said transfer track, and noting upon said car in chalk certain directions for the switching crews, and by notifying the operator at the Des Moines Union office of so placing said car, and you find that the freight agent of the Des Moines Railway Company was also the agent of the Wabash Railroad Company, and if you find the facts established as herein stated, and if you further find that the car and horses in question were so handled and transferred, and that upon arrival at Des Moines they were placed upon said transfer track, and that chalk marks were placed upon the car as a guide to the switching crews, and that some one in charge at the freight office of the Des Moines Union and Union Railroads was notified thereof, and if you find that no further act of defendant company was necessary to their delivery to the Wabash Railroad Company, and that all

this was done without unreasonable delay, then the defendant company has complied with the contract, and done all that was required of it concerning said shipment and would not be liable herein for damages to plaintiff, and your verdict should therefore be for defendant."—Approved: Wisecarver & Stone v. Chicago, R. I. & P. Ry. Co., 141 Iowa, 121, 119 N. W. 532. See note to next preceding instruction.

§ 3271a. Burden of Proof on Last Carrier.

"Where the carriage of freight is to be over several connecting carriers, as was the case here, it seems that if the consignee, the consignee bringing the suit in this case, shows to the jury that the animals were in good condition when delivered to the initial carrier, and that they were not in good condition when delivered by the discharging carrier, then these facts alone, without any more, put the burden on the defendant, the discharging carrier, to show to the reasonable satisfaction of the jury that the harm and injury did not come to the animals while they were in the keep of the discharging carrier."—Approved: Central of Ga. Ry. Co. v. Dothan Mule Co. (Miss.), 49 South. 243.

§ 3272. Injury from inherent condition of Cattle—Weakness.

"Again, if you believe from the evidence in this case that the cattle of plaintiff were shipped over the lines of defendant carriers, and that they died or were injured from no acts of the defendants, or either of them, or that they did not so die, or were not so injured by delays, unloading in crowded pens at Ft. Worth, and delays while in possession of the defendants, or in transportation, or if you find the same died or were injured, but such deaths, if any, and such injuries, if any, were the result of the inherent weakness of the cattle, or that their condition was such that they were not able to make such a journey without such injuries or deaths, then you will find for the defendants."—Approved: Texas & P. Ry. Co. v. Felker, 44 Tex. Civ. App. 420, 99 S. W. 439.

§ 3273. Shipper's Negligence in not Caring for Stock.

"If, however, you should find from the evidence before you that such shipment was carried by said defendant, the St. Louis & San Francisco Railway Company, under a written contract with plaintiff, John B. Brosius, wherein plaintiff agreed to care for, load, and unload, feed, and water such stock, and such contract was upon a valuable consideration, then should you further find from the evidence that said defendant furnished to plaintiff facilities and means for loading and unloading, feeding, and watering such mules, which were suitable and adequate for such purpose, in so far as was possible by the exercise of ordinary and proper care and prudence, and that the injuries to plaintiffs' said mules, if any, were caused by plaintiffs' failure to care for, load, and unload their said mules, after being given an opportunity by defendant to do so, then you shall find for the defendant, the St. Louis & San Francisco Railway Company, for all damages, if any, resulting from plaintiffs' failure in any or all of the above respects."—Approved: St. Louis & S. F. R. Co. v. Brosius & Le Compte, 47 Tex. Civ. App. 647, 105 S. W. 1131.

§ 3274. Shipper's Negligence in Overloading.

"The court instructs the jury that the defendant, ... Company ....., would only be liable for damages and injury, if any, done to said cattle by reason of the negligence, if any, of said company while said cattle were in possession of said company and on its own line of road. The court instructs you that if you believe from the evidence that the plaintiff negligently overloaded the cattle in the cars for transportation to T., and that his negligence in that particular, if any, contributed to the damage suffered by his said cattle, if any, then you will return your verdict for defendants, even though you may believe from the evidence that the defendants were negligent in handling plaintiff's cattle."—Approved: Missouri, K. & T. Ry. Co. v. Chittim, 24 Tex. Civ. App. 599.

§ 3275. Loading on Wrong Car—Injury from Removal.

"If you believe from the evidence that the defendant, or its agents, designated the car in which another's hogs were loaded as the car in which plaintiffs should load their hogs, and that plaintiffs did load their hogs in said car, and that the defendant, or its agent, required plaintiffs to unload the hog in question and load him in another car at a time when it was not reasonably safe to do so, and that plaintiffs' hog died as a result of such removal, you will find for plaintiffs the reasonable market value of the hog at said time, unless you believe that plaintiffs failed to use ordinary care in removing and handling said hog, and that by reason thereof the death of the hog resulted.

"If, however, you believe that plaintiffs' hog was in such condition that he would have died notwithstanding such removal, or that defendant's agent gave plaintiffs the privilege of letting the hog remain in the car in which it was first loaded until it could be safely removed, or that the defendant did designate the proper car for plaintiffs to load their hog in, and that the plaintiffs were themselves negligent in not loading their hog in the car so designated, or that the hog's death resulted from the careless and negligent manner in which it was removed and thereafter handled, then, in any one of these events, you will find for the defendant."—Approved: Weisinger v. Southern Ry. Co., 129 Ky. 592, 112 S. W. 660.

§ 3276. Delay from Act of God—Unloading in Unsafe Yards.

"If you find from the evidence the shipment of the stock as alleged in the petition, and the train in which said stock was transported, by reason of a storm and extreme cold, was unable to proceed beyond Whittemore; and that the defendant, by its agents and servants, unloaded said cattle at Whittemore, without the consent of plaintiffs, and placed them in yards insufficient in strength or size to ordinarily prevent cattle from escaping therefrom, and that they escaped therefrom without any fault or negligence on the part of the plaintiffs; and that in placing said stock in such insufficient yards the defendant did not exercise reasonable care and prudence; and that any of the stock so escaping were lost and perished without any negligence on the part of the plain-

tiffs contributing thereto,—then you will find for the plaintiffs; but if you find from the evidence that the cattle were then in charge of one of plaintiffs, and were unloaded at Whittemore at his request, to be sheltered and fed, and he took charge of the same, and placed them in the yards, from which they escaped and perished in the storm, then the defendant would not be liable. If you should find that defendant was requested to place cars of cattle next the coal-sheds, and defendant failed to comply with the request, such failure would not, as a matter of law, be negligence. You will determine whether defendant was negligent in its care of the cattle, from all the facts and circumstances in evidence."—Approved: Chapin v. Chicago, M. & St. P. Ry. Co., 79 Iowa, 582, 44 N. W. 820.

§ 3276a. Injury from Unnecessary Switching of Cars.

"You are instructed that if you believe from the evidence in this case that the defendant, ——— Co., received of the plaintiffs, D— and S—, a carload of horses, the property of plaintiffs, at ———, in good condition, and contracted to deliver said horses at ———, then it was their duty to use reasonable care not to injure said stock, and if you find from the evidence that the agent or agents of the defendant, while at ———, or elsewhere on the route from ———, to ———, did carelessly and negligently, while in charge of said car loaded with plaintiffs' horses, hitch same to a switch engine, and run them back and forth in making up trains for a period of two hours, or any other length of time, unnecessarily, and that plaintiffs' horses were damaged by such careless and negligent handling, then you will find for the plaintiffs."—Approved: St. Louis, I. M. & S. Ry. Co. v. Dunn & Stewart (Ark.), 127 S. W. 464.

§ 3277. Fright—Proximate Cause of Injury.

"If the jury believe from the evidence that the injury to the mare, Emily Letcher, complained of was directly and proximately caused, not by a defect in the stalling, but by her becoming frightened and in consequence of such fright kicking loose the stalls and other appliances, they should find for the defendant."—Approved: Southern Express Co. v. Fox & Logan, 131 Ky. 257, 115 S. W. 184.

§ 3278. Injury from Viciousness of Stock not Ground for Recovery.

"You are instructed that the plaintiff can recover nothing for so much, if any, of the damage, if any, to his stock as may have been caused by the inherent vice of said stock, or by their natural character and condition, or by treatment to which they had been subjected before being loaded, or on account of being overloaded, if they were overloaded, or by the usual and ordinary course of their transportation by rail without negligence on the part of the railroad company or companies; and in making up your verdict you will allow plaintiff nothing for any damage which you may believe, from the evidence, was caused by the inherent vice of said stock, or by their natural character and condition, or by the treatment to which they had been subjected before being loaded, or on account of being overloaded, if you find they were overloaded, or

by the usual and ordinary course of their transportation by rail, without negligence on the part of the railroad company or companies."—Approved: Houston & T. C. R. Co. v. Gray, 38 Tex. Civ. App. 249, 85 S. W. 838.

§ 3279. Injury to Live Stock—Burden of Proof.

(a) "The burden is on the plaintiffs to show by a preponderance of the evidence the fact that their horses and cattle were injured, the nature and extent of such injuries, and that they were damaged thereby. After these facts are shown by such preponderance of evidence, it would then be the duty of the jury to award to the plaintiffs such a sum as would compensate them for the damages so by them sustained; the amount of such damages or compensation to be ascertained and fixed according to instructions hereinafter given."—Approved: St. Louis Southwestern Ry. Co. v. Kilberry, 83 Ark. 87, 102 S. W. 894.

(b) "Unless you believe from the evidence that the stock in controversy passed over the road of the St. Louis, Iron Mountain & Southern Railway Company, and were in charge of said road at the time of the injuries complained of in De Soto, your verdict should be for said defendant; and, passing upon the question as to whether or not the injury happened upon said defendant's road, you are not at liberty to presume that the road or yards at De Soto belonged to the said defendant, but such fact must appear from the evidence."—Approved: St. Louis Southwestern Ry. Co. v. Kilberry, 83 Ark. 87, 102 S. W. 894.

§ 3280. Injury from Defective Car.

"If you believe from the evidence that defendants or either of them, transported said stock in a defective car, and that in doing so such defendant or defendants so transporting them were guilty of negligence and that by reason thereof said stock were injured, if any, and plaintiff was damaged, if any, thereby, then such defendant or defendants would be liable to the plaintiff for such damages, if any, caused by such defendant or defendants."—Approved: San Antonio & A. P. Ry. Co. et al. v. Dolan (Tex. Civ. App.), 85 S. W. 302.

§ 3281. Failure to Feed within Time Limited by Law.

"The law made it the duty of the defendant company during the time it had the mules in its possession as carrier to rest, water, and feed the same at least once in twenty-eight hours, not longer without such watering, feed, and rest than twenty-eight hours, and at the end of the period of twenty-eight hours the mules should be rested for a period of at least five hours, and for this purpose should be taken from the car. It appears from the evidence in this case that the mules were not fed until after they arrived at Cincinnati and about thirty-eight hours after their shipment and at that time were fed about two hundred pounds of hay. Now, if you shall believe from the evidence that the mules in question by reason of the failure of the defendant company to feed them within twenty-eight hours and of their failure to feed the mules until thirty-eight hours had elapsed after their shipment or because said mules were

not then fed sufficiently, if such be the fact, the three mules in the evidence referred to were made sick and that by reason of the sickness so brought about they died, or if the jury shall believe from the evidence that the failure of the defendant company to feed the mules within twenty-eight hours or to sufficiently feed them co-operated or concurred with a subsequent like failure on the part of the connecting carrier in causing the death of the mules, then the law is for the plaintiff, and the jury should so find.

"But unless the jury shall believe from the evidence that the death of the three mules in the evidence referred to was caused by the failure of the defendant company to feed the mules within the twenty-eight-hour limit or its failure to feed them at all until about thirty-eight hours had elapsed, or their failure to sufficiently feed them, if such be the fact, or that such failure upon the part of the defendant co-operated and concurred with a subsequent like failure on the part of the connecting carrier in causing the death of said mules, the law is for the defendant, and the jury should so find."—Approved: Baltimore & O. S. W. R. Co. v. Wood & Co., 130 Ky. 839, 114 S. W. 734. So far as this instruction refers to connecting carrier it is probably erroneous under the Carmack amendment.

§ 3282. Failure to Furnish Cars—Contract.

(a) "The court instructs the jury that if you find by a preponderance of the evidence that L. L. Snoddey was in November, 1906, a station agent of the defendant at Zinc, Ark., on defendant's line of railway and in sole charge of the same, and of the business of the defendant at that point, engaged in receiving and shipping freight for said defendant, and that he entered into a contract as such agent with the plaintiff or another for him to furnish cars for the shipment of cattle and sheep at a specified time, the 10th of November, 1906, as set out in plaintiff's complaint, and that plaintiff in performance of said contract and acting under the same drove his cattle and sheep from home to Zinc, Ark., and there tendered them to said agent for shipment in accordance with said contract, and the defendant failed and refused on its part to comply with said contract by not furnishing said cars at the time agreed upon, you will find for the plaintiff such damages as you may find that he is entitled to."—Approved: St. Louis, I. M. & S. R. Co. v. Taylor, 87 Ark. 331, 112 S. W. 745.

(b) "You are instructed that if you believe from the evidence that plaintiffs contracted with defendant's agent at Ballinger that defendant would furnish cars in which to ship cattle at a time certain, and that said agent had authority to so contract, and you further believe that defendant failed to receive and ship said cattle at the time agreed upon, and that, by reason of the failure to receive and ship said cattle, plaintiffs were damaged, then plaintiffs are entitled to recover."—Approved: McCarty v. Gulf, C. & S. F. Ry. Co., 79 Tex. 33, 15 S. W. 164.

§ 3283. Written Notice of Claim for Damages.

"You are instructed that the railroad company has a right to limit its responsibility to the owners in the carrying of stock or goods by

special contract so long as the limitation does not affect its liability on account of negligence or misconduct. Defendant alleges that the mules were removed from the pens at their destination in Ada, Okl., prior to the time that written notice was given for any claim for damages because of said injuries. Should you find from the testimony that the mules were so removed, and, further, that the mules were injured so as to depreciate in value, and that the injury to the mules was caused by the carelessness and negligence of the agents and servants of the defendant company, and that the company had a good, fair, and reasonable opportunity to examine and inspect said mules, and to know their condition after they were removed without unreasonable inconvenience, you will then find that the service of the notice or application for damages was made in due time, and the company is not absolved from liability because of the fact that written notice was not given to the company before said mules were removed from the pen at their destination. The purpose of said notice is that the company might have a fair and reasonable opportunity for examination and inspection of the condition of live stock transported under its management before it shall be placed beyond its reach and beyond possibility of identification."—Approved: Missouri, K. & T. Ry. Co. v. Davis (Okl.), 104 Pac. 34.

(b) "The contract of shipping in this case contains the following clause: 'In order that any loss or damage to be claimed by the shipper may be fully and fairly investigated, and the fact and nature of said loss be preserved beyond dispute and by the best evidence, it is agreed as a condition precedent to his right to recover any damage for a loss or injury to his said stock during the transportation thereof, the shipper, or his agent in charge of said stock, will give notice in writing of his claim therefor to some officer of the company, or to the nearest station agent, before said stock shall have been removed from the place of destination above mentioned, or from the place of delivery of the same to the consignee.' In this connection I say to you that if you find from the evidence in this case that the cattle in question, at the time that they were unloaded, were then injured, or had been injured on the trip from Kansas City to Spivey by the negligence of the railroad company in transporting them, and that the plaintiff, Morris, had knowledge of such injuries, and, having said knowledge, he unloaded said cattle, and removed the same from the place of destination without giving the notice in writing provided for in the section of the contract above quoted, the removal of the said cattle in violation of the provisions of the said section of the said contract would be a complete bar to his right to recover in this action for any damages which he may have sustained by reason of the negligence of the company in the shipping of the said cattle; but this would not apply to damages which he may have sustained which he did not know of, and were not readily to be seen."—Approved: Atchison H. S. F. Ry. Co. v. Morris, 65 Kan. 532, 70 Pac. 651.

§ 3284. Necessity for Making Claim in Proper Time.

"The court instructs the jury that if they believe from the evidence that the plaintiffs in this case entered into a written contract with

the defendant to transport said stock in question (which was consigned to Media, Lancaster and Philadelphia, Pa.) to the terminus of its own road, and there to deliver it to the connecting carrier, and that it was agreed between the plaintiffs and said defendant in said contract in case of loss and damage, whereby any legal liability or responsibility should or might be incurred by the terms of said contract, that that company alone should be held responsible therefor in whose actual custody the live stock might be at the happening of such loss or damage, and if the jury further believe from the evidence that the northern terminal of the defendant's road is in H., Md., and that it safely and in a reasonable time delivered the said stock there to the C V. railroad, and that the damage, if any, occurred after it had been so delivered to the connecting carrier, then they will find for the defendant, unless they believe from the evidence that the plaintiffs or their agent did, within a reasonable time after said delay or damage, if any, make demands upon the said defendant for satisfactory proof that said delay or damage did not occur while the said stock was in its possession."—Approved: Norfolk & W. Ry. Co. v. Reeves, 97 Va. 284, 33 S. E. 606.

§ 3285. Inspection of Stock, Waiver of Notice of Claim.

"If when said mules were delivered in the stock pens of defendant at Waco, plaintiffs did not give to the defendant any notice of, or file with any station agent of the defendant any claim for, their damages, giving the amount thereof, as provided for in said contract before said animals were mingled with other animals, or removed from the pens of the defendant at their destination at Waco, then you will find for the defendant, unless you find for the plaintiffs on the further instruction hereinafter given you on this issue. But if you find from the evidence that after said stock had been placed in the pens of the defendant at Waco, that an authorized agent and servant of the defendant went with one of the plaintiffs to the stock pens and inspected the stock and saw their condition, and there learned of plaintiff's claims, and if you find that said agent took a memorandum in writing of plaintiffs' claim and loss, and authorized plaintiffs to remove said stock from the pens, then you are charged that you will find for the plaintiffs on this issue."—Approved: Missouri K. & T. Ry. Co. v. Hood (Tex. Civ. App.), 120 S. W. 236.

CHAPTER XCVII.

CONTRACTS.

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A. CONTRACTS.

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§ 3286. Construction for the Court.

"It is the duty of the court to construe the contract, and you are instructed that the legal meaning of the same is that the defendant, Corrington obligated himself to use his best judgment and all effort reasonably at his command to furnish such an amount of water as according to his judgment, under all the circumstances, was sufficient to make the crop."—Approved: Kelly v. Corrington (Tex. Civ. App.), 105 S. W. 1155 (not reported in state reports).

§ 3287. Words—Meaning of—Plain and Ordinary Sense.

"The same rules of law which govern the interpretation and construction of other written contracts and agreements on other subjects, are equally applicable to contracts of insurance, and must govern in their construction and interpretation. And the phrase above quoted from the policy, and the words it contains, are to be construed according to their sense and meaning, as collected from the words themselves and the entire phrase; and in arriving at their sense and meaning the words themselves are to be understood in their plain, ordinary, and popular sense. In other words, the best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it, for it may be safely assumed that such was the aspect in which the parties themselves to the contract viewed it. A result thus obtained is exactly what is obtained from the ordinary rule of intention; and the word 'lightning,' in this policy of insurance, must be understood in its plain, ordinary, and popular sense."—Approved:

Spensley, Adm'x, etc., v. Lancashire Ins. Co., 62 Wis. 443, 22 N. W. 740.

§ 3288. Ambiguous Meaning—How Determined.

"You are further instructed that all contracts, whether written or oral, that have been introduced in this case, are before you for your consideration and interpretation, together with the circumstances and surroundings of the parties, and it is for you to determine from all the circumstances and evidence of the case, the attitude and conduct of the parties, what was the real intention of the parties."—Approved: Carstens v. Earles, 26 Wash. 676, 67 Pac. 404.

§ 3289. Made by Offer and Acceptance.

(a) "The court instructs the jury that the written order numbered 22,917, given by defendant to the plaintiff, together with plaintiff's letter of June 10, 1903, constituted a contract whereby the defendant became obligated and bound to accept from plaintiff one thousand net tons of bar iron according to specifications to be furnished by defendant to plaintiff during the time between June 3, 1903, and December 31, 1903, and to be paid for by defendant at the rate of $1.70 for each one hundred pounds delivered at defendant's works, with extra prices known to the trade as half iron card extra, in addition to said price of $1.70, and defendant to make no charge for cutting said bar iron into lengths specified."—Approved: Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co., 210 Mo. 715, 109 S. W. 47.

(b) "If you believe from the evidence that after the Snead Architectural Iron Works made its bid to the defendant, E. P. Lynch, to do certain work in connection with the improvements at the Kenyon Building for a certain specified price, there was an acceptance of that offer by the defendant Lynch, then the law in this case is for the plaintiff, and you shall so find, unless the acceptance was made with the understanding between the parties that the work was to be done in a certain stipulated time, or that after that acceptance a contract between them should be put in writing and signed by the parties, or a bond should be executed by the Iron Works to Lynch. Now, if you believe any of those stipulations or terms were understood and agreed to between the parties, and the plaintiff, the Snead Architectural Iron Works, failed to do those things or any one of them, if it had agreed to it, then the law of this case is for the defendant, and you should so find."—Approved: Lynch v. Snead Architectural Iron Works, 132 Ky. 241, 116 S. W. 693

§ 3290. Written Contract Avoided by Parol Agreement.

"You are further instructed that where it has been once established that there has been a contract of agreement between two or more individuals, and the same is sought to be avoided by any parol agreement, that the written agreement is the best evidence, unless the parol agreement shall be established by a preponderance of the evidence satisfactory to your minds, and that in a case where there is a dispute respecting the change of a written agreement, and you are in doubt regarding the truth, that the burden of proof to establish the change from the

written agreement to the oral agreement is upon the person who sets up the oral agreement to defeat the written agreement."—Approved: Carstens v. Earles, 26 Wash. 676, 67 Pac. 404.

§ 3291. Meeting of Minds Necessary.

"The court instructs the jury that, in order for the parties to have made a contract for the insurance in controversy, the minds of the parties must have met, and both of them, or the agents of both of them, must have agreed that the defendant company should issue a policy on the Gant house for $1,000, payable to plaintiff, the same to expire at the same time the policy then held by plaintiff in the defendant company on the Wilson house expired, and in consideration of the unearned premium on said old policy; and, unless the jury should so believe, they should find for defendant."—Approved: American Central Ins. Co. v. Leake (Ky.), 104 S. W. 373 (not reported in state reports).

§ 3292. No Assent—Signing by Illiterate Person.

"Although the jury may believe from the evidence in the cause that the plaintiff did sign (by making his mark) the title bond read in evidence in this cause, and that by the terms of said bond the plaintiff was to convey to said A. McPike the real estate mentioned in said title bond by a good and sufficient warranty deed, yet if they believe from the evidence in the case that plaintiff was an illiterate man, not being able to read or write, and that he signed said bond not knowing the contents thereof, and without any fault or negligence on his part, and that said plaintiff, if he had been aware of the contents of said title bond, would not have signed the same; and that said A. McPike took said title bond from plaintiff knowing that plaintiff was not aware of the contents thereof, and if he had he would not have executed the same, then said title bond is void and of no effect, and the jury should find for the plaintiff."—Approved: Wright v. McPike, 70 Mo. 175.

§ 3293. Burden of Proof on Party Affirming Consent was Fraudulently Obtained.

"If you find that the agreement about which plaintiff testified was voluntarily entered into by the defendant then the burden of showing that her consent to the same was procured by misrepresentations or concealment of material facts amounting to a fraud is upon the defendant."—Approved: Weil v. Fineran, 78 Ark. 87, 93 S. W. 568.

§ 3294. Release—Mental Incapacity.

"In this case you are instructed that, as a defense, defendant pleads a settlement and release made with the plaintiff, and, in avoidance of such settlement and release, the plaintiff claims that, when such settlement was made and such release executed, he did not have the mental capacity to do such things, and you are instructed to return a verdict for the defendant unless you believe from the evidence that, at the time plaintiff made such settlement and executed such release, he was mentally incapable of understanding the nature and effect of such settlement and release."—Approved: Missouri, K. & T. Ry. Co. v. Craig, 44 Tex. Civ. App. 583, 98 S. W. 907.

§ 3295. Release—Executed Under Influence of Opiate not Valid.

"If you find from the evidence in this case that plaintiff, while a passenger on one of defendant's trains, was injured in a wreck of the train on which she was a passenger, and that the wreck was caused by the negligence of defendant, as explained in other instructions, that she was frightened, injured, and shocked to such an extent that opiates were administered to her, and by reason thereof her mental faculties were impaired to the extent of rendering her incapable of entering into a contract, as explained in other instructions, and, while in that condition, defendant's agents procured her signature to the release introduced in evidence, it is no defense in this action."—Approved: St. Louis, I. M. & S. Ry. Co. v. Sandidge, 81 Ark. 264, 99 S. W. 68.

§ 3296. Unless after being Free from such Influence the Consideration is Retained.

"Even if you should find from the evidence that plaintiff signed the release at a time when her faculties were so impaired that it would not be binding on her, still if you find from the evidence that after she got to Hot Springs and two or three days after she had taken any opiates, and while she was in possession of her faculties and capable of understanding what she was doing, she collected the money, and she knew at the time that said amount was in full satisfaction of all claims against the defendant, this is a ratification of the contract, and your verdict must be for the defendant."—Approved: St. Louis, I. M. & S. Ry. v. Sandidge, 81 Ark. 264, 99 S. W. 68.

§ 3297. Without Consideration—Nudum Pactum.

"You will determine from the evidence what the agreement of the parties was in relation to a return of the property to this county; and upon the questions here presented you are instructed that if it was a part of the agreement between the parties under which the note and mortgage in controversy were sold and transferred to the plaintiffs that the defendant was to see to it that the property should be returned to this county by a time named or understood between them, then it was his duty, under such agreement, to have the property returned by the time understood or agreed upon. But if you believe from the evidence that it was not a part of the agreement under which the note and mortgage were sold and transferred to the plaintiffs that the defendant was to see that the mortgaged property should be returned to the county, but that defendant, after the sale and transfer of the mortgage and note were made, and the bargain fully closed, agreed that he would see that the property should be returned to the county, then the agreement would be without consideration, and of no force or effect."—Approved: Harris v. Welch, 70 Iowa, 80, 29 N. W. 811.

§ 3298. Consideration—Forbearance from Action.

"You must also find, before the plaintiffs can recover, that after this lumber was sold and delivered the defendant Harness told the plaintiffs, in substance, that, if they would refrain from filing a lien against the property of the defendant, he would pay the same, and that the

plaintiffs, relying upon such promise upon the part of the defendant, failed to file such lien, and thereby lost its right to a lien upon the property of the defendant by reason of such delay—that is to say, you must find that the language which was used by the plaintiffs, or one of them, and the defendant, amount to such a contract, and that at the time of such conversation each of the parties understood that, if the plaintiffs delayed, and did not file a lien that in consideration of such delay, and a failure to file a lien, the defendant would become responsible to the plaintiffs for the amount of its account."—Approved: Harness v. McKee-Brown Lumber Co., 17 Okla. 624, 89 Pac. 1020.

§ 3299. Illegal Consideration—Agreement not to Prosecute.

(a) "You are instructed that, although you may believe from the evidence that Barton Bros. were not guilty of any offense for which they could be punished criminally either under the federal or state statutes, and that the Nevada County Bank and Beal-Doyle Dry Goods Company did not intend to prosecute them criminally, yet, if you find that C. C. Hamby, acting either as attorney or agent of the Nevada County Bank and Beal-Doyle Dry Goods Company, represented to W. P. Barton, Sr., that if he signed the obligations sued on his sons, Barton Bros., would not be prosecuted criminally, but if he did not sign the said obligations they would be criminally prosecuted, and you believe this was the consideration moving W. P. Barton, Sr., in the execution of said instruments, then in that event the said obligations are void, and your verdict should be for the defendant."—Approved: Beal-Doyle Dry Goods Co. v. Barton, 80 Ark. 326, 97 S. W. 58.

(b) "Any agreement that tends to stop or prevent a criminal prosecution, and thereby to interfere with the course of justice, is void; whether within the terms of the statute or not is against public policy and is void. And in this case, if the jury find from the evidence that the obligations sued on were signed under the agreement that the plaintiffs would not prosecute the maker's sons for the violation of the criminal statutes, state or federal, then and in that event their verdict should be for the defendant."—Approved: Beal-Doyle Dry Goods Co. v. Barton, 80 Ark. 326, 97 S. W. 58.

(c) "If, after considering all of the facts and circumstances shown by the evidence to have been contemplated by the parties at the time of making the agreement in question, you believe that the real purpose of the parties in making said contract was to provide thereby that plaintiff should not prosecute defendant criminally for the alleged act of seduction, and to provide means for secreting plaintiff, so that she could not be found and used as a witness against defendant by the state in a criminal prosecution for said act, then the contract is void, and constitutes no defense to this action. But if you believe from the evidence that the 'criminal claims' referred to in the agreement had reference to bastardy proceedings for the support of the child, referred to in the agreement, and that it was not the purpose of said agreement to prevent plaintiff from prosecuting defendant criminally, for the alleged act of seduction, or to hire her not to so prosecute defendant, nor to place her beyond the reach of the state, so that she could not be used

as a witness against defendant in a criminal prosecution, then said contract would not be illegal, and it would be a complete bar to plaintiff's recovery in the case, unless you find from the evidence that said contract was obtained through fraud, as before explained."—Approved: Baird v. Boehner, 77 Iowa, 622, 42 N. W. 454.

§ 3300. Agreement to Maintain Permanent and Only Depot.

(a) "If you believe, from the evidence, that plaintiffs entered into a contract with defendant by which they agreed to procure to be deeded to defendant the lots described, in consideration of defendant's building and maintaining thereon its permanent and only depots in the city of Des Moines, and that such agreement on the part of the defendant was the consideration upon which plaintiffs, and those whom they claim to represent, advanced their money, if they did advance any, then you are instructed that such contract was against public policy, and illegal, and plaintiffs cannot recover thereon, or for a breach thereof."—Approved: Williamson v. Chicago, Rock Island & Pacific R. Co., 53 Iowa, 126, 4 N. W. 870.

(b) "It appears from the testimony in the case given by the plaintiff himself that he made an arrangement or an agreement with the defendant whereby he was to be paid a commission for the sale of certain real estate which the defendant was offering for sale; that, pursuant to the agreement so made, he was to subscribe for certain lots at meetings of persons solicited to become buyers, and that the defendant was to take off his hands such subscriptions as he made, if he did not wish to retain them. It appears further that this arrangement, both with respect to the compensation he was to receive, and with respect to his colorable subscription for lots, was concealed from the buyers, or those who proposed to be buyers, and that he attended meetings of proposed buyers, and talked with persons thought likely to become buyers, with the view to induce them to become such, concealing from them both of said arrangements with the defendant. Such an arrangement is contrary to the policy of the law and to sound morals, in that it tends to deceive persons so dealt with, by inducing them to rely upon advice which they supposed to be disinterested, though in fact interested, advice. The law will not permit him to recover the compensation agreed upon for the fulfillment of such a contract, and your verdict must therefore be for the defendant."—Approved: McDonnell v. Rigney, 108 Mich. 276, 66 N. W. 52.

§ 3301. Release upon Executed Contract—Right to Show Immoral Purpose.

"If Samuel Forker has not been paid, you will then inquire whether he executed the release set up by the defendant. If you find from the evidence that he did execute the release, and that at the time he so executed it he knew the purpose for which it was executed to be such as set forth in the reply of the plaintiff, viz: to corruptly and wrongfully influence the voters of Tama county, then he is particeps criminis to an immoral and unlawful act, and the plaintiff cannot recover. The services having been fully performed and the release executed, prior to the

assignment to plaintiff, and prior to the commencement of this action, neither law nor good morals will permit the parties to invalidate a release which imports a consideration by showing the moral turpitude of the parties signing it."—Approved: Harvey v. Tama County, 53 Iowa, 228, 5 N. W. 130.

§ 3302. Contract Made on Sunday.

"If an agreement was made between the plaintiff and Jenckes, representing the defendant, and assented to by both parties on Sunday, and the services, if any, later rendered by the plaintiff were all rendered under and in pursuance of this agreement made and assented to by both parties on Sunday, and there was no later agreement made or assented to by either party, the plaintiff cannot recover."—Approved: Shepley v. Henry Siegel Co., 203 Mass. 43, 88 N. E. 1095.

(b) "The law prohibits the transaction of such business or dealings as this on Sunday, consequently Brazee never acquired any title or ownership to the horse by means of that Sunday transaction, but the horse was then and has always since remained Bryant's property the same as if that Sunday bargain had never been made. This Sunday transaction left these parties standing towards each other the same as they would if Brazee, wishing to purchase the horse, had deposited the price, $160, with Bryant, who at the same time let Brazee take the horse on trial, to keep and use for such reasonable length of time as he might desire, to see if it was such a horse as he wished to purchase, but reserving to Bryant the right at any time to offer back the money and call for his horse, and reserving the like right to Brazee to return the horse and demand his money whenever he saw fit."—Approved: Brazee v. Bryant, 50 Mich. 136, 15 N. W. 49.

§ 3303. Party Signing Writing without Due Attention.

"If the plaintiff signed such paper knowing its contents, or having the means at hand of making himself acquainted therewith which he declined or neglected to use, then he is bound by its stipulations, and can only recover the amount of his bill for goods less the amount due under the written contract for lightning-rods.

"On the other hand, if you find from the testimony in the case that the plaintiff, being prevented by the temporary loss of his spectacles from reading said paper, applied to the agent of the defendants to read it for him, and thereupon said agent pretended to read the same, but did not read the same correctly, leaving out the prices therein contained, and concealed from the plaintiff the fact that a contract as to price was incorporated in said paper, and the contract as made was for said lightning-rods for $100, then the plaintiff is entitled to recover the full amount of his bill, less only the said sum of $100."—Approved: Cole Bros. & Hart v. Williams, 12 Neb. 440, 11 N. W. 875.

§ 3304. Custom Entering into Contract.

"The court instructs the jury that, before they can find for defendant on account of the custom referred to in instruction No. 4, they must believe from the evidence that such custom was reasonable and of such

age, such uniformity of observance at the point of delivery of the logs, such certainty and fixedness of character, and of such notoriety, that a jury would feel clear in saying that such custom was known to the plaintiff at the time of the making of the contract."—Approved: Thomas v. Charles (Ky.), 119 S. W. 752.

§ 3305. Modification of Written, by Subsequent Oral, Agreement.

(a) "If the jury believe from the evidence that after the making of the written contract introduced in evidence, and after placing the stock and assignment in escrow, the plaintiff and defendant by parol agreement modified the same as to the time of performance by mutual agreement between each other, and that the plaintiff performed said contract as so modified, then both parties should be bound by the contract as thus modified."—Approved: Pounds v. Coburn, 210 Mo. 115, 107 S. W. 1080.

(b) "Unless you find and believe from the evidence that about December 24, 1901, the defendant had failed to make some payment called for by the option contract marked 'Exhibit B,' and the plaintiff and defendant then agreed in substance that the plaintiff would leave the papers in escrow and waive his right to withdraw same, and that in consideration thereof the defendant would pay the sum called for in 'Exhibit B,' instead of having an option to make such payment as provided in 'Exhibit B,' your verdict will be for the defendant. The burden of proof is on plaintiff to show by the greater weight or preponderance of the evidence that said contract, 'Exhibit B,' was so changed by mutual agreement of the parties thereto."—Approved: Pounds v. Coburn, 210 Mo. 115, 107 S. W. 1080.

§ 3306. Intent from Contracts Partly Oral and Partly Written may be Jury Question.

"You are further instructed that all contracts, whether written or oral, that have been introduced in this case are before you for your consideration and interpretation, together with the circumstances and surroundings of the parties, and it is for you to determine from all the circumstances and evidence of the case, the attitude and conduct of the parties, what was the real intention of the parties."—Approved: Carstens v. Searles, 26 Wash. 676, 692, 67 Pac. 404.

§ 3307. Novation—Facts Constituting.

"If you find that about the time Harriet J. Comstock died, in about May, 1890, Alfred M. and William B. Comstock, and all her other heirs, met there, at her home, and while there agreed that Alfred's business should be closed out at Port Huron and he should go on the farm, and take care of his aged father, and that it was then understood and known by the heirs that his mother held a chattel mortgage on Alfred's stock, and that Alfred owed Grieb, this plaintiff, and that they then understood and agreed that, in closing out Alfred's business, that Grieb's debt would have to be paid; and if you further find that, in pursuance of that agreement, Alfred informed Grieb of their understanding, and shortly afterwards William B. Comstock, this defendant, came to Port

Huron, and took possession of the stock, and while here, in the presence of Alfred and Grieb, agreed and promised to pay Grieb what Alfred owed him, if he realized it out of the stock in cash, and, if not, he would send it to Grieb when he got home, and that it was then and there understood that Alfred was to be released, and Grieb did in fact release Alfred, and afterwards looked to the defendant, William B. Comstock, solely, for the payment,—then I say to you that that state of facts would be sufficient to make the arrangement a novation or substitution of debtors, and the plaintiff would be entitled to recover, and, unless you find that some such state of facts did exist, you must find for the defendant. On no other theory can the plaintiff recover."—Approved: Grieb v. Comstock, 99 Mich. 520, 58 N. W. 497.

§ 3308. Reasonable Time for Performance.

"The question of what was a reasonable time in which to deliver said lumber under said contract is a question for you to determine, and in arriving at your conclusion upon this proposition you will take into consideration the question of whether or not the plaintiff told the defendant what use he intended to make of said lumber, the conduct of the parties, and the other facts and circumstances connected with the case."—Approved: Felsberg v. Moore, 84 Ark. 399, 106 S. W. 197.

§ 3309. Sale Conditioned on Weather Permitting Delivery.

"If you believe from the evidence that the defendant on Friday, the day of———, bargained to the plaintiff his twelve fat hogs at ——— per hundred weight, to be delivered to the plaintiffs at ——— on Saturday, the following day, and, upon delivery, to be paid for by the plaintiffs, and that said agreement on the part of said defendant was upon condition that the weather was good on said Saturday, and that if the weather was not good and the hogs remained in the pen until Monday, the hogs were to remain the property of said defendant; and if the jury find from the evidence that said Saturday was a very stormy day and one not reasonably fit for removing said hogs from the residence of said defendant, where said hogs then were, to said ———, then the jury should find for the defendant."—Approved: Kitzinger v. Sanborn, 70 Ill. 146, 148.

§ 3311. Substantial Performance—Allowance for Minor Defects.

"If you find from the evidence that the plaintiff has substantially performed its contract in this regard, you should find for the plaintiff on this issue. And in passing upon this issue you are instructed that if you believe the plaintiff in good faith substantially performed the terms of its contract, but that there are some slight omissions, or defects which are not so essential as to defeat the object of the parties, but could be readily remedied, then the plaintiff can recover the contract price less the damages occasioned by the omission or defect. Such damages are what it would have cost the defendant to remove the defect or omission, and thus give to the defendant what his contract called for."—Approved: Nebraska Plumbing Supply Co. v. Payne, 84 Neb. 390, 121 N. W. 243.

§ 3312. Subscription Conditioned on Performance of Certain Work.

"The court instructs the jury, that where money is promised to be paid upon a subscription paper, and the promise is based upon the fulfillment of certain conditions, or the performance of certain work, or the attainment of certain objects, set forth in the instrument subscribed, then the performance of the conditions, or the labor, or the attainment of the object, is sufficient consideration to support the promise to pay."—Approved: McCabe v. O'Connor, 69 Iowa, 134.

§ 3313. When Date of Performance Accrues.

"The court instructs the jury that the plaintiff in this cause cannot recover unless the consideration of the contract shown in evidence wholly failed. If the jury believe from the evidence that the defendant agreed to sell to the plaintiff lots Nos. 6 and 7, in block 1, in the declaration mentioned, to be paid for in installments, and that deed to the property was not to be delivered until all of the installments are paid, then the defendant has until the last installment falls due to restore said lots to substantially their original condition, if the same can be so restored and, if from the evidence the jury believe that said lots can be so restored, the plaintiff cannot recover."—Approved: Riverside Residence Co., Inc., v. Husted, 109 Va. 688, 64 S. E. 958.

§ 3314. Time of Performance as Implied from Previous Dealings.

"If, by reason or pursuant to a uniform practice, extending through years, it was mutually understood by the defendant company and the plaintiff that the plaintiff was to have until 'pay day' of the succeeding month in which to pay for goods purchased during the month preceding, then he was entitled to such time, though it was never expressly and in so many words agreed between the parties; in other words, an agreement for time may be implied from the acts of the parties, the circumstances and conditions of their business relations, though express words may not have been employed to indicate their agreement."—Approved: Hayes v. Union Mercantile Company, 27 Mont. 264, 70 Pac. 975.

§ 3315. Acceptance of Performance without Opportunity for Inspection.

"The court instructs the jury that if they should believe from the evidence that the defendant accepted the work as done by the plaintiffs, without having an opportunity of inspection and made no complaint at the time, yet the defendant may show the actual condition or the defects of plaintiff's machine, and carelessness of the plaintiffs; and if the jury are satisfied, from the evidence, that the defendant was injured or damaged, and such damage was the result of defective machinery, or a careless manner of working such machine, the jury may deduct the amount of such damage from the value of the threshing, as fixed by the parties."—Approved: Garfield v. Huls, 54 Ill. 428.

§ 3316. Implied Agreement to Pay for Use and Occupation.

"In this case there is no proof of an express contract on the part of this defendant to pay the plaintiff any rent, but I instruct you that if you

find from the evidence that the defendant, after his purchase from Ward with full knowledge of all the facts that this was plaintiff's land, and that Ward up to the time of the sale to defendant occupied this land under an agreement with the plaintiff whereby he paid a weekly rental therefor, took possession of the premises at the time of taking possession of the elevator, and continued to use and occupy them the same as Ward did while he owned the elevator, and after he had been informed by the plaintiff that if he did continue to occupy them he would be required to pay the same rental as Ward had paid, a contract would be implied from such occupation and possession on the part of the defendant to pay the plaintiff the same rental as he was receiving at the time the defendant took possession."—Approved: Thompson v. Sanborn, 52 Mich. 141, 17 N. W. 730.

§ 3317. Assumpsit Implied from Request to Perform and Performance.

"You are instructed that if one person requests another to perform certain services for him, and the person so called upon performs such services in reasonable compliance with such request, and no amount of compensation is agreed upon between the parties to be paid and received for the performance of such services, then the person performing such services in reasonable compliance with the request made of him is entitled to recover from the person for whom he performs such services the reasonable value of the services so performed by him."—Approved: Buckler v. Kneezell (Tex. Civ. App.), 91 S. W. 367 (not reported in state reports).

§ 3318. Money Paid on Request.

(a) "If you find from the evidence that the plaintiff paid the money as alleged in plaintiff's petition, and that said money was so paid at the request of the defendant, then you are instructed that the law implies a promise on the part of the defendant to repay the same to plaintiff; and then, in that case, if you find the same has not been repaid, you should find for the plaintiff for the sum so paid, with interest at 7 per cent. from date of such payment."—Approved: Grand Island Mercantile Co. v. McMeans, 60 Neb. 373, 83 N. W. 172.

(b) "The jury are instructed that if they find from the evidence, by a preponderance thereof, that the plaintiffs herein made advances to laborers in the employ of the defendant, at the request of the defendant, then your verdict will be for the plaintiffs for amounts so advanced, together with interest thereon at 6 per cent. per annum from the date of such advances."—Approved: Red River Levee Dist. No. 1 v. Russell, 88 Ark. 164, 114 S. W. 213.

§ 3319. When Time is of Essence Delay may be Waived by Conduct.

"Under this contract the plaintiff was required to have the work completed on the 13th day of June, 1884. He did not. Then there was an obligation upon the defendant; that obligation was this: it was then the duty of the defendant to stop the plaintiff's work, or, if he allowed him to go on and work without protest he must pay him

for the work that he did; if he wished to insist upon a forfeiture, if he wished to insist upon the strict terms of the contract, it was then his duty so to insist."—Approved: Dunn v. Steubing, 120 N. Y. 232, 235, 30 N. Y. St. Rep. 653.

§ 3320. Work and Labor Performed at Defendant's Request.

(a) "It is admitted by the defendants in their answer that the plaintiff furnished the material and performed labor on tin work, for painting and pointing the front of the house for $279.95, and for shoring the front of the house $110, and the court now instructs you to find for the plaintiff the said sum of $290. And the court further instructs you that if you shall believe from the evidence in this case that under the direction of the defendants, or at the special instance and request of the defendants, the plaintiff furnished the material and performed the labor in shoring up the joists of the house, then you will find for the plaintiff such additional sum, not exceeding $250, as you may believe from the evidence in this case would be a fair and reasonable compensation for furnishing said material and performing said labor.

"But, unless you shall believe from the evidence that plaintiff furnished the material and performed the labor in shoring up said joists under the direction of the defendants, or at their special instance and request, then the law is for the defendants as to the said $250, and you will so find."—Approved: Weikel v. Weil, 33 Ky. Law Rep. 958, 111 S. W. 705.

(b) "If you believe from the evidence, gentlemen of the jury, that the plaintiff did the work for Tarrant county as alleged in his petition, and expended the money mentioned in his petition in and about doing said work, and that the same was reasonably and necessarily expended, and that he did such work at the request of the commissioners' court of said county, or at the request of the county judge of Tarrant county, acting for said court, then you are charged to return verdict for the plaintiff for what such work was reasonably worth, and the amount of said money so expended, unless you find from the evidence that neither plaintiff nor defendant, Tarrant county, through the commissioners' court, expected, at the time plaintiff began work, that plaintiff would be paid for the same."—Approved: Browning v. Tarrant County, 50 Tex. Civ. App. 619, 111 S. W. 748.

(c) "If the jury believe, from the evidence, that the building represented by the first drawings offered in evidence was never erected, and that the work on the building under said first drawings was abandoned, and that the defendant directed and engaged the plaintiff to draw other and different plans, specifications, and details for a building larger than represented by the first plans, and that the plaintiff, in accordance with such direction and engagement, did draw other and different plans, specifications, and details not contemplated in the written contract, and that no price or sum was mentioned as compensation to which plaintiff should be entitled, then you are instructed that the plaintiff would be entitled to the customary, usual, and reasonable fees charged by architects in this community for such work."—Approved: Atchison v. McKinnie, 233 Ill. 106, 84 N. E. 208.

(d) "If the jury find from the evidence that the defendant employed the plaintiff to do the work and labor, and furnish the materials necessary for the painting of the house of the defendant mentioned in evidence, and that the plaintiff did said work and furnished said materials, then the plaintiff is entitled to recover in this case such sum as you may find from the evidence to be the fair and reasonable value of said work and materials. But, if you further find from the evidence that the plaintiff and the defendant entered into a contract for the doing of said work, then plaintiff is not entitled to recover in this case more than the contract price agreed upon between them. And, if you find and believe from the evidence that plaintiff did not do said work according to said contract, but omitted any portion thereof, or that said work was not done in a good and workman like manner, then in fixing the amount of your verdict, in the case, you should deduct from said contract price such sum as you may find from the evidence it would cost the defendant to complete the said work in accordance with the terms of such contract between the parties; and upon whatever sum you may find for the plaintiff you should add interest at the rate of six per cent. per annum, from the 5th day of November, 1888."—Approved: J. Fleischmann v. Miller, 38 Mo. App. 177.

§ 3321. Reasonable Value of Services Performed on Request.

"The jury are instructed that if they find from the evidence in this case, by a preponderance thereof, that board, rodman, axman, teams and hacks, and labor for cutting levee right of way were furnished defendant by plaintiffs, and this at defendant's request, then, as to these items of account, your verdict will be for the plaintiffs in the amount such services and accommodations were then reasonably worth, less any amount or amounts they may have been paid by defendant as credit thereon."—Approved: Red River Levee Dist. No. 1 v. Russell, 88 Ark. 164, 114 S. W. 213.

§ 3322. Necessaries to and Carrying for Insane Person.

"Gentlemen of the jury, the court instructs you that, where services are rendered and received, a contract of hiring, or obligation to pay, will be presumed, but a presumption may arise from the relationship of the parties, that the service rendered are acts of gratutious kindness, and in this case it is a question for you, taking into consideration all the circumstances, including the nature and degree of the relationship of the parties, and their circumstances in life, to determine whether there was any implied contract for compensation or not. Now, if you find from the evidence in this cause, that plaintiff rendered services to the mother in taking care of her, and waiting on her, and that she intended while rendering such services to charge the mother for the same, and that her mother was insane at the time, and that such services were necessary for the comfort and well being of her mother, then you will find the issues for the plaintiff, and allow her on your verdict such sum as you may believe, from the evidence in the cause she is entitled to, not exceeding the sum of one thousand dollars."—Approved: Reando v. Mosplay, 90 Mo. 251, 2 S. W. 405.

§ 3323. Charging Member of Family for Board and Services.

(a) "If you find from the evidence that the deceased was the mother of plaintiff's wife, and that the plaintiff furnished and provided support for deceased as one of his own family during the period claimed in the statement of plaintiff's claim, and that such support was provided without any agreement or mutual understanding between plaintiff and deceased that the same should be paid for until within a few weeks prior to the death of deceased, and that then plaintiff told deceased that he should charge her a certain sum per week, beginning with the early part of the year 1868, and that the deceased then promised to pay therefor, such promise would be void for want of consideration, except as to such services and support as were provided after such promise; and the plaintiff cannot recover for the services and support provided before such promise. But if you find that there existed a prior understanding between the parties that one should receive compensation and the other pay for support, then the subsequent statement or understanding as to the amount to be charged from a particular time would not preclude the right to recover upon a former understanding between the parties."—Approved: Van Sandt v. Cramer, Adm'r, etc., 60 Iowa, 424, 15 N. W. 259.

(b) "If the jury find from the evidence that the defendant has lived in the family of the plaintiff and has had her boarding and washing done and furnished by the plaintiff and his family, and that there was no contract or agreement between the plaintiff and defendant, and as to how much defendant should pay plaintiff for said boarding and washing, then I charge you that the law is, that there was an implied contract that the defendant was to pay plaintiff what said boarding and washing were reasonably worth for the time said defendant so boarded at plaintiff's house; and you will so find for plaintiff such reasonable compensation, not to exceed the amount claimed in plaintiff's petition. The rule above applies, unless the jury find from the evidence that defendant lived with her son as a part of his family."—Approved: Greenwell v. Greenwell, 28 Kan. 675.

(c) "If the jury find from the evidence that the defendant is the mother of the plaintiff, and that, for the time mentioned in plaintiff's petition, the defendant lived with the plaintiff as one of his family, assisting in performing the ordinary duties of the household, and there was no express contract that the defendant was to pay for her board and washing, and no understanding by either party that such board and washing were to be paid for, then I charge that, as between mother and son, there is no implied promise to pay for such board and washing, and the plaintiff cannot recover in this case."—Approved: Greenwell v. Greenwell, 28 Kan. 675.

(d) "Usually when one person performs services or labor for another, which is of value, the law implies a promise or legal obligation on the part of the person receiving the service to pay what such services are reasonably worth. Yet this is not always the case. When, from the circumstances and situation of the parties, it could not reasonably be expected that either party could suppose or apprehend there was any-

thing to be paid or received, and did not so understand at the time, then the law does not imply any legal obligation to pay. . . . If you find from the evidence that defendant, at the request of a friend of the plaintiff, when the plaintiff was a child of five or six years old, took him into his family and nurtured and cared for him when he was too young to provide for himself, and he remained there as a member of the family of defendant, and, when he became of sufficient age, performed service and labor for defendant, and continued to receive his board and clothes, and continued to make the defendant's house his home, then, for the time being, the legal obligations existing between the parties were the same that they would be between parent and child, and the law will imply no legal obligation on the part of defendant to pay him for his services, nor could defendant maintain any action against the plaintiff for his board or clothes, or care in rearing him and providing for him a home."—Approved: Boyer v. Riley, 41 Iowa, 14.

(e) "If the plaintiff, after she arrived at full age, continued to live with her father, as she had done previously, with no new duties or responsibilities assumed in the family by her, and was provided with necessaries, etc., as one of the family, she would not be entitled to recover for such services, unless there was an express understanding between her and her father, before these services were rendered, that she should receive such compensation; and if the note was given for such past services, and there was no such understanding existing between them, she cannot recover. But if the note was given for such past services, the fact that it was given, will raise a presumption that there had been a previous understanding or agreement between the plaintiff and her father that such compensation was to be made, and unless such presumption is overcome by evidence that no such understanding existed, the plaintiff will be entitled to recover."—Approved: Pitt's Admr. v. Pitts, 21 Ind. 314.

§ 3324. Ordinary Domestic Services by Child for Parent.

"The jury are instructed that in case of a child rendering domestic services to a parent there can be no recovery unless there is a contract, either express or implied, to pay for such services, and the burden is on the plaintiff in this case to either prove an express contract for the services, or a state of facts from which such a contract is necessarily implied. (Refused. Amended so as to read 'ordinary' domestic services, and given as amended.)"—Approved: Williams v. Walden, 82 Ark. 136, 100 S. W. 898.

§ 3325. Services between Relatives upon Prior Understanding.

"It is not necessary in this class of cases to show that at a given time before the rendition of services an oral contract was entered into on a particular day, on the one part, to work and perform services, in order to authorize a recovery; but you must be satisfied, by a fair preponderance of evidence, that it was distinctly understood by both these parties that the claimant was to work for his uncle, Mr. Little, and that Mr. Little was to pay for the work performed or done: that is, you must

find that whatever services, if any, were performed by claimant were performed by him in the expectation that the services were to be paid for, and that, on the other hand, Mr. Little, the deceased, received the benefit of such services expecting to pay for them."—Approved: Hooker v. Van Slambrook, 127 Mich. 61, 86 N. W. 402.

§ 3326. Money Obtained Through Undue Influence—Obligation to Repay.

"The court instructs the jury that if they believe from the evidence that the defendant, Robert Riley, obtained from Joseph Riley about April, 1903, the sum of $2,000 by the exercise of undue influence upon him on the part of the defendant, Robert Riley, or others acting for him and in his behalf at his instance, and that the defendant received, accepted and retained said sum, you will find for the plaintiff, John W. Collins, administrator of the estate of Joseph Riley, a sum not exceeding $2,000, with interest thereon from January 1, 1904, the amount claimed in the petition."—Approved: Riley's Adm'r v. Riley (Ky.), 116 S. W. 267.

§ 3327. Accepting and Using Plans and Specifications Prepared by Another.

"But, if the plans and specifications were completed and presented to the defendant to act upon, it became his duty either to accept or reject the plans and specifications at that time, and, if he entered upon the building upon the property with the plans and specifications substantially before him, then I do not think that he can afterwards be heard to say that after having used them that he did not like them."—Approved: Bennett v. Greenwood, 151 Mich. 274, 114 N. W. 1019.

§ 3328. Extra Work by Public Officer—No Implied Assumpsit.

"If, at the time the plaintiff performed the services in connection with the making of the settlements between the auditor and the treasurer, he did so under the belief, mistaken or otherwise, that the performance thereof was a part of his duties as county auditor, and the performance thereof was permitted and accepted by the defendant under the belief, mistaken or otherwise, that the performance of such services was a part of the duties of county auditor, the plaintiff cannot recover in this action for the value of such services."—Approved: Keogh v. Wendelschafer, 73 Minn. 352, 76 N. W. 46.

§ 3329. Performance of What is Fairly Implied by a Contract.

"If you find that a steam boiler of the fire-box pattern, eleven feet and a half in diameter by fourteen feet in length, could have been constructed so as to have been reasonably suitable for the purpose for which it was purchased, then it was the duty of the plaintiff to construct and place in said steamship, Simon Langell, a boiler reasonably suitable for the purpose for which it was constructed, to wit, for the purpose of supplying a suitable quantity of steam to the engine of said steamship, when said steamship was navigating the Great Lakes."—Approved: Detroit Shipbuilding Co. v. Comstock, 144 Mich. 516, 108 N. W. 286.

§ 3330. Proof by Plaintiff of Readiness to Perform.

"You observe that the defendants do not deny but that the plaintiff did sell the number of brick claimed, and at the price claimed, to the defendant .....; hence the plaintiff will be entitled to recover therefor from him, unless ..... has proven his defense of payment."—Approved: Fleming v. Stearns, 79 Iowa, 256, 44 N. W. 376.

§ 3331. Waiver of Notice Provided by Contract to be Given.

"You are instructed that the defendant may waive the right to insist upon one day's notice required by the contract, and by 'waiver' is meant some action of the defendant, its proper agents, servants, or employes, by which it evinces an intention not to reply, or insist, on this clause in the contract, or an agreement expressed or implied not to rely upon the same."—Approved: St. Louis Southwestern R. Co. v. Grayson & Seitz, 89 Ark. 154, 115 S. W. 933.

§ 3332. Improper Performance Knowingly Accepted without Objection—Estoppel.

(a) "If the jury find from a preponderance of the evidence that plaintiff's inspector fraudulently or grossly improperly culled staves tendered under the contract, and if you should further find from the evidence that defendants knew of such fraudulent or improper culling, and that notwithstanding such knowledge they failed to notify the plaintiff or some agent having authority to act that they expected to insist upon such improper culling as a breach of the contract, and that, after said alleged breaches occurred, defendants continued to ship staves to the plaintiff and induced plaintiff to believe that they would continue to ship staves under the contract, and thereby the plaintiff was induced to perform its part of the contract and to rely on performance by defendants, then you are instructed that this would be a waiver on the part of the defendants of any improper culling that you may find, if any, on the part of plaintiff's inspector, and your verdict should be for the plaintiff."—Approved: Lanier & Co. v. Little Rock Cooperage Co., 88 Ark. 557, 115 S. W. 401.

(b) "The court instructs the jury that the defendants owed the plaintiff the duty of being candid with it, and if in fact the plaintiff's inspector, at any time, improperly culled the staves tendered by the defendants, and the defendants intended to insist upon such improper culling as a breach of contract, and to take advantage of such breach, it was the duty of the defendants to have notified some officer of plaintiff company who had power to act upon such complaint, and, if they failed to make such notification, they cannot do so now."—Approved: Lanier & Co. v. Little Rock Cooperage Co., 88 Ark. 557, 115 S. W. 401.

§ 3333. Sufficiency of Performance—Best Judgment of One Party.

"If you believe that the defendant, Corrington, in good faith, exercised his best judgment as to the amount of water necessary to make the crop, and as to when it should be furnished and applied, and that he used reasonable efforts under the circumstances to furnish and apply the same, or if you believe that he did furnish and apply such

an amount of water as he, in good faith, judged was necessary, or that if he failed so to do that such failure resulted from accidents to his wells and machinery, which he could not prevent, or over which he had no control, then in either event named in this paragraph, even though you may believe Corrington's judgment was at fault or was incorrect, you will find for defendant, and inquire no further.

"On the other hand, if you believe that the defendant did not perform his contract and exercise his best judgment as to the amount of water necessary, and that he did not use reasonable efforts to furnish and apply the same at the proper time, or believe he did not keep and perform his contract as to the inside levees, and believe that thereby there was not as much rice produced as there would have been except for defendant's failure, and that by reason of such failure of the defendant plaintiff suffered loss, you will find your verdict in plaintiff's favor, and assess the damages according to instructions hereinafter given you in paragraph 11."—Approved: Kelly v. Corrington (Tex. Civ. App.), 105 S. W. 1155 (not reported in state reports).

§ 3334. Breach Implied from Conduct or Acts.

"It is not only an absolute refusal in words to perform a contract, but also manifestations by words or acts of an intention not to perform it according to its terms that will authorize the other party to treat it as a repudiation and bring his action, and if you find from the evidence that the Spencer Medicine Company manifested its intention by words or acts not to perform the contract in question according to its terms, then Hall had a right to treat it as at an end, and is entitled to damages, if any be shown by the evidence to have accrued to him thereby, providing he himself had performed his part of the contract."—Approved: Spencer Medicine Co. v. Hall, 78 Ark. 326, 93 S. W. 985.

§ 3335. Breach by Revocation of Authority to Act.

"If you find from a preponderance of the evidence that defendant did enter into a contract with plaintiff to pay him the sums of money expended by him in finding her, and a $100 fee for his services in that connection, and the further sum of twenty per cent. of any share of her mother's estate which he might recover for her, and if you further find that said contract was made in good faith, and not procured by fraud, misrepresentation, or concealment of material facts on the part of the plaintiff, and that afterwards the defendant revoked the power of attorney executed by her to plaintiff, then it is for you to say whether such revocation was intended by her and understood by him as dismissing him from the case, and denying him the right to proceed and carry out his part of the contract; if you should find that it was so intended and so understood by both parties, then you should find for plaintiff such sum in damages as you believe he is entitled to recover under the other instructions given herein."—Approved: Weil v. Fineran, 78 Ark. 87, 93 S. W. 568.

§ 3336. Disputed Terms of Oral Contract—Question for Jury.

"It is admitted by both parties that an agreement was entered into between them, whereby plaintiff was to furnish certain laborers and material in the matter of certain plumbing work done on the Pierson

hotel building. It is for the jury to determine what the terms of this contract are, and, in doing so, you will take into consideration all the facts and circumstances in evidence in the case, and determine what was in the minds of the parties at the time, and, in making your estimates of the amounts due (if any) under the contract for labor and material furnished, you will be governed by what the parties agreed upon, whether the same be the reasonable value of labor and material or otherwise. If, therefore, you believe from the preponderance of the evidence that Richard Keays, pursuant to the contract alleged, furnished to the defendant Mrs. L. M. Bell any laborers and material, you will find for the plaintiff such sum of money (if any) as you may determine from all the evidence to be due therefor under the terms of the agreement, less all just offsets, credits, etc., together with interest at six per cent. from January 1st after the amount became due. If you find that nothing is due, your verdict will be for the defendant."—Approved: Bell v. Keays (Tex. Civ. App.), 100 S. W. 813 (not reported in state reports).

B. Building Contracts.

§ 3337. Express Contract and Recovery upon the Common Counts—Burden of Proof—Extra Work.
3338. Reliance on Plans and Specifications—Misrepresentation—Increased cost.
3339. Departure from Plans and Specifications by Agreement.
3340. Substantial Compliance with Plans and Specifications as a Whole.
3341. Time of Completion Postponed by Act of Defendant.
3342. Judgment of Engineer Made Test of Performance—Must be in Good Faith.
3343. Architect's Certificate—Bad Faith.
3344. Architect's Agreement to Prepare Plans for Structure to Cost within Fixed Sum.
3345. Withholding Architect's Certificate after Acceptance of Performance.
3346. Accepting Plans of Architect though not According to Order.
3347. Completion of Part of Building Postponed at Request of Defendant.
3348. Deviations from Contract at Defendant's Request.
3349. Improper Performance Causing Incomplete Structure to Fall—Reconstruction.
3350. Defective Material Causing Collapse of Building—Damages.
3351. Defective Work—Right to Counterclaim.
3352. Right to Recover for Extra Work and Materials.

§ 3337. Express Contract and Recovery upon the Common Counts—Burden of Proof—Extra Work.

"The court charges the jury that if the evidence reasonably satisfies them that there was an express contract between plaintiff and defend-

ant for the construction of the house, then he is not entitled to recover under the common counts for money due on account, and for merchandise, goods and chattels sold, and for work and labor done, or upon any one of them, except what may be due, if anything, for the extra work done and extra material furnished by him, unless the evidence also reasonably satisfies the jury that he complied with the terms of the contract, or that defendant accepted the house as constructed. The burden of proving one of these two facts rests upon the plaintiff, and unless he has done so to the reasonable satisfaction of the jury, they must find for the defendant, except as to plaintiff's claim for extra work done and extra material furnished." "The court charges the jury that, except as to his claim for extra work done and extra material furnished, plaintiff is not entitled to recover upon any one of the common counts for money due on account, and for merchandise, goods and chattels sold, and for work and labor done, unless the evidence reasonably satisfies their minds, either that he complied with the undertakings of the contract on his part, or that defendant accepted the house as constructed. The burden of proving one of these facts to the reasonable satisfaction of the jury is upon plaintiff. If the evidence does not so satisfy their minds that he complied with his part of the contract, but they find that defendant nevertheless accepted the house as constructed, then he is entitled to recover for work done and for the material furnished in the construction of the house, outside such extra work and extra material, only their actual value, less payments thereon made him, and interest on such excess from the time the same became due."—Approved: Aarnes v. Windham, 137 Ala. 531, 34 South. 816.

§ 3338. Reliance on Plans and Specifications—Misrepresentations—Increased Cost.

"The material question as to counts 1 and 2 of the petition, which you are called on to consider in relation to said contract, is the character of the material which was necessary to be excavated in order to reach the rock upon which the foundation was to be laid, as shown by the contract, and as actually found during the work. You are instructed that where parties have entered into a contract with reference to a certain state of fact within the knowledge of one party and upon which the other entirely relied, and the one having the knowledge represented and stated in said contract certain facts to be true, and you find the same were material facts, then and in that case the party so stating and representing such material facts shall be bound to them. And in this case if you find that the plaintiff bid upon the work named in said contract with reference to the plans and specifications, and, relying upon said plans and specifications to be true and correct, he made his bid and entered into the contract referred to, and you further find that the representations on said plans were not true and correct, then you will further inquire and determine from the evidence whether, by reason of such difference, the work of making the excavations for abutments and piers were thereby rendered more expensive. And, if you find that it was, you will then proceed to determine from the evidence the difference between what it would have cost to do said work,

if the conditions had been as represented by the contract, and the reasonable and necessary cost of doing the work under the conditions that you find existed, as shown by the evidence. In ascertaining such difference, you will take into consideration additional labor and material, if any, necessary to do said work, as the conditions existed. And, if you find as above stated, you will allow plaintiff such difference, if any you so find, not exceeding the amount claimed in the first and second counts, to wit, $23,314.23."—Approved: Capital City Brick & Pipe Co. v. City of Des Moines, 136 Iowa, 243, 113 N. W. 835.

§ 3339. Departure from Plans and Specifications by Agreement.

(a) "If H (plaintiff's assignor) had not performed his agreement to build said house fully, but had substantially completed it, leaving little to be done, and so far performed it as to erect a structure useful to the defendant ———, then they should allow the plaintiff the contract price for building the same, less such amount as it would take or require to construct those parts by said H omitted or neglected to be built or constructed; and if said H had by the consent or agreement of both parties, during the progress of the work, constructed some parts of said building of materials different from that required by his agreement, or of size and form different from that by said agreement required of him, but yet if, as constructed and made in consequence of said agreement the same were useful to the defendant, then the plaintiff should recover the contract price for erecting said building, less the difference in the value of those parts so constructed and their value as the contract required them to be constructed."—Approved: Goldsmith v. Hand, 26 Ohio St. 101, 103.

(b) "At the request of the plaintiffs, the court instructs the jury that if the jury find that the plaintiffs completed the building by ———, except as to the erection of the loading platform, and that the construction of said platform was postponed by request of the defendants, and was afterwards elected promptly upon request, and in the manner directed by the witness C, acting under instructions from the defendants, then the jury may find that the building was completed ———, within the meaning of the contract."—Approved: Iron Clad Mfg. Co. v. Stanfield & Son, 112 Md. 360, 76 Atl. 854.

§ 3340. Substantial Compliance with Plans and Specifications as a Whole.

"In deciding whether or not plaintiff was proceeding with said building in compliance with the contract, you are instructed that there must have been a substantial compliance in every material particular in each item as called for by a fair, reasonable, and practical construction of the contract, plans, and specifications, taken together; and where there is a conflict, if any, in these, this should be reconciled in a practical, workman-like manner, so as to arrive at the fair and reasonable intention of the same."—Approved: Linch v. Paris Lumber & Grain Elevator Co., 80 Tex. 23, 15 S. W. 208.

§ 3341. Time of Completion Postponed by Act of Defendant.

"If the jury believe from the evidence that plaintiff has furnished the materials and put up in a workmanlike manner the articles mentioned in the contract in the mill of defendants, and set the stones on the foundation in a workmanlike manner, and put the mill, so far as the two wheat runs of stones are concerned, in a good running condition, and that the delay in the finishing of said contract after the time of the completion thereof had expired was caused by said defendants or was by their consent, then the plaintiff is entitled to recover the balance unpaid on said contract and ten per cent. interest thereon from the date of the same."—Approved: Strawn v. Cogswell, 28 Ill. 457, 458.

§ 3342. Judgment of Engineer Made Test of Performance Must be in Good Faith.

"By the terms of the contract between Ricker, Lee & Co. and defendant railway company, you will find for the railway company against Ricker, Lee & Co., unless you find that the engineer of the railway company, in making the classification of the work, was guilty of fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment in making his estimates."—Approved: Gulf, C. & S. F. Ry. Co. v. Ricker (Tex.), 17 S. W. 382 (not reported in state reports).

§ 3343. Architect's Certificate—Bad Faith.

(a) "The court instructs the jury that if you believe from the evidence that the architect, Clinton J. Warren, in this case inspected the work in question and knew its character and quality, and that said architect accepted the work done and materials furnished by the plaintiffs as being in compliance with and in full performance of the contract on plaintiffs' part, and if you further believe from the evidence, and under the instructions of the court, that said contract was completed in accordance therewith, and you further believe from the evidence that said architect in bad faith and without just cause refused to deliver to the plaintiffs a final certificate showing such acceptance and completion and the balance due the plaintiffs, if any, then the plaintiffs are entitled to recover whatever, if anything, the jury shall find from the evidence is due upon the contract."—Approved: Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709.

(b) "Under the law and evidence in this case, it was the duty of the architect, A. Klingensmith, to supervise the work done by plaintiff, Fred Schleuter, and to see that same was done in accordance with the contract, plans, specifications, and the said A. Klingensmith, by the terms of the agreement between plaintiff and defendant, had the exclusive right to pass upon said work, and the plaintiff, Fred Schleuter (in the absence of fraud on the architect's part), cannot defeat the payment of the forfeit of $25 per day for delays, if any, which were caused by said architect in supervising said work."—Approved: Boston Store v. Schleuter, 88 Ark. 213, 114 S. W. 242.

§ 3344. Architect's Agreement to Prepare Plans for Structure to Cost within Fixed Sum.

"If you believe from the evidence that defendants employed plaintiff to prepare plans and specifications for an addition to, remodeling, or repairing and veneering the church building of the Central Presbyterian Church testified about, and that they, or said church, had not to exceed $8,000 which they could expend therefor, and that at the time they so employed him he knew, or they informed him, that they would rely upon him to ultimately prepare such plans and specifications as would call for such improvements not to exceed $8,000 in cost to them, exclusive of heating apparatus, and you further believe from the evidence that they did so rely upon him, then it was his duty toward them to inform them before they ultimately instructed him to prepare said plans and specifications that said improvements would cost them a much greater sum if so, and if you further believe, if plaintiff had so informed them, they would not have had him prepare said plans and specifications, then you are instructed plaintiff cannot recover, and you will find for defendants."—Approved: Dudley v. Strain (Tex. Civ. App.), 130 S. W. 778.

(b) "If the jury shall believe from the evidence that the plaintiffs undertook to prepare plans for a building for the defendant upon the condition that they were not to be paid for their services unless they could furnish plans which would be satisfactory to the defendant, and upon which a building could be erected at a cost satisfactory to the defendant, and that, in accordance with such undertaking, the plaintiffs from time to time submitted to the defendant various sketches or preliminary drawings, none of which were accepted by the defendant, but that finally on or about the ——— day of ———, plans were submitted, and the plaintiffs represented to the defendant that a building could be erected in accordance with such plans for $———, fully equipped and ready for occupancy, and guaranteed that a building so erected in accordance with such plans would not cost over $———, and that thereupon the defendant accepted such plans upon the condition that a building fully equipped and ready for occupancy could be erected in accordance therewith for not over $———, and that the plaintiffs then proceeded to prepare working drawings and specifications for such a building, yet, if the jury shall further find that a building could not have been erected (in accordance with the plans and specifications so prepared) for $———, their verdict must be for the defendant."—Approved: Williar v. Nagle (Md.), 77 Atl. 680.

§ 3345. Withholding Architect's Certificate After Acceptance of Performance.

"If you believe from the evidence and the instructions of the court that the architect or superintendent named in the contract in this case accepted the work performed by the plaintiffs as the work progressed, as required by the contract, and if you further find from the evidence that such contract was completed in accordance with the terms thereof, and you further believe from the evidence that, after the contract was

completed, the architect accepted the work performed by the plaintiffs, and if you further believe from the evidence and instructions of the court that the architect withheld or refused to deliver to the plaintiffs his statement, or certificate in writing, showing the amount due the plaintiffs, if anything, either because the defendant, the owner, directed him, the said architect, to withhold or not to deliver the same, or for any other reason not in accordance with the terms of the contract between said parties, if shown by all the evidence in this case, then you are instructed, if you find such facts proven from the evidence, that the plaintiffs would not be bound to produce such certificates before they were entitled to recover in this case."—Approved: Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709.

§ 3346. Accepting Plans of Architect though not According to Order.

"If you believe from the evidence in the case that the defendant employed the plaintiff to draw plans and specifications for a hotel to cost not exceeding $18,000, and you further believe from the evidence that plaintiff furnished the plans and specifications of a hotel building which would cost more than $18,000, and would cost $30,000, or more, then you are charged that the plaintiff cannot recover in this case, unless defendant accepted the plans drawn, and this with knowledge of the excess in cost to erect the building."—Approved: Hall v. Parry (Tex.), 118 S. W. 561.

§ 3347. Completion of Part of Building Postponed at Request of Defendant.

"At the request of the plaintiffs, the court instructs the jury that if the jury find that the plaintiffs completed the building by July 1, 1905, except as to the erection of the loading platform, and that the construction of said platform was postponed by request of the defendants, and was afterwards erected promptly upon request, and in the manner directed by the witness Conn, acting under instructions from the defendants, then the jury may find that the building was completed July 1, 1905, within the meaning of the contract."—Approved: Iron Clad Mfg. Co. v. Stanfield & Son, 112 Md. 360, 76 Atl. 854.

§ 3348. Deviations from Contract at Defendant's Request.

"At the request of the plaintiffs, the court instructs the jury that, if they find for the plaintiffs, there should be no deduction made from the balance, if any, due under the contract price for deviations, if any, from the provisions of the contract, which were made by the plaintiffs in consequence of directions from the defendants or their duly authorized agents."—Approved: Iron Clad Mfg. Co. v. Stanfield & Son, 112 Md. 360, 76 Atl. 854.

§ 3349. Improper Performance Causing Incomplete Structure to Fall—Reconstruction.

"Now, with regard to the charge of improper tamping: As I have said, if the contractor did what he was required to do by the contract,

he would not be liable for any damage because of a fault in the contract itself, and if he was required by the contract to tamp this concrete, and if the fall of the wharf was occasioned by the tamping of the concrete, the plaintiff could not recover, because, under the contract, he was required to tamp the concrete; but it is for you to say, under the evidence, whether, in tamping the concrete, he did it in the way that it should have been done—whether there was any defect in the tamping of this concrete—and if you should find from the evidence that he did not tamp the concrete as it should have been done, or did not put it in place as it should have been put there, or did not mix it in the proper proportions, or did not use a sufficient quantity, and if you should find that on any of these accounts or for any of these reasons the wharf fell, and the plaintiff was put to the expense of reconstructing it, then you would find for the plaintiff to the extent of $4,000, if you should be satisfied that the plaintiff incurred that expense in that way."—Approved: Novelty Mill Co. v. Heinzerling, 39 Wash. 244, 81 Pac. 742.

§ 3350. Defective Material Causing Collapse of Building—Damages.

"If you believe from the evidence in this case that the iron front, or some part thereof, furnished by the defendant to the plaintiff under the contract between the plaintiff and the defendant, was defective, or that the material or some part thereof in said front was defective, and that by reason of either being defective the plaintiff's building was caused to fall down, then the law is for the plaintiff, and you will find for it such sum in damages as you may believe from the evidence it sustained by reason of the falling down of said building, not exceeding, however, the sum claimed in the petition, to wit, $1,500."—Approved: Fraternal Const. Co. v. Jackson Foundry & Machine Co. (Ky.), 89 S. W. 265 (not reported in state reports).

§ 3351. Defective Work—Right to Counterclaim.

"The court instructs the jury that if they believe from the evidence that the plaintiff was to do and perform said work in good and workmanlike manner, and furnish in the construction of said building good and first class material, and if you further find from the evidence that said work was not done in a good and workmanlike manner, and that the material furnished was not good and first-class, and that the defendant was damaged by reason thereof, you must find for the defendant in such sum as you may believe he is damaged, not to exceed ..... dollars."—Approved: Clapper v. Mendell, 96 Mo. App. 40, 69 S. W. 669.

§ 3352. Right to Recover for Extra Work and Materials.

"The court instructs the jury that if they find from the evidence that the defendant submitted, or caused to be submitted to the plaintiffs the plan of the ..... to be built at the ....., as contained on the plat which was given in evidence, indorsed "....." and that the specifications of the ..... to be built at ..... as contained on the plat, and that the plaintiffs undertook and

agreed with the defendant to build said ..... in accordance with the said plans and specifications and upon the terms set forth in the articles of agreement, dated ....., also in evidence; and shall further find that after the commencement of the work in question, it was found impracticable to build said ..... in accordance with said plans and specifications and that the defendant changed the character of the ..... from a ..... to a ..... and required the plaintiffs to use ..... in the construction of the ..... not called for by the specifications, as contained in said plan, or by said articles of agreement, and of a greater length than the ..... called for by said papers, and that the plaintiffs built said ..... for the defendant in accordance with said changes, and that the defendant accepted said ..... when finished, and has not paid for the same; and shall further find that in consequences of said changes, the quantity and character of materials, and the amount of labor required to be furnished and done by the plaintiffs in the construction of said ....., was greatly increased, and the plaintiffs suffered loss from delays in consequences of said changes, so that the plaintiffs were put to a greater expense in constructing said ..... as finally constructed, than they would have been if said ..... had been built according to the said original plans and specifications, then the plaintiffs are entitled to recover such sum as the jury may estimate such increase of labor and materials, and such loss, to amount to; and in making such estimate the jury will be guided by the prices named in said original contract, so far as the same may be applicable to the work and materials as done and furnished."—Approved: Annapolis & B. Short Line R. Co. v. Ross, 68 Md. 310, 11 Atl. 820.

C. Duress.

§ 3353. With Respect to Contracts—What Constitutes.
3354. Threats Exciting Fear of Grievous Wrong—Contract Voidable.
3356. Money Paid under Duress—Recoverable When.
3357. Note Surrendered under Duress not Cancelled.
3358. What Constitutes such Duress as will Avoid a Deed.
3359. Notice of Disaffirmance as Sufficient Evidence.
3360. Ratification by Subsequent Acts.
3361. Burden to show.
3362. Payment to Obtain Goods Held for Illegal Charge.

§ 3353. With Respect to Contracts—What Constitutes.

(a) "Duress in the making of a contract exists when the person making it is induced to make it by reason of being put in fear by means of threats of arresting him and unlawfully charging him with crime, when the threats and the fear induced thereby are such as would influence a man of reasonable courage and prudence, and do deprive the party making the contract of the exercise of free will in making it. The threatened arrest, however, must be wrongful and unlawful, and apparently about to be enforced."—Approved: Kennedy v. Roberts, 105 Iowa, 521, 75 N. W. 363.

(b) "You are also charged that the threatened injury, in order to amount to duress, must be immediate. A mere threat to prosecute the witness Maher at some indefinite time in the future is insufficient, particularly if he (Maher) at the time knew the person making such threat had no present means of carrying it into execution, by actually taking him into custody, and he still had within his own knowledge the power and opportunity to make a defense to such threatened prosecution. The contract in question cannot be avoided, set aside, or disaffirmed on the ground that it was procured by duress."—Approved: Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321.

§ 3354. Threats Exciting Fear of Grievous Wrong—Contract Voidable.

"A contract made under compulsion may be avoided by the party by whom it was executed. Compulsion, however, to have this effect, must amount to what the law calls duress. Mere angry or profane words, or strong earnest language, cannot constitute such compulsion as will amount to duress, or enable a party to be relieved from his contract. There may, however, be duress by threats. Duress by threats does not exist wherever a party has entered into a contract under the influence of a threat, but only where such threat excites, or may reasonably excite, a fear of some grievous wrong, as bodily injury or unlawful imprisonment."—Approved: Adams v. Stringer, 78 Ind. 75.

§ 3356. Money Paid under Duress—Recoverable When.

"The rule in this class of cases is, that where a payment of money is made upon an illegal or unjust demand, when the party is advised of all the facts, it can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it. But where the person making the payment can only be reached by a proceeding at law, he is bound to make his defense in the first instance, and he cannot postpone the litigation, by paying the demand in silence and afterwards suing to recover it back."—Approved: Lieber v. Weiden, 17 Neb. 584.

§ 3357. Note Surrendered under Duress not Cancelled.

"The court instructs the jury that if the payee of the note surrendered it to the maker voluntarily, in liquidation of a just debt then due from him to them, the note was fully canceled by the surrender; but if the note was obtained from ..... wrongfully and unlawfully by threats and duress, it was not canceled by the surrender, and the plaintiff can maintain an action for the amount due thereon, if she is the owner thereof."—Approved: Koehler v. Wilson, 40 Iowa, 183.

§ 3358. What Constitutes such Duress as will Avoid a Deed.

"To constitute duress which would avoid the deed, it is not necessary that the threats be of physical injury alone; but if the plaintiff, the wife of Tapley, was induced to execute the deed by the threats of Tapley, her husband, that he would separate from her as her husband, and not support her, it is duress and would avoid the deed. The threats

must be such as she might reasonably apprehend would be carried into execution, and the act must have been induced by the threats. It is not necessary that the threats be made at the time, or immediately before signing, if it was within such time, and the circumstances satisfy you that the threats or its influence properly continued and influenced the plaintiff."—Approved: Tapley v. Tapley, 10 Minn. 458.

§ 3359. Notice of Disaffirmance as Sufficient Evidence.

"You are charged, however, that, if the written conveyance referred to was procured from said D. J. Maher by means of duress, it would not be in good faith, as the term is here used, but, on the contrary, would be voidable; that is, the said D. J. Maher and Martin Maher might in such case disaffirm the contract in question by any act which would clearly indicate an intention on their part to disaffirm and repudiate the aforesaid contract. And a notice to Mr. VanBrunt, on the 16th day of May following the conveyance to plaintiffs, that they elected to disaffirm said contract, would be sufficient evidence of a disaffirmance, provided that you find that said contract was procured by duress, as here explained."—Approved: Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321.

§ 3360. Ratification by Subsequent Acts.

"It is claimed by the defendant that the plaintiff, after the execution of said note, ratified the execution of same in the summer of 1895. A contract that is fraudulent by reason of same having been procured by means of duress may be ratified and confirmed by the maker thereof if his subsequent acts, with knowledge of all the facts, are such as to fully indicate that he intends to then agree to and confirm said contract. If it appears from the evidence, by the letter written by plaintiff to his daughter concerning the note in question after same was executed, and by plaintiff's statements concerning the note and its payment by him to the officers of the Red Oak National Bank, that the plaintiff intended at the time of making said statements to assent to and confirm the contract made in said note, and pay the defendant, then such state of fact would amount to a ratification of said note by plaintiff, from subsequently claiming that said note was obtained from him by duress. But, to amount to a ratification of said note, the plaintiff's acts must have been such as to fully indicate an intention on his part at that time to assent to and confirm the contract contained in said note. If the plaintiff's purpose in writing to his daughter and in making statements to the officers of said bank was to get and keep the note within the jurisdiction of this court, so that he could replevin same from defendant, and not confirm the contract contained in said note, then said acts and statement would not, in any event, amount to a ratification of the note. If said note was obtained by duress, to overcome such duress the burden rests with the defendant to show that plaintiff ratified said note, by a preponderance of the evidence. This is challenged by appellant. She argues that ratification, estoppel, or waiver is a legal result, operating upon a certain state of facts, independent of all question of intent.

'Waiver' has been defined to be the intentional relinquishment of a known right."—Approved: Kennedy v. Roberts, 105 Iowa, 521, 75 N. W. 363.

§ 3361. Burden to Show.

"The burden of the proof is upon the defendants, upon the question of duress; that is, the presumption of law is that the conveyance of the property to plaintiffs was the voluntary act of said D. J. Maher. Hence, in order to find that said conveyance was procured by duress, the defendants must satisfy you by proof, and a preponderance of evidence that, at or a short time previous to the execution thereof, plaintiffs' agent or attorney had threatened D. J. Maher with arrest and prosecution for an alleged crime, and that the threats so made, if any were in fact made, must have been of such a character as to naturally overcome the mind and will of a person of ordinary firmness, and deprive him, for the time being, of the power of mind and will to resist the demand by the person making such threats."—Approved: Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321.

§ 3362. Payment to Obtain Goods held for Illegal Charge.

"That duress is any improper means brought to bear upon a party whereby he is not a free agent, and if the jury believe that the defendant was placed in such a condition by the plaintiff that he could not get his goods to market (the oil mentioned in the sets-off), or get them out of the plaintiff's possession without paying for freight thereon to Laurel Junction at a rate exceeding twenty cents per ton per mile over the line of said Laurel Fork & Sand Hill Railroad Company, then that constitutes such duress of goods as would entitle the defendant to recover upon his said sets-off, provided the jury believe from all the evidence that the plaintiff did charge the defendant for said transportation a rate exceeding 20 cents per ton per mile as charged in said sets-off, and that the plaintiff was operating by steam power the said Laurel Fork & Sand Hill Railroad, and that said railroad does not exceed thirty miles in length."—Approved: West Virginia Transportation Co. v. Sweetzer, 25 W. Va. 434.

D. Gaming and Gambling Contracts.

§ 3363. Invitation to take Part in Game of Chance (Statutory).
3364. Visiting Gambling Place on Invitation and Losing at Play—Recovery.
3365. Suing for Money Lost in a Game of Poker.
3366. Suing for Money Lost on a Foot Race.
3367. Where there is Concerted Plan between Players, all are Liable to Loser.
3368. Recovery from Stakeholder on Election Bet.
3369. Stakeholder Paying over Wager after Demand, Liable to Loser.
3369a. Money Loaned to be Used in Gambling.
3370. Copartners in Bookmaking on Horse Races—No Action between.
3371. Players Receiving Part of Sum Lost, May be Sued for Entire Loss.
3372. Action does not Lie for Specific Property under Grain Gambling Contract.
3373. Sales on Future Deliveries to be Settled on Margins.
3374. Option Contracts—Privilege of Delivering or not Delivering.

§ 3363. Invitation to Take Part in Game of Chance (Statutory).

"The court instructs the jury further, that by inviting, persuading or inducing is not meant that personal application be made to such person visiting such place, but the mere setting up and furnishing a place to carry on a game of chance is sufficient invitation."—Approved: Roberts v. Respass, 131 Ky. 10, 114 S. W. 341.

§ 3364. Visiting Gambling Place on Invitation and Losing at Play—Recovery.

"If, from all the evidence, the jury believe that the defendants, J. B. Respass, James Nolan, or Andrew Hennegar, or either of them, invited, persuaded, or otherwise induced plaintiff to visit the place at the southeast corner of Court avenue and Second street, in the proof described, and that at the said place a game of chance was being carried on, to wit, a poker game, by defendants, as partners, or either of them, and that while playing said game the plaintiff lost at any time and within twenty-four hours $5 or more, they shall find a verdict for the plaintiff for the amount of his losses, not exceeding the sum of $3,500, the amount claimed in the petition; otherwise they will find for the defendants, or either or all of them."—Approved: Roberts v. Respass, 131 Ky. 10, 114 S. W. 341.

§ 3365. Suing for Money Lost in a Game of Poker.

"Gentlemen of the jury, the plaintiff sues to recover money lost in a game of poker. If you believe from a preponderance of the evidence that plaintiff played in a game of poker with these men, the defendants, and that they won his money, he can recover, and you will render a

verdict for the amount of money won from him."—Approved: Bynum v. Brady, 82 Ark. 603, 100 S. W. 66.

§ 3366. Suing for Money Lost on a Foot Race.

"The court instructs the jury that betting upon a foot race between two persons is gaming within the meaning of Pub. St. c. 99, § 1; that, in order for the plaintiff to recover under that statute he must show that he bet his money upon the race; that he lost his bet; and that the defendant, acting by himself or his agents, was the winner."—Approved: Jones v. Cavanaugh, 149 Mass. 124, 21 N. E. 306.

§ 3367. Where there is Concerted Plan between Players all are Liable to Loser.

"But, if the money was won by somebody else besides these men, or if there is any one or more of the defendants who did not win any of it, then you cannot find a verdict against all of the defendants, only against the men that won the money; that is, if you find that the money was won from the plaintiff by one or more of the defendants, then you can find for the plaintiff against such number of defendants, naming them, as won the money, and you will find for these defendants who didn't win the money, unless you find there was some concerted plan among them to deprive this man of his money in a poker game, then you will find against all who participated in it."—Approved: Bynum v. Brady, 82 Ark. 603, 100 S. W. 66.

§ 3368. Recovery from Stakeholder on Election Bet.

"The court instruct the jury that a wager upon the result, either of a state or national election, is an illegal contract and utterly void, and that an action upon such a contract cannot be maintained by the winning party against the losing party; but that if the money has been paid over to the winning party by the consent of the losing party, the latter cannot maintain an action against the former to recover the wager back; that if the money was, as in the present case, deposited with a stakeholder, either party may forbid his paying over his money to the other party, and after proper proofs may maintain an action against the stakeholder to recover the money so deposited with him; and that the action may be maintained against the stakeholder, even after he has paid the money to the winner, if he has paid it over after his authority to do so had been revoked, or after he had been directed by the loser not to pay it over. . . . 'As there is no dispute in this case as to the amount of money deposited, as to the person with whom, or the terms upon which the deposit was made, the only question of fact for the jury to pass upon is whether the defendant paid over to C the $325, with or without the consent and permission of the plaintiff; that the fact, if it was a fact, that the parties had agreed to submit to the determination of sporting men the question of C's right to the money, would not legalize the wager or make it any the less illegal or void; but that the jury should consider this evidence, in connection with the other evidence in the case, as bearing upon the question whether

the money was or was not paid over by the defendant to the said C with the consent and permission of the plaintiff; that if, upon all the evidence, the jury should find the money was paid with the consent or permission of the plaintiff, it would be their duty to return a verdict for the defendant; but if they should upon the evidence find that the money was paid over without the consent or permission of the plaintiff, and after the plaintiff had directed him not to pay it over, they should return a verdict for the plaintiff."—Approved: Fisher v. Hildreth, 117 Mass. 558.

§ 3369. Stakeholder Paying Over Wager After Demand Liable to Loser.

"(a) In this state all species of gambling, including bets, or wagers on races, are by law held to be immoral and void, as against sound public policy. (b) The defendant's liability for the money placed in his hands depends upon whether or not he paid the said money over to Courtier after he had been notified by the plaintiff not to pay it to Courtier. (c) If the defendant paid the money to Courtier after notice of the plaintiff not to pay it, he would be liable, otherwise he would not."—Approved: Riddle v. Perry, 19 Neb. 505, 27 N. W. 721.

§ 3369a. Money Loaned to be Used in Gambling.

"The court charges you that where money is loaned or advanced with the understanding between the parties that it should be used in gambling, such party becomes particeps criminis, and cannot recover in a suit for the money, and that where a party advancing money to be used in gambling participates and shares in the gambling transaction thus promoted by his act becomes particeps criminis, and he cannot recover in a suit for the money."—Approved: Terry v. Peterson (Utah), 108 Pac. 1106, 1108.

§ 3370. Copartners in Bookmaking on Horse Races—No Action between.

"The court instructs the jury, as a matter of law, that if they believe from the evidence that the plaintiff and the defendant were copartners in the business of making books on horse races, and that the money given the defendant by the plaintiff was in furtherance of said partnership business of bookmaking on horse races, then the jury will find for the defendant."—Approved: Shaffner v. Pinchback, 133 Ill. 410, 24 N. E. 867.

§ 3371. Player Receiving Part of Sum Lost May be Sued for Entire Loss.

"The court instructs the jury that if they believe from the evidence that the plaintiff lost at or upon a game of chance, known as poker, played by him and others in the house or building in which defendant, under a license, had a saloon and was the proprietor or owner thereof, the sum of $800, or any greater sum of value than $5, within twenty-four hours of the first loss, if any, and further believe that the defendant, Jno. F. Cartwright, received the money that plaintiff lost upon the

game, or any part of it, to his credit in bank and subject to his check or order, or that it was placed to his credit in bank, or cashed by him or his agent, they will find for plaintiff as against defendant the amount that they believe plaintiff lost at said game or games, not to exceed the amount sued for, to wit, $800.

"If the jury believe from the evidence that plaintiff gave to Chas. Cartwright checks for such sum or sums of money amounting to $800, and that Chas. Cartwright paid him the money upon said checks and that he did not lose said money upon a game of poker, they will find for defendant as to such amount so paid by Chas. Cartwright to the plaintiff upon check, or checks, not to exceed $800, and, if they believe that the entire $800 was so paid by Chas. Cartwright to the plaintiff, they will find for the defendant.

"Although the jury may believe from the evidence that the defendant, J. E. Cartwright, was the owner of the saloon business conducted on Main street in Bowling Green, Ky., and may further believe that Robert or Charles Cartwright or other person, above said saloon, conducted a gambling room wherein the plaintiff lost the money sued for, or some part thereof, yet if they further believe from the evidence that the defendant did not authorize said Robert or Charles Cartwright to run or conduct said gambling room and did not participate in any of the profits thereof, if any, or received any of the money lost by the plaintiff, then the jury shall find for the defendant."—Approved: Cartwright v. McElwain, 132 Ky. 83, 116 S. W. 297.

§ 3372. Action does not Lie for Specific Property under Grain Gambling Contract.

"Hence, if you believe from the evidence that J. C. Pike, for the purpose of raising in advance, by way of credit, with plaintiffs, money with which to pay losses said Pike might in the future suffer in the purchase and sale of grain and other commodities made with or through plaintiffs, wherein it was not the purpose, intention, or expectation of either of the parties to such purchase or sale that such purchases or sales should be actually carried out or consummated by actual delivery or receipt of the thing purchased or sold; but, on the contrary, if it was the purpose of all the parties thereto that the same should and would be settled and adjusted by the payment of the difference between the purchase or selling price and the market price at the time of settlement, executed and delivered said written instruments in evidence, and dated respectively April 26, 1880, and July 2, 1880, then you are instructed that though said money so raised by said Pike was by plaintiffs actually used in settling and adjusting or closing out such purchases and sales, said instruments are void, and plaintiffs cannot through them establish title to the corn therein mentioned, and cannot recover in this action, and your verdict will be for defendant."—Approved: Lowe Bros. & Co. v. Young, 50 Iowa, 364, 13 N. W. 329.

§ 3373. Sales on Future Deliveries to be Settled on Margins.

"If it was the mutual contract of parties, plaintiff and defendant, and they so actually understood the same, that no wheat was actually to be

delivered, and that the contract was not in fact to be performed, and the 'deal' should be settled upon the basis of the contract and market price, then the plaintiffs cannot recover in this case. But it is not sufficient that the defendant so understood the contract or 'deal,' but the plaintiffs must be a party to such contract and understanding. If it was a proper and lawful contract on their part, and entered into by them in good faith, intending to perform the same, then it is immaterial as to the private understanding of defendant."—Approved: Whitesides v. Hunt, 97 Ind. 191.

§ 3374. Option Contracts—Privilege of Delivering or Not Delivering.

"The jury are instructed that a contract for the sale and future delivery of grain, by which the seller has the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for the grain, just as they choose, and which on its maturity is to be filled by adjusting the differences in the market value, is an option contract in the nature of a gambling transaction, prohibited by law. And, if the jury believe, from the evidence, that the purchases and sales of grain involved in this suit were made, and were intended by both ..... and the firm of ..... to be made, as a means of gambling on the fluctuation in the market price of such grain, and that no delivery or acceptance of grain was intended by either of the parties, then the plaintiff, ..., is not entitled to recover for any alleged profits or margins, and the defendants, ..., are not entitled to recover for any margins upon the losses alleged to have been sustained by them. Neither can recover in such event."—Approved: Watte v. Costello, 40 Ill. App. 307.

CHAPTER XCVIII.

CORPORATIONS.

A. Corporations.
B. Banks and Banking.
C. Monopolies.
D. Municipal Corporations.

A. Corporations.

§ 3375. Controlling Officers—Who Are.
3376. Rights of Stockholders as Creditors.
3377. Subscriptions to Stock—Secret Agreement with Some Subscribers—Fraud on Others.
3378. Subscription to Stock Made on Condition in Prospectus.
3379. Persons Holding Themselves Out as Officers of a Non-existing Corporation.

§ 3375. Controlling Officers—Who Are.

"By the expression 'controlling officers,' as used in the foregoing paragraph, is meant some chief officer, or vice principal of the company, who must be shown to possess, under and for the company, sufficient authority and discretion to act and speak for the company as if it were present in the person of its managers, speaking and acting for itself and on its own responsibility."—Approved: American Freehold Land Mortgage Co. v. Brown (Tex. Civ. App.), 118 S. W. 1106.

§ 3376. Rights of Stockholders as Creditors.

"Under the law of this state, Isaiah Crossette and his sister Alice Crossette would occupy no different position as creditors than any other creditors of the Isaac Crossette Lumber Company. The fact that they were members and officers of the company did not affect their legal rights in that respect."—Approved: Crossette v. Jordan, 132 Mich. 78, 92 N. W. 782.

§ 3377. Subscriptions to Stock—Secret Agreements With Some Subscribers, Fraud on Others.

"In the subscription of each person to the capital stock of a corporation every other subscriber has a direct interest. Their respective subscriptions are contributions to a common object. The action of each in his subscription is supposed to be influenced by that of the others, and every subscription to be based upon the ground that the others are what they are represented to be. The fact that one person binds himself to place a certain amount of his money upon the risk involved

in the enterprise is an inducement to others to venture in like manner, and any secret agreement between the company and a subscriber or his privies, which changes the condition of the subscription, is a fraud upon the other subscribers, and renders this agreement, and any contract growing out of it, null and void; and any agreement between the company and second parties, which contemplates a deception to be practiced upon others not parties to the agreement, is contrary to public policy and void. Therefore, if you believe that the contract sued upon was entered into with the understanding that John J. Dixon was to appear at a public meeting in Dundee and subscribe for ten shares of the stock, without stating the conditions of his subscription, then your verdict will be, 'No cause of action;' and this would be your verdict even though you find that no meeting was in fact held, for it is the intention of the parties which vitiates the agreement. Or if you believe—that is, if you find from the evidence—that the plaintiffs, or either of them solicited subscriptions for the stock of the defendant company, and represented that John J. Dixon had subscribed for ten shares of this stock, without stating that his subscription was conditional, then your verdict should be for the defendant, 'No cause of action.' Or if you find from the evidence that John J. Dixon, with the consent or knowledge of either of the plaintiffs, solicited subscriptions for the stock of the defendant company, and represented that he had subscribed for ten shares of this stock, without stating that this subscription was conditional, then your verdict should be for the defendant, 'No cause of action.' Or if you find from the evidence that the agents of the defendant company solicited subscriptions for the stock of the company, and, by and with the consent and knowledge of the plaintiffs or either of them, represented that John J. Dixon had subscribed for ten shares of stock, without stating that his subscription was conditional, then your verdict should be for the defendant, 'No cause of action.' Or if you believe that the agents of the defendant company solicited subscriptions for the stock of this company, and in the presence of the plaintiffs, or either of them, represented that John J. Dixon subscribed for ten shares of this stock, without stating that his subscription was conditional, then your verdict should be for the defendant, 'No cause of action.' If you find that this contract is vitiated with fraud, then the plaintiffs cannot recover; and, to establish this fraud, it is not necessary that you are convinced that any person has been misled in subscribing to this stock, but it is sufficient if you find that an attempt has been made to mislead or deceive subscribers."—Approved: Zabel v. New State Tel. Co., 127 Mich. 402, 86 N. W. 949.

§ 3378. Subscription to Stock Made on Condition in Prospectus.

"The court instructs the jury that if they find that the defendant subscribed to ten shares of the stock of the ..... Company and paid $..... thereon, still, if they further find that said subscription was made upon the terms and conditions contained in the prospectus, offered in evidence, and upon the faith of representations contained therein and verbally made to him by a certain ....., a director of said company, as to facts of a nature to induce said sub-

scription, and shall further find that said representations were false and fraudulent as to said facts, and that the defendant learned of the fraudulent nature of said representations and of said prospectus, and within a reasonable time thereafter, and while the company was still a going concern, notified the said company that he would make no further payment upon his said subscription, then their verdict should be for the defendant, unless they shall further find that the defendant failed to exercise reasonable diligence, under all the circumstances of the case, in ascertaining the fraudulent nature of said representations or that he failed to finally repudiate his said contract after acquiring knowledge of said fraudulent representations."—Approved: Urner v. Sollenberger, 89 Md. 316, 43 Atl. 810.

§ 3379. Persons Holding Themselves Out as Officers of a Non-existing Corporation.

"The court instructs the jury that if they believe from the evidence that W., C. and H. represented or held themselves out as officers of a corporation named W.-H. M. Company, and the jury further believe from the evidence that there was no such corporation as the W.-H. M. Company, then in such case all of the parties who represented themselves to be officers of such corporation or allowed their names to be so used as to lead parties dealing with said concern to believe that said concern was a corporation, then in such case such parties so making representations or so allowing their names to be used as to lead parties to believe said concern was incorporated, would be liable for all contracts made in the name of said W.-H. M. Company."—Approved: Churchill v. Thompson Elec. Co., 119 Ill. App. 430 (434).

B. Banks and Banking.

§ 3380. Knowledge of Officers—Defense to Note.
3381. Presumption of Knowledge of Director.
3382. Special Deposit—Bank's Refusal to Honor Check Against.
3383. Deposit in Favor of Another—Depositor no Right to Withdraw.
3384. Bank Appropriating Balance to its Own Debt and Refusing to Pay Checks Thereon.
3385. Retaining Funds to Meet Certified Check.
3386. Usage as Affecting Diligence in Collection of Drafts.
3387. Cashier's Check in Payment of His Own Debt.

§ 3380. Knowledge of Officers—Defense to Note.

"In determining whether or not the plaintiff had knowledge of the defenses, if any, of the defendant, H. L. Hall, to the note sued on at the time it acquired the same, you will not consider any knowledge or information that may have come to any porson who was an officer or agent of the plaintiff at a time when he was not engaged in the plaintiff's business. Knowledge or information derived by persons who occupied the relation of officers or agents of the plaintiff at times

and in transactions when and where they were acting for themselves individually and not for the plaintiff would not be binding on the plaintiff or affect its rights."—Approved: Grayson County Nat. Bank v. Hall (Tex. Civ. App.), 91 S. W. 807 (not reported in state reports).

§ 3381. Presumption of Knowledge of Director.

"In this connection I charge you that a presumption arises, in the absence of evidence to the contrary, that a managing director of a bank has knowledge of its doings and transactions, whenever by ordinary diligence he could have acquired the same, and whether or not such presumption is satisfactorily overcome in any case is for you."—Approved: Rattlemiller v. Stone, 28 Wash. 104, 68 Pac. 168.

§ 3382. Special Deposit—Bank's Refusal to Honor Check Against.

"If you shall believe from the evidence that S. C. Colwell, on or about March 1, 1907, drew a check on the First National Bank of Hazard, Ky., directing said bank to pay to the plaintiffs herein $1,064.30, and that thereafter, and on about March 3, 1907, the said Colwell delivered to C. G. Bowman, at Irvine, Ky., a check for an amount sufficient to pay checks drawn to plaintiffs to be deposited in defendant bank to his credit for the purpose of paying the check drawn to plaintiffs, and that said check was delivered to said Bowman with instructions to be deposited in defendant bank for the purpose of paying outstanding checks delivered to the plaintiffs, and that said check delivered to said Bowman was collected by said bank before the protest of plaintiffs' check, and that said bank had notice through C. G. Bowman, or otherwise, that said deposit was made for the purpose of paying the plaintiffs' outstanding check, then they will find for the plaintiffs the sum of $1,064.30."—Approved: First Nat. Bank of Hazard v. Barger (Ky.), 115 S. W. 726.

§ 3383. Deposit in Favor of Another—Depositor no Right to Withdraw.

"The court instructs the jury that, when one person deposits money in a bank to the credit of another, the bank has no right to return it to the person who made the deposit, without the consent of such other."—Approved: Drumm-Flato Com. Co. v. Gerlach Bank, 107 Mo. 426, 81 S. W. 503.

§ 3384. Bank Appropriating Balance to its Own Debt and Refusing to Pay Checks Thereon.

"The jury are instructed, that in order for the holder of a check to maintain an action thereon against the bank on which it is drawn, he must show that when it was presented for payment the bank owed the drawer a sufficient sum to pay it; and that, therefore, in this case, if they find from the evidence that on June 2, ..., the drawer had a credit balance in its account as a depositor with the defendant of ....., or thereabouts, but that the defendant, on that day or thereafter, prior to the presentation of the checks in suit to the defendant for payment, appropriated the said balance as a payment on

account of a note of said drawer to the defendant, and payable on demand, in consequence of which appropriation there were no funds of said drawer in the hands of the defendant for payment of checks when said checks were presented for payment, then the law is that the defendant had the right to make such appropriation, and moreover had the right to make it without first demanding payment of the note, and the verdict should be for the defendant, and the form of the verdict should be, "We, the jury, find the issues for the defendant."—Approved: First Nat. Bank of Chicago v. Kelsay, 54 Ill. App. 660.

§ 3385. Retaining Funds to Meet Certified Checks.

"The court instructs the jury that if they find from the evidence that the check sued on was certified by the authority of the defendant company, and that at the time of said certification there was sufficient funds of the maker of said check on deposit with defendant to pay said check, then defendant had the right to retain out of the funds of said maker a sufficient amount to pay said check whenever the same might be presented."—Approved: Muth v. St. Louis Trust Co., 94 Mo. App. 94, 4 Bank. Cas. Ann. 416.

§ 3386. Usage as Affecting Diligence in Collection of Drafts.

"The court instructs the jury that, if they believe the facts stated in the agreed statement, and also from the evidence in the cause that the plaintiff transmitted to the defendant as its correspondent in B., for collection the bill of exchange for $....., dated the 29th of October, 19.., which has been offered in evidence, and that the defendant, as such correspondent, received and undertook and assumed to collect the same on the morning of the 30th of October, 19.., and placed it in the hands of the witness H. for that purpose, and that said H. was an officer or agent of the defendant, and that said H. presented said bill of exchange to the said J. L. & Co., about one o'clock in the afternoon of the 30th of October, 19.., and that the said J. L. & Co., on whom the same purports to have been drawn, were then in doubtful credit, and that the said H. then received from the said J. L. & Co., for said bill of exchange and other claims also in the hands of the defendant, the check on the M. Bank for $....., which had been offered in evidence, and gave up said bill of exchange to J. L. & Co., and that the latter marked said bills as canceled, and that the said M. Bank was at that time within the same square with the banking house of the said J. L. & Co., and that the banking house of the defendant is several squares off from the latter and that the said check would have been paid by the M. Bank if it had been presented any time between one and two o'clock in the said afternoon of the 30th of October, 19.., and that said check was taken by the said H. to the defendant, and the amount thereof placed by it to the credit of the plaintiff, and that the payment of said check was not demanded until a few minutes before or after three o'clock in the afternoon of the 30th of October, 18—, and if they shall also believe that at the time last mentioned there was a usage among the banks of the city of B—, as between them and their corespondents abroad, to get checks

received for sight bills of exchange, when said checks were drawn by houses or individuals of doubtful credit paid or endorsed 'good' before taking them back to the banks holding them for collection, then the plaintiff is entitled to recover in this action the amount of said bill of exchange; provided, that the jury find that the defendants in failing to have said check presented for payment or to be endorsed as good by the M. Bank before three o'clock on the 30th of October, 18—, were guilty of a want of due care, skill and diligence in their employment as collectors of the said bill of exchange; and that they also find that the said check, if it had been presented for payment between the hours of one and two o'clock on that day, would have been paid by the M. Bank and the said draft collected."—Approved: Merchants' Bank of Balto v. Bank of Commerce, 24 Md. 12, 29.

§ 3387. Cashier's Check in Payment of His Own Debt.

"The court instructs the jury that the general authority of the cashier as general agent of the bank to draw drafts or checks on the bank in the conduct of its business, does not by itself permit him to draw such drafts or checks in payment of his personal debts or to raise money for the transaction of his personal business. Where, therefore, as in this case, he draws a draft or check on the bank, payable to his own order, and for his individual debt, the party acting thereon takes the risk that the agent or cashier may act without authority to do so. But if it appears that the agent had repeatedly done such acts on previous occasions, and that such acts had been ratified, and not repudiated, by the officers of the corporation, then, providing such acts have been done for a period sufficiently long to establish a settled course of business, it may be inferred, from the general manner in which they have been done, that such acts were known, or ought to have been known, by the directors, and that the cashier had authority to do such acts. If that be shown, the bank is liable. The authority to make such personal use of the funds of the bank may be shown therefore by the long-continued doing of such acts under such circumstances as warrant the inference that the acts were known and authorized by said bank, that is, authority of the cashier may be inferred from the power he was accustomed to exercise without the dissent of the bank, and with its acquiescence."—Approved: Gale v. Chase Nat. Bank, 104 Fed. 214.

C. Monopolies.

§ 3388. Monopoly—State Statute not Applicable to Articles in Interstate Commerce.
3389. Monopoly—Combination—Continuance—Daily Violation.
3390. Monopoly—Two Corporations under one Management—Restricting Domestic Trade—Penalties.

§ 3388. Monopoly—State Statute not Applicable to Articles in Interstate Commerce.

"Oil, all other products of petroleum, and goods, wares, or merchandise of any character which the defendant or its agents may have

purchased or acquired in any manner outside of the state of Texas and caused to be transported to its agents or others within the state, are the subjects of interstate commerce when they enter this state, and so remain until such commodities are removed from the original tanks, vessels, or other packages in which they are imported into the state and become mixed with the common mass of property of similar character in this state. The anti-trust laws of Texas have no reference to agreements or pools or arrangements of any character concerning subjects of interstate commerce, and no agreement, pool, or other arrangement, if any, which the defendant may have entered into with reference to the sale of any subject of interstate commerce, can be considered by you as violating any anti-trust law of Texas. But neither oil purchased by the defendant from the Corsicana Refinery or elsewhere in Texas, nor other merchandise purchased by defendant at points in Texas, nor such oil or other merchandise purchased by defendant at points outside the state and transported into the state, and removed from the original packages or vessels in which it was brought into the state, and mingled with other property of similar character in the state, is the subject of interstate commerce, but, on the contrary, is the subject of local commerce, and any agreement or pool or arrangement entered into by defendant with reference to such property, or the sale thereof, if any such sale there were, would be unlawful, if in violation of the anti-trust laws of this state."—Approved: Waters-Pierce Oil Co. v. State, 48 Tex. Civ. App. 162, 106 S. W. 918.

§ 3389. Monopoly—Combination—Continuance—Daily Violation.

"If you find from a preponderance of the evidence that the defendant company, acting through its duly appointed and authorized agents, entered into or became a party to an agreement or understanding with the Standard Oil Company of New Jersey, on June 1, 1900, to fix or regulate the price in Texas of oil refined from petroleum, and if you further find from a preponderance of the evidence that the defendant company remained or continued to be a party to said agreement or understanding, if any, and persisted in carrying same out in Texas, if any, through its duly authorized agents on June 1, 1900, or on any other date or dates subsequent to June 1, 1900, and prior to March 31, 1903, and if you further find from a preponderance of the evidence that the oil with reference to which said agreement or understanding, if any, was so made and carried out, was the subject of local, as distinguished from interstate, commerce, you will return a verdict for the state and say by your verdict: 'We, the jury, find for the state on the issues submitted for our consideration in paragraph 7 of the court's charge.' You are instructed, in this connection, that if you find in favor of the state on the issue above submitted for your consideration in this paragraph of the charge, each day embraced between May 31, 1900, and March 31, 1903, during which the defendant remained a party to the agreement or understanding herein mentioned, if there were any such agreement or understanding, and if it remained a party to same on any of said days, would constitute a separate and distinct violation of the anti-trust laws of Texas. If you do not find from a preponderance of the evidence that the defendant was on June

1, 1900, or on some date subsequent thereto and prior to March 31, 1903, through the action of its duly appointed and authorized agents, a party to an agreement or understanding with the Standard Oil Company of New Jersey to fix or regulate the price in Texas of oil refined from petroleum, and if you do not further find from a preponderance of the evidence that the oil with reference to which defendant entered into said agreement or understanding, if any such there were, was the subject of local, as distinguished from interstate, commerce, you will say by your verdict: 'We, the jury, find for the defendant on the issues submitted for our consideration in paragraph 7 of the court's charge.' "—Approved: Waters-Pierce Oil Co. v. State, 48 Tex. Civ. App. 162, 106 S. W. 918.

§ 3390. Monopoly—Two Corporations under One Management—Restricting Domestic Trade—Penalties.

"If you find from a preponderance of the evidence that the direction of the affairs of the defendant corporation and the affairs of the Standard Oil Company of New Jersey were under the same management or control on March 31, 1903, or on any date subsequent thereto and prior to April 29, 1907, and that they were placed under such common management or control, if any, by their respectively authorized officers under such circumstances that such common management or control, if such there were, created or tended to create or carry out restrictions in the sale in Texas of oil of the kind and character mentioned in the last preceding paragraph of this charge, or to fix, maintain, or increase the price in Texas of such oil, or to prevent or lessen in Texas the competition in the sale of such oil, you will return a verdict for the state, and say by your verdict: 'We, the jury, find for the state on the issues submitted for our consideration in paragraph 10 of the court's charge In this connection you are instructed that, if the defendant entered into a monopoly of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April 29, 1907, that it remained a party to such monopoly, if there were any such days, constituted a separate violation of the anti-trust laws of Texas. If you do not find from a preponderance of the evidence that the direction of the affairs of the defendant corporation and the affairs of the Standard Oil Company of New Jersey were under the same management or control on March 31, 1903, or on some date subsequent thereto and prior to April 29, 1907, and that they were brought under such common management or control, if any, by their respectively authorized officers under such circumstances that such common management or control, if such there were, created or tended to create or carry out restrictions in the sale in Texas of such oil, or fix, maintain, or increase the price in Texas of such oil, or to prevent or lessen in Texas the competition in the sale of such oil, you will say by your verdict: 'We, the jury, find for the defendant on the issues submitted for our consideration in paragraph 10 of the court's charge.' "—Approved: Waters-Pierce Oil Co. v. State, 48 Tex. Civ. App. 162, 106 S. W. 918.

D. Municipal Corporations.

§ 3391. Officers—No Compensation unless Charter Expressly Provides Therefor.
3392. Contracts to be Approved by and Filed with Officers.
3393. Right of City to Charge for Wharfage.
3394. Change of Grade Damaging Abutter.
3395. Adoption of Plan of Improvement by City Council.
3396. City Officers Overseeing Street Construction—Estoppel.

§ 3391. Officers—No Compensation unless Charter Expressly Provides Therefor.

"The council are under no obligation to make compensation to any of the officers of the corporation unless the charter expressly provides that compensation shall be made, or that the officers are entitled to compensation."—Approved: Perry v. Cheboygan, 55 Mich. 250, 21 N. W. 333.

§ 3392. Contracts to be Approved by and Filed with Officers.

"If you find that the contract, upon which plaintiff sues in this action, was never approved by and filed with the president of the defendant's board of school directors, as provided by the law, then the plaintiff is not entitled to recover in this action, unless you further find that said contract has been ratified; and the burden is upon plaintiff to show such ratification by a preponderance of evidence, and if she fails to so satisfy you, your verdict will be for the defendant."—Approved: Gambrell v. District Township of Lenox, 54 Iowa, 417, 6 N. W. 693.

§ 3393. Right of City to Charge for Wharfage.

"The court instructs the jury that under the pleadings, if they believe from the evidence that defendant's steamboats, Bald Eagle and Spread Eagle, or either of them, made fast to or landed passengers or freight or mails at or over defendant's wharfboat riding upon the waters of the Mississippi river at or near the foot of Vine street, in the city of St. Louis, Missouri, at any of the times mentioned in the petition and statement of account thereto attached, and that such landings or fastenings were in excess in number of two landings per week for the steamboat Bald Eagle and six landings per week for the steamboat Spread Eagle; and that at said times said wharfboat was connected or attached by chains to iron ring bolts set in the levee, then the jury should find for the plaintiff in the sum of $8.39 for each time in excess of two times per week for each of the weeks beginning June 8th and June 15th, 1903, the steamboat Bald Eagle did so make fast or land passengers or freight or mail at said wharfboat, and $8.53 for each time in excess of six times per week for each of the weeks beginning June 4th, June 11th, and June 18, 1903, the steamboat Spread Eagle did so make fast or land passengers, freight, or mail to, at, or over said wharfboat.

"And you are further instructed that although you may believe and find that in making such landing aforesaid, the defendant attached its

wharfboat, on and over which said landings were made, to the piers of the elevated railroad, and constructed stages, flatboats, or bridges for the carriage of its passengers, freight and mail over the waters into and upon the pavement of Vine street, yet the plaintiff would be entitled to recover as aforesaid if you further find from the evidence that in making all such landings the defendant made use of the city's wharf by using a certain iron ring bolt or ring bolts set in said levee, for the purpose of holding and securing in position defendant's said wharfboat for its use in making such landings."—Approved: City of St. Louis v. Eagle Packet Co., 214 Mo. 638, 114 S. W. 21.

§ 3394. Change of Grade Damaging Abutter.

(a) "If the jury believe from the evidence, that the plaintiff purchased the lot in the declaration mentioned and built his residence thereon, and that the lot abutted on the Northwestern turnpike, and, when so purchased and built upon, it was out of the limits of Parkersburg, but that the limits of Parkersburg were subsequently extended so as to include this lot, and that the defendant in improving Pike street, formerly the Northwestern turnpike, to the entire width thereof and close up to the line of the plaintiff's lot, inflicted damage on the plaintiff, then it is immaterial whether the grade of the Northwestern turnpike, on that portion of it which was graded at the time of the plaintiff's purchase of this lot, was materially altered or not, or whether it was widened out to or near the plaintiff's line at substantially the same grade, as existed on the graded portion of the Northwestern turnpike, as it had before existed, or whether this grade in this widening was changed, provided the change made in improving this street by the defendant was such as to interrupt the plaintiff in the possession and enjoyment of his property. For if this was the case, or the plaintiff was obstructed in his mode of ingress and egress to and from his property, he is entitled to recover such damages, as you may find from the evidence he has sustained by reason thereof, and it makes no difference whether the old grade of the Northwestern turnpike was changed or not, the question for the jury is, 'Did what the defendant performed in improving this street damage the property of the plaintiff?' If so, he is entitled to recover."—Approved: Hutchinson v. City of Parkersburg, 25 W. Va. 226.

(b) "The city of Louisville had the right to have Woodland avenue improved along and adjacent to the plaintiff's property described in the petition, but it had no right, in so doing, to diminish the value of said property; and if you believe from the evidence that said property was diminished in value by reason of the construction of said street, as it was constructed along and adjacent to plaintiff's property, then the law is for the plaintiff and you should so find."—Approved: City of Louisville v. Kaye, 122 Ky. 599, 92 S. W. 554.

§ 3395. Adoption of Plan of Improvement by City Council.

"When a street has been improved by the construction therein of a box drain or culvert, one end of which is protected by a stone, placed there at the time of its construction, and was a part thereof; and the

pay-roll prepared by the officers in charge of the work for the labor and material has been subsequently audited by the board of public works, allowed by the common council of the city, and approved by the mayor, this corporate action must be considered equivalent to the adoption of the plan by which the improvement was made."—Approved: Davis v. Mayor, etc., of the City of Jackson, 61 Mich. 530, 28 N. W. 526.

§ 3396. City Officers Overseeing Street Construction—Estoppel.

"If you find from the testimony that the concrete was in such condition in the spring of ——, that it could have been covered with brick, and that when so covered it would have made a good substantial pavement, such a pavement as is provided for in the contract and specifications, then the defendant was not justified in causing the concrete to be torn up and preventing the plaintiff from completing his contract, and the plaintiff ought to recover for whatever is due him by reason thereof. That is, he ought not to be charged up with the losses in that regard in case he did it—in case that in the spring after it was taken, as the plaintiff makes claim, that it was in a good condition then to lay the brick upon, and, if it was, the city ought to have allowed him to lay the brick upon it and complete his job. If you find that the city's engineer and inspectors charged with the duty of seeing that the pavement was properly built were present during the entire progress of the work and saw the manner in which the contractor was performing it, and knew the quality of the material, had personal knowledge of the quality of the material, without objecting thereto, and if the board of public works acting weekly or at various times upon the reports made by such representatives of estimates reported by the city engineer, then the city is estopped to set up an improper performance of the contract so far as the contract was performed by the plaintiff in that way. Now, in explanation of that, gentlemen, you must remember that during all the time it implies that the inspectors were there and saw how it was being done themselves and knew the material. If they thought that the material was good, and the plaintiff knew it was not, then the plaintiff must suffer the loss, but if they knew about it as well as he did what the material was, and both of them thought that it was in accordance with the contract, then after it was completed the city cannot complain that this man did not do right if he did what he thought was right and what the inspectors thought was right at the time, but if he fraudulently concealed anything from the inspectors, or the inspectors themselves fraudulently allowed anything to pass, he also knowing of the defect, then the city can recover back at any time within the proper statute of limitations from them, and can make the defense in this case. I think you understand me, gentlemen. If both the inspectors and Mr. Ryan were wrong on anything that passed the city is not responsible for that, but the plaintiff is. If Mr. Ryan was wrong, and did not tell the inspector so that the inspector knew as much about it as he did, and the inspector acted ignorantly, and the plaintiff knew he was acting ignorantly, in allowing it to pass, then Mr. Ryan would be responsible.

but if he acted in good faith, and told the inspector all that he knew about it, or did not try to conceal anything from the inspector, and supposed the inspector knew the whole thing, and it passed over and was received by the city and passed on as being completed, then Mr. Ryan would not be liable for the defects in it."—Approved: Ryan v. Bay City, 160 Mich. 559, 125 N. W. 398.

CHAPTER XCIX.

DAMAGES.

A. Damages in General.
B. Damages for Death.
C. Damages for Breach of Contract—Measure of.
D. Carriers of Freight and Telegraph Companies.
E. Personal Injury—Measure of Damages.
F. Personal Injury to Minors—Measure of Damages.
G. Damages for Torts—Measure of.
H. Sales of Intoxicating Liquors.
I. Exemplary Damages.

A. Damages in General.

§ 3397. Burden of Proof to Show Loss and Extent.
3398. Must be based on Evidence in the case.
3399. Exemplary Damages not Awarded without Actual Damages.
3400. Avoidable Consequences not Compensated.
3401. Notice of Rescission Stops Accrual of Damages so Far as may be Prevented.
3402. Where Cause of Damage may be Removed by Party Damaged, He should Remove it.

§ 3397. Burden of Proof to Show Loss and Extent.

"The court instructs the jury that a party who claims compensation for an alleged wrong done must show, not only that he has suffered a loss on account of the injury, but also what was the amount of the loss, and the burden of proving both these things is upon the party alleging the wrong."—Approved: Haggerty Bros. v. Lash & Shaughnessy, 34 Mont. 517, 87 Pac. 907.

§ 3398. Must be Based on Evidence in the Case.

"There is no evidence in this case as to any loss of earning capacity on the part of plaintiff. You are not permitted to guess at such loss, and therefore can award nothing in the way of damages for loss of earning capacity. There is no evidence in this case as to the probable duration of plaintiff's life. Hence you cannot award any damages for the future loss of plaintiff by reason of his injury."—Approved: Pierce v. Bidwell Thresher Co., 153 Mich. 323, 116 N. W. 1104.

§ 3399. Exemplary Damages Not Awarded Without Actual Damages.

"You cannot, in any event, find any exemplary damages unless you find for the plaintiffs actual damages, and if you do not find that the

plaintiffs have suffered actual damages under the instructions herein given you, you will return your verdict for the defendant."—Approved: American Freehold Land Mortgage Co. v. Brown (Tex. Civ. App.), 118 S. W. 1106.

§ 3400. Avoidable Consequences not Compensated.

"It is claimed by defendant that plaintiff, before he commenced to build said house and made the improvements on said lot, had noticed that there was no street on the north line of the same. On this subject you are instructed, that if you believe from the evidence that plaintiff, before he commenced the erection of the house on said premises, knew that there was no street on the north line of said lot, then he cannot recover any damages to said house or improvements occasioned or resulting from the want of a street. The plaintiff could not, with the knowledge that no such street existed, build his house with a view to having it front on what he knew was not a street, and then claim damages of defendant by so erecting it."—Approved: White v. Smith, 54 Iowa, 233, 6 N. W. 284.

§ 3401. Notice of Rescission Stops Accrual of Damages So far as May be Prevented.

"That after a contract has been entered into between two parties, and notice is given by one of them that the contract is rescinded on his part, he is liable for such damages and loss only as the other party has suffered by reason of such rescinding of the contract; and it is the duty of such other party, upon receiving such notice, to save the former, so far as it is in his power, all further damages, though the performance of this duty may call for affirmative action on his part."—Approved: Hale v. Hess, 30 Neb. 42, 46 N. W. 261.

§ 3402. Where Cause of Damage May be Removed by Party Damaged He Should Remove it.

"If, however, you believe from the evidence that the plaintiff, by the use of ordinary care and at a reasonable cost, could have cleaned out the spring and removed the cause of pollution, you will, in case you find for her, award her such damages only as will fairly compensate her for the diminution in the value of the use of the property up to the time when she might have so cleaned out the spring, together with the reasonable cost of so cleaning it out."—Approved: Cincinnati, N. O. & T. P. Ry. Co. v. Gillispie, 130 Ky. 213, 113 S. W. 89.

B. Damages for Death.

(N. B. These Instructions depend on local statutes.)

§ 3403. Instruction under Missouri Statute.
3404. Death of Father—Pecuniary Loss and Loss of his Society.
3405. Death of Husband—Damages based on Health and Earning Capacity.
3406. Same—Loss of Comfort, Society, Assistance in Caring for Family and Support for widow during their probable joint lives.
3407. Pecuniary Benefits for Minor Children Defined.
3408. Recovery Present Worth of Pecuniary Benefits, or what is Reasonably Expected Deceased would Contribute.
3409. What husband would probably Earn and Services in Care of Family.
3410. No Recovery by Widow for Grief and Loss of Society.
3411. Recovery by Estate for Destruction of Power to Earn Money.
3412. Same—Recovery by Next of Kin.
3414. Position in Life of Minor's family as Indicating his probable Savings before Attaining his Majority.
3415. Damage what Deceased Husband would have Probably Earned and Contributed to his Family.
3416. Death from Intemperance Actual Value of Loss of Means of Support—Habits of Industry, etc., Considered.
3417. Expectancy According to Mortality Tables, if Deceased was Strong and Robust.
3418. Measure of Damages for Death of Mother.
3419. Next of Kin—Fair and Just Compensation for Pecuniary injury to them.
3420. No Damage Presumed from Death of a Brother but must be Proved.
3421. Next of Kin—Jury to Say if there is Any Pecuniary Loss.
3422. Death of child—Mental Grief not Considered, but pecuniary benefits in Life of Child during Minority.
3423. Same—Artistic Capacity as affecting the Question of expense to Educate and probable net Earnings, during minority, if any.
3424. Same—Net Earnings above Cost of Maintenance.
3425. Several Plaintiffs—Recovery apportioned by the jury.

§ 3403. Instruction Under Missouri Statute.

"The court instructs the jury that under the law, if they find for the plaintiff their verdict must be for five thousand dollars, and cannot be for more nor less than that sum if for plaintiff."—Approved: Everett v. St. Louis & San Francisco Railroad Company, 214 Mo. 54, 112 S. W. 486.

§ 3404. Death of Father—Pecuniary Loss and Loss of his Society.

"The jury are instructed that if your verdict shall be for the plaintiffs, such damages may be given by you to plaintiffs as, under all the

circumstances of the case, may be just, but not exceeding the amount prayed for in the amended complaint. And in determining the amount of such damages you have the right to take into consideration the pecuniary loss, if any, suffered by these plaintiffs in the death of William H. Keast by being deprived of his support; also the relations proved as existing between plaintiffs and deceased at the time of his death, and the injury, if any, sustained by them in the loss of his society."—Approved: Keast v. Santa Ysabel Gold Min. Co., 136 Cal. 256, 68 Pac. 771.

§ 3405. Death of Husband—Damages based on Health and Earning Capacity.

"If you find the issues for the plaintiff, you should assess her damages at such sum, not exceeding five thousand dollars, as you may deem just and fair under the evidence of this cause, with reference to the necessary injury resulting to her from the death of her husband; and in estimating such damages, you may take into consideration his age, the condition of his health and his earning capacity at the time of his death, as shown by the evidence."—Approved: Hach v. St. Louis, Iron Mountain & Southern Railway Company, 208 Mo. 581, 106 S. W. 525.

§ 3406. Loss of Comfort, Society, Assistance in Caring for Family and support of Widow during their probable joint Lives.

"I charge you, gentlemen, in this connection, where the widow sues for damages for the death of her husband by the wrongful act of another, in estimating her pecuniary loss, the jury may properly take into consideration her loss of the comfort, protection, and society of her husband in the light of all the evidence in the case relating to the character, habits, and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death, and they may also consider his services in assisting her in the care of the family, if any; but the widow is not entitled to recover for her mental anxiety or distress over the death of her husband, nor for his mental or physical suffering from the injury. She is also entitled to reasonable compensation for the loss of support which her husband was legally bound to give her, based upon his probable future earnings and other acquisitions, and the station or condition in society which he would probably have occupied, according to his past history in that respect and his reasonable expectations in the future; his earnings and acquisitions to be estimated upon the basis of the deceased's health, age, business capacity, habits, experience, energy, and his present and future prospects for business success at the time of his death, and all these elements to be based upon the probable joint lives of the widow and husband. She is also entitled to compensation for loss of whatever she might reasonably have expected to have received in the way of dower or legacies from her husband's estate, in case her life expectancy be greater than his. The sum total of all these elements is to be reduced to a money value, and its present worth to be given as damages. Within these limits the jury exercise a reasonable

discretion as to the amount to be given, based upon the facts in evidence and the knowledge and experience possessed by them in relation to matters of common knowledge and information."—Approved: Georgia, F. & A. Ry. Co. v. Sasser, 4 Ga. App. 276, 61 S. E. 505.

§ 3407. Pecuniary Benefits for Minor Children Defined.

"By 'pecuniary benefits,' as here used, is meant, not only money, but everything that can be valued in money, and in the case of the minor children it includes the reasonable pecuniary value of the nurture, care, and training, if any, you may believe from the evidence they would have received from their deceased father during their minority, had he lived."—Approved: Missouri, K. & T. Ry. Co. v. Wallace, 53 Tex. Civ. App. 127, 115 S. W. 302.

§ 3408. Recovery Present Worth of Pecuniary Benefits or What is Reasonably Expected Deceased Would Contribute.

"You are instructed to find for plaintiffs such sum as you find and believe from the evidence to represent the present worth or value of the pecuniary benefits, if any, which you believe from the evidence his wife and children and mother, who are plaintiffs herein, had a reasonable expectation that the said H. M. Wallace would have contributed to them in the future, had he not been killed; and you will apportion the amount you find among the plaintiffs in such sum as you may determine each is entitled to receive."—Approved: Missouri, K. & T. Ry. Co. v. Wallace, 53 Tex. Civ. App. 127, 115 S. W. 302.

§ 3409. What Husband Would Probably Earn and Services in Care of Family.

"If, under the evidence and instructions of the court, the jury find for the plaintiff, then, in assessing the damages which the plaintiff is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the wife and children of the deceased, and, determining this, you may consider the probable earnings of the deceased, his age, business capacity, experience, habits, health, bodily and mental qualifications, during what probably would have been his lifetime if he had not been killed, so far as these matters have been shown by the testimony; and you may also consider the value of his services might have been in the superintendence and attention to and care of his family, and the education of his children; but the amount you can allow cannot exceed the sum of $5,000."—Approved: Chicago, R. I. & P. Ry. Co. v. Zernecke, 59 Neb. 689, 82 N. W. 26.

§ 3410. No Recovery by Widow For Grief or Loss of Society.

(a) "If the jury find for the plaintiffs, you will determine from the evidence that probable amount and value of the pecuniary aid, if any, which the said Bertie White would probably have contributed after the 19th day of February, 1908, if he had not been killed, to the plaintiffs, Mrs. Annie M. White, Mrs. Sarah White, Henry Edward White, and Bertie Lee White, or to any one or more of them, and the probable pecuniary value, if any, of the counsel and advice, if any, which the

said Henry Edward White and the said Bertie Lee White would probably have received from the said Bertie White, if he had not been killed, and fix the damages, if any you find, in such sum as you find from the evidence, if paid in hand at this time, would justly and fairly compensate them, respectively, for the pecuniary loss, if any, resulting to them by reason of the death of the said Bertie White; and you will apportion the damages so found, if any, between the plaintiffs in such shares as to you may seem just, stating in your verdict the amount, if any, you find for the respective plaintiffs; but in this connection you are instructed that, if you find for either or all of the plaintiffs, they are not entitled to recover any damages on account of grief or distress of mind or loss of society because of the death of the said Bertie White, but can only recover damages for such pecuniary loss, if any, as the evidence may show they have sustained, respectively, on account of his death."—Approved: International & G. N. R. Co. v. White (Tex. Civ. App.), 120 S. W. 958.

(b) "If you find for plaintiff, you will take into consideration all the facts and circumstances in evidence concerning her husband, and the relations existing between her and him, and will allow her such sum as will, if paid now, fairly compensate her for the pecuniary damage and loss which you believe she has sustained by reason of the death of her husband; but, in assessing such damages, you will not take into consideration or allow any compensation to her as a solace for her grief or for the loss of the companionship of her husband. If you find for the defendant, you will say so, and no more."—Approved: Citizens' Telephone Co. v. Thomas, 45 Tex. Civ. App. 20, 99 S. W. 879.

§ 3411. Recovery by Estate for Destruction of Power to Earn Money.

(a) "If your finding be for the plaintiff upon any one or all of the three states of case set out in instruction No. 1, then you will find such a sum in compensatory damages as you believe from the evidence will reasonably compensate the estate of Tinsley Stewart, deceased, for the destruction of his power to earn money, in any sum in your discretion not to exceed the sum of $30,000."—Approved: Lousiville & N. R. Co. v. Stewart's Adm'x., 131 Ky. 665, 115 S. W. 775.

(b) "If you find for the plaintiff, you will estimate the damages to which he is entitled; and, in so doing, you will not allow anything for pain and suffering of deceased, nor wounded feelings, nor grief of his relatives, nor anything by way of exemplary damages or punishment of defendant, nor infer any fortuitous circumstance whereby the income or fortune of deceased might be increased or improved had he lived. This suit is brought only to recover a pecuniary loss, namely, what the estate of the deceased had lost in consequence of his untimely death, and no more. And, in determining what amount you will allow, you should take into consideration the age of the deceased, his occupation, the wages he was receiving, the condition of his health, his ability, if any, to earn money, his expenditures, and habits as to industry, sobriety, and economy, the amount of property which he had accumulated at the time of his death, if any, the probable duration of his lifetime, and all these in connection with all the evidence before

you, throwing light on this question, and determine therefrom the probable pecuniary loss to the estate caused by his death, and allow the plaintiff such sum, and such only, as will compensate the estate for such loss."—Approved: Spaulding v. Chicago, St. P. & W. C. Ry. Co., 98 Iowa, 205, 67 N. W. 227.

(c) "You will assess the amount of the recovery at such sums as you find from the evidence will compensate the said E for the pecuniary loss he has sustained by reason of the death of his mother. * * * You are not permitted, however, to allow any damages on account of mental suffering or bereavement, or as a solace on account of such death, as the law recognizes only pecuniary loss; nor are you permitted to allow any damages by way of vindictive or punitive damages. You should consider the relation of the parties, the earning capacity of the mother, her disposition to support her son, the probability or improbability of her continuing to do so, the loss of companionship and advice, in so far as you find from the evidence such elements to be of a pecuniary loss to said E."—Approved: Wood v. City of Omaha (Neb.), 127 N. W. 174, 176.

§ 3412. Same—Recovery by Next of Kin.

"If they find for plaintiff then in estimating plaintiff's damages they may take into consideration the prospective life of said George Ross, his opportunities, abilities and habits with reference to the making and saving of money to be estimated by the jury from all the facts and circumstances proved, and the jury may assess such damages as from the evidence will be a fair compensation for the pecuniary loss suffered by the next of kin, if any, from the death of deceased."—Approved: Ross v. Chicago, Rock Island & Pacific Railway Company, 149 Ill. App. 286.

§ 3414. Position in life of Minor's Family as Indicating his probable Savings before attaining his majority.

"I instruct you that if you should find that the defendant is guilty of the wrongful act, as charged in the complaint, and that the same resulted in the death of the child, Leo Friedman, then the plaintiff is entitled to recover in this case, for the benefit of the estate, such damages as the jury may deem from the evidence and proofs, as fair and just compensation therefor, not exceeding the amount claimed in the complaint, and in arriving at your verdict, you should consider what pecuniary benefit the estate of said deceased would have derived, had said adobe wall not fallen upon him. You are to consider the probability of the said child living and growing to manhood and obtaining property, which the law, upon his death, if intestate, would have passed to his legal representatives; you are to consider the age and health of the child, his expectancy and probability of living and his mental and physical vigor and the probability of his accumulating property. You are to consider the damages that the said child's estate has sustained.

"I instruct you, in ascertaining the amount of damages, you will consider the evidence as to the age and sex of the child who was killed;

also the evidence, if any, of the position of life of the parents and of the expectancy of life which the child had, and from these form an estimate of the amount which the child would have saved from his earnings between the time when he attained the age of twenty-one years and the date which he might reasonably be expected to live. Such estimate will be the measure of damages in this case."—Approved: De Amado v. Friedman (Ariz.), 89 Pac. 588 (not reported in state reports).

§ 3415. Damages that Deceased Husband would have Probably Earned and Contributed to His Family.

"The law reads that, if your verdict be for the heirs of Hollingsworth, you may allow such damages as under all of the circumstances of the case must be just. In that case it would not be just to allow more than compensation; that is to say, payment for the financial loss which they have sustained by reason of his death. But under the head of compensation (if your verdict is for them) you may consider any amount which Hollingsworth, Sr., would probably have earned during his life (if not cut off) and contributed to his wife and children. You may in this connection consider his capacity to earn money, his age at death, his disposition to work, his habits of life and living, and his own expenditures. In connection with the probable expectancy of life of Hollingworth, Sr., you may also consider the age and expectancy of life of his wife with relation to his own age. You should bear in mind another matter (if your verdict is for his heirs) when you come to the consideration of allowing payment for the future earnings and contributions of the dead man. Simply multiplying his expectancy by his yearly contribution from earnings would be excessive and not as reliable as determining what would buy with some responsible life insurance company a yearly income equal to what he would earn and contribute to them during the joint expectancy of himself and all and any of his heirs and leave nothing at the death of any as to the allowance made on account of such as would have died before he would have died. If your verdict is for the plaintiffs, you may consider any loss of comfort, society, or protection of a father and husband, and in that case, if it was of money value, you may allow pecuniary compensation. In other words, if your verdict is for them, you must give such damages as will fully compensate them, both wife and children, for the pecuniary value to them of the life of the husband and father. Sympathy and pity must not influence you in a verdict. Neither a desire to help the plaintiffs nor to punish the defendant should be exercised."—Approved: Hollingsworth v. Davis-Daly Estates Copper Co., 38 Mont. 143, 99 Pac. 142.

§ 3416. Death from Intemperance—Actual Value of Loss of Means of Support—Habits of Industry, etc., considered.

(a) "This action being brought for loss of means of support which would have been supplied to the plaintiffs by the deceased father and husband had he lived, the extent of such loss is to be considered and measured by you by the time, character, and value of the services of

the deceased to plaintiffs in his vocation or business when living; and, as to the value of the loss of such means of support to the minor child of plaintiff, it would depend in some degree upon the age and ability to support himself, bearing in mind you cannot take into consideration and assess remote, speculative, or exemplary and punitive damages, but you can assess damages, if any, only to the extent of the real and actual value of the loss of means of support to plaintiff occasioned by the death of the father and husband. In passing on this case should you find for the plaintiff, in estimating the damages you must take into consideration the situation of the deceased, his estate, if any, the physical condition and health of deceased, his means of earning money and a livelihood, and his habits of industry, his vocation, the daily, monthly, or annual product or value of same, and whether any of the plaintiffs are of such tender age as to render them entirely dependent upon parents, and especially upon the deceased, for support; taking into consideration his reasonable expectation of life, and should you find he was a strong, robust man, the Carlisle tables of expectancy introduced in evidence before you will be the proper estimate of his, the deceased's life."—Approved: Sellars v. Foster, 27 Neb. 118, 42 N. W. 907.

(b) "In determining the amount which plaintiff should recover in this action, if any, you should consider the situation of the deceased, his annual earnings, his habits, his health, and his estate, if any, the profits of his labors, what he would have earned if he had lived for the support of those entitled to recover, and the probability, or the reasonable expectation, of the life of the deceased at the time of the injury; and in determining this you may take into consideration the tables of expectancy which have been introduced in evidence."—Approved: Roose v. Perkins, 9 Neb. 304, 2 N. W. 715.

§ 3417. Expectancy According to Mortality Tables, if Deceased was strong and robust.

"If you find the principal defendants were licensed to sell malt, spirituous, vinous, and intoxicating liquors or drinks, and that the other defendants were their bondsmen, as averred by plaintiff, and you find the deceased, Henry W. Foster, at the time of his death, was intoxicated, and that such intoxication was the cause of his death, and you find that he was the father and husband of plaintiffs, and they were dependent on him for their support as alleged, and you find all the principal defendants sold or gave to deceased intoxicating drinks, which contributed to such intoxication, and you further find the plaintiffs have lost their means of support which would have been supplied to them by said deceased, you must find for the plaintiffs against all the defendants, assessing your damages at actual value of such loss of support to plaintiffs, estimating his expectancy of life upon the Carlisle tables introduced in evidence before you, if you find the deceased was a strong, robust man, bearing in mind, in any event, you only can return a verdict, if any, against those principal defendants and their bondsmen, whom you find, by a fair preponderance of evi-

dence, sold or gave to deceased the intoxicating drinks which contributed towards or caused intoxication of deceased, which caused his death; and should you find the deceased was intoxicated at the time of his death, and that his decease was caused by such intoxication, in no, nor in any, event can you return a verdict against any of the principal defendants and their bondsmen, unless a fair preponderance of the evidence satisfies you such principal defendants sold or gave to deceased intoxicating drinks, which caused or contributed to the intoxication of the deceased. In other words, should you find the deceased came to his death, by means and by reason of being intoxicated, at the time and place as alleged, you shall find against such of the principal defendants, as gave or sold intoxicating drinks to deceased, and their bondsmen,—and this you must find from the preponderance of evidence,—and should you find a part or portion of the principal defendants gave or sold intoxicating drinks to deceased, and a part or portion did not, you will return a verdict against the former and their bondsmen, and in favor of the latter and their bondsmen, bearing in mind your verdict cannot exceed the amount of damages claimed against any principal defendant, and not to exceed the penalty of the bond signed by the respective bondsmen."—Approved: Sellars v. Foster, 27 Neb. 118, 42 N. W. 907.

§ 3418. Measure of Damages for Death of Mother.

"You will assess the amount of the recovery at such sum as you find from the evidence will compensate the said Charles Nelson Eddy for the pecuniary loss he has sustained by reason of the death of his mother. You are not permitted, however, to allow any damages on account of mental suffering or bereavement, or as a solace on account of such death, as the law recognizes only pecuniary loss; nor are you permitted to allow any damages by way of vindictive or punitive damages. You should consider the relation of the parties, the earning capacity of the mother, her disposition to support her son, the probability or improbability of her continuing to do so, the loss of companionship and advice, in so far as you find from the evidence such elements to be of a pecuniary loss to said Charles Nelson Eddy."—Approved: Wood v. City of Omaha (Neb.), 127 N. W. 174.

§ 3419. Next of Kin—Fair and Just Compensation for Pecuniary Injury to Them.

"The court instructs the jury that, if they should find for the plaintiff, they should assess the damages at whatever sum they believe from the evidence would compensate the next of kin of William Voss, deceased, for the pecuniary loss they sustained by his death; that the law prescribes no rule for the measurement of the damages, except that the jury should give such damages as they should deem a fair and just compensation with reference to the pecuniary injury resulting from the death of said William Voss to his next of kin."—Approved: Little Rock & Ft. S. Ry. Co. v. Voss (Ark.), 18 S. W. 172 (not reported in state reports).

§ 3420. No Damages Presumed from Death of a Brother, but Must be Proved.

"In a suit like the one pending, the law does not allow damages for grief caused to the relatives of the deceased by his being accidentally killed, but only for pecuniary loss sustained, and where the nearest relatives are a brother and sisters, as here, the law does not presume damage to them, but damages must be proved. In the absence of such proof you can only assess nominal damages, by which term is meant one dollar or one cent."—Approved: Rhoads v. Chicago & A. R. Co., 227 Ill. 328, 81 N. E. 371.

§ 3421. Next of Kin—Jury to Say if there is any Pecuniary Loss.

"The court instructs the jury as to the measure of damages that, if you find for the plaintiff, the law allows no punitive damages, but only compensatory damages, that is, compensation to the next of kin for their pecuniary loss sustained by the death of their relative. These, perhaps, are in their nature uncertain and indefinite, for if the deceased had lived they might not have been benefited, and, if not, then no pecuniary injury would have resulted to them from his death. It is difficult to get at the pecuniary loss with precision and accuracy, but, taking all the facts and circumstances of the case into consideration, you are, according to your deliberate judgment, to determine whether the parties for whose benefit this action was brought have suffered any pecuniary injury, and, if so, you are to assess such damages as you shall deem fair and just, remembering that it is only the pecuniary value of the life of the deceased to his next of kin, that is, the pecuniary value they would have derived had his life not been terminated, that constitutes their claim for damages on account of his death."—Approved: Anderson v. Chicago, B. & Q. R. Co., 35 Neb. 95, 52 N. W. 840.

§ 3422. Death of Child—Mental Grief not Considered, but Pecuniary Benefit in Life of Child During Minority.

"No mental grief or agony can be computed in a case of this sort, but only actual compensatory, pecuniary damages, if any, can be recovered; and in estimating damages the age and character of the child, and its pecuniary benefit to plaintiffs up to its arrival to twenty-one years of age, may be considered, after allowing all reasonable expense of its rearing and education for the same period."—Approved: Houston City St. Ry. Co. v. Sciacca, 80 Tex. 350, 16 S. W. 31.

§ 3423. Same—Artistic Capacity as Affecting Expense of Education and Probable Net Earnings During Minority, if Any.

"In this case, if the verdict of the jury is for the plaintiff, it can only be for an amount that the boy Leo Snyder's services would have been worth over and above the expenses of taking care of him, clothing him, and educating him from the time of his injury up to the time he was twenty-one years of age. In considering the question of how much the services of the said Leo Snyder would probably have been worth from the time of his injury up to the time that he was twenty-one

years of age, over and above the expense of taking care of and clothing him and educating him in a manner which was probable that he would have been educated, the jury are entitled to take into consideration what the services of a boy, such as the testimony describes him to have been, would have fairly been worth ordinarily. While there has been testimony allowed in this case as to what wages have sometimes been paid boys for services in particular lines of business, this is not of itself conclusive as to what the services of this boy would have been worth. There has been evidence introduced on the part of the defendant on the question of the value of services of a boy of the age that this one was at the time of his injury and from that time up to the time he was twenty-one years of age, and the jury must make up their minds on this subject based upon facts, not upon any fancies which they may have in their minds, what would be the value, ordinarily, of the services of such a boy, over and above his expense as above set forth, as shown by the evidence. The jury has been allowed to hear the testimony of witnesses in different kinds of business, and in somewhat different stations or kinds of business life, giving their judgment as to what the value of the services of a boy would ordinarily be from the age of Leo Snyder up to the time that he was twenty-one years of age, over and above the cost and expense of raising him, and his cost and expense of living; and the jury are entitled to take this testimony into consideration with any other that may be in the case for the purpose of determining this question. The jury is instructed that the fact, if it be a fact, that the boy Leo Snyder was in the habit of making pictures or drawings, or was interested in that line of work, would not by any means establish as a fact in this case that he would at some future time be able, through any such work, to earn any large sums of money. You may consider that testimony, however, as bearing upon his possible earning power and ability had he lived. While this testimony was allowed to go in before the jury, it does not follow that the jury would be justified in determining that his services in the future would be worth what those of somebody else may have been in the line of business that was mentioned by the witnesses. It is not alone what a boy would probably earn from the time he was eleven and one-half years old until he was twenty-one, but the jury should consider also the amount of probable expense of raising, educating, clothing, and feeding such boy, and the payment of such other ordinary expenses as would naturally be expected to be paid for him during the years mentioned. In considering the question of the value of services, the jury have a right to consider from the testimony there is in the case what would probably be the number of years that the boy would attend school for the purpose of obtaining an education to fit himself for any particular line of work; and if, during a certain number of years of his life, he was not able to earn any money, or any great amount of money, but during such years, whether it would or would not be probable that money would have to be paid out for his care, keeping, and clothing, then as he grew older he would be able to earn more money, but still be obliged to pay for his keeping and clothing and ordinary necessary expenses—

all these things should be considered by the jury in determining what the net value of his services would be, if anything, for the whole period of time from his accident up to the time he was twenty-one years of age; and if, in considering all these facts, the jury believe that his services would not be worth anything in cash, then they are not entitled to find any damages beyond nominal damages in this case. In considering this question of damages the jury is not to take into consideration anything except the question of what his probable services would be worth from the time of his injury up to the age of twenty-one years, over and above his expenses as above explained, if he had lived. The jury cannot take into consideration, nor be in any way swayed in this case by, the grief which his death may have caused his parents, or any of his relatives, or by the loss of his society to them, or of any other facts in the case except that of loss of services; and consequently, however sad this accident may have been to his family, and however much sorrow may have been caused by such accident and by his death, is of no sort of consequence to this jury in determining the question that is before you to determine as to damages, if you come to a point of determining the matter of damages. If you find for the plaintiff, the verdict must be one based entirely upon monetary consideration for the value of services, less expenses, as above explained; and no other thing must enter into your consideration on the question of damages to be allowed. The law does not allow damages in this kind of a case for loss of companionship of the deceased, for sorrow on account of his death, for expenses for his burial, or for any other thing whatever except for the loss of services until he is twenty-one years of age, and no longer; and the jury must be governed by this law as given by the court, and apply no other rule to it. Upon this question of damages I further instruct you that, if you find the plaintiff is entitled to recover, you should take into consideration the probability of the deceased living to be twenty-one years of age; also the probability of his father and mother living until the boy attained twenty-one years of age. Also any liability to illness, and the liability of his inability to earn money, or for any other reasons which the testimony may show, inability to get employment, injury to any part of his person which might impair one's ability to earn money. You should, on this question, consider everything that would be likely to affect, favorably or unfavorably, his power to earn money. On this question, gentlemen of the jury, I think it best to read you the following provision of law, which now exists, and which counsel on both sides in their argument to you commented upon, so that there will be no mistake as to the law; and, as both counsel seem to differ a little about it, in view of that difference in the statement of the law to you, I thought best for me to read this section of the statute, which is plain English, and you can understand it fully as well or better than if I tried to state it to you in general terms." (The judge read to the jury section 4847, Comp. Laws, requiring the children within school ages to attend the public schools.) "You should weigh, gentlemen of the jury, with great care, this testimony upon the question of this boy's claimed adaptabilities to draw and carve, if you find

he had such adaptabilities, and you should only allow damages upon this branch—if you come to the question of damages—after the most careful consideration of the testimony bearing upon the question, and after satisfying yourselves from the testimony that he had (if he had) such special adaptability to draw and carve as claimed by the plaintiff in this case, and, further, after being fully satisfied from the evidence that, if he did have such adaptability, he would have followed the business until arriving at twenty-one years of age. Would he have made a good workman at drawing, carving, etc.? Would he have followed it? Would he have received such wages as the witnesses testify are now being paid to draftsmen? Consider all these questions, all the testimony, all the matters and contingencies weighing for and against the question of his special adaptabilities, and decide it according to your own good judgment. Unless you are satisfied that he would have earned something because of this claimed drawing ability or his ability to carve, you must not allow anything for it. Now, I am not telling you, and do not mean, by this instruction, that you should not nor that you should allow anything on this account. I leave it to you wholly as a question of fact, and simply give you that instruction in view of that feature in this case, so that you will consider that branch of the case with great care."—Approved: Snyder v. Lake Shore & M. S. Ry. Co., 131 Mich. 418, 91 N. W. 643.

§ 3424. Same—Net Earnings Above Cost of Maintenance.

"If you find for the plaintiff in any sum, then you will allow her only a fair compensation for the loss of service which she has sustained, as shown by the evidence, taking into consideration the age, health and habits of the deceased, his capacity for labor, the probability of his living to the age of majority, and the fair and probable cost of his clothing maintenance and care, and such matters as are inseparably connected with his bringing up by his mother."—Approved: Benton v. C., R. I. & P. R. Co., 55 Iowa, 496, 8 N. W. 330.

§ 3425. Several Plaintiffs—Recovery Apportioned by the Jury.

(a) "If, under the foregoing instructions, you find for plaintiffs, you will, in that event, award them such an amount as you may believe proportioned to the injury sustained, if any. The proper measure of damages would be such a sum of money as, if paid now, would reasonably compensate them for the pecuniary loss, if any, sustained by them in the death of D. Davenport, and you will apportion same among plaintiffs, as you may believe they are severally entitled to receive."—Approved: Houston & T. C. R. Co. v. Davenport (Tex. Civ. App.), 110 S. W. 150 (not reported in state reports).

(b) "If you find for plaintiff, and further find from the evidence that the injuries of the said Charles M. Heard, if any, proximately caused his death, and that both plaintiffs were damaged thereby, then I charge you that you should award plaintiffs such a sum as you believe from the evidence would compensate them for the pecuniary loss, if any, which you believe from the evidence they have sustained by reason of the death of the said Charles M. Heard, if any, and, in the event you so

find for plaintiffs, you should apportion such amount and say in your verdict what sum, if any, you allow the plaintiff May Heard, and what sum, if any, you allow the plaintiff John A. Heard."—Approved: Galveston, H. & S. A. Ry. Co. v. Heard (Tex. Civ. App.), 91 S. W. 371 (not reported in state reports).

(c) "If, under the foregoing instructions, you find for the plaintiffs, then you will apportion the amount so found among them in such sums as you may determine each is entitled to receive; and you are instructed that the measure of damages, if you find for plaintiffs, is such sum as you find and believe from the evidence to be the present worth or value of the pecuniary aid, if any, that you believe from the evidence plaintiffs had a reasonable expectation that the said Robert Lee Williams, deceased, would have contributed to them had he lived. By 'pecuniary aid' is meant not only money, but everything that can be valuable in money, and, in the case of the minor children, includes the reasonable pecuniary value of the nurture, care, and education, if any, you believe from the evidence they would have received from the said Robert Lee Williams, deceased, during their minority had he lived. If you find for plaintiffs, you will not allow them anything for any grief or sorrow on account of the death of the said Robert Lee Williams or for the loss of his society, affection, or companionship."—Approved: Missouri, K. & T. Ry. Co. v. Williams (Tex. Civ. App.), 117 S. W. 1043.

C. Damages for Breach of Contract—Measure of.

§ 3426. Sale—Non-delivery—Difference between Market Value and Contract Price.
3427. Difference between Contract Price and Market Value at Nearest Point, less Freight.
3428. If Property has Advanced, Purchaser Recovers Difference as of Date for Delivery.
3429. When Seller Has Shipped may Sell for Best Price and Recover Difference plus expense.
3430. Refusal to Accept Gravel—Difference between Contract Price and Cost to Furnish.
3431. Warranty—Difference in Market Value of that Delivered and that Agreed to be.
3432. Diseased Cattle—Difference in Value Plus Loss in Effort to Use Same.
3433. Difference in Actual Value of that Sold and that Delivered.
3434. Boiler—Difference in Value Plus Loss from Use of Unsuitable Article.
3435. Right to Recoup for Difference in Values in Suit for Price.
3436. Difference between Market Value of Land and as Represented to be.
3437. Failure of Title to Land—Purchase Price and Value of Improvements Made.
3438. Delay—Frames for a Distillery—Profits Lost by Idleness.
3439. Delay in Furnishing Materials for Building—Recoupment.

3440. Stoppage of Work—Services Performed—Profits from Complete Performance.
3441. Breach of Agreement to Give Farm—Value of Services.
3442. Exclusive Agency—Commissions Diverted.
3443. Sale of Good Will—Loss of Profits During Entire Period.
3444. Contract for Services—Profits that Would Have Been Earned.
3445. Failure to Properly Pack Fruit—Diminution in Value.
3446. Liquidated Damages.
3447. Breach of Agreement to Furnish Water for Irrigation.
3448. Wrongful Discharge of Attorney.

§ 3426. Sale—Non-delivery—Difference between Market Value and Contract Price.

(a) "If you find for the plaintiff, the measure of his damages will be the difference between the contract price and the market value of said lumber at the time it should have been delivered under the contract."—Approved: Felsberg v. Moore, 84 Ark. 399, 106 S. W. 197.

(b) "The court instructs the jury that, if you find for the plaintiff, the measure of its damages will be the difference between the actual cash market value of such staves as were still undelivered under the contract at cars at Nashville, Ark., at the time of the refusal of the defendants to fulfill their contract, if proven, and the amount which plaintiff was to pay for such staves at the price agreed upon by the parties as shown by such contract, if any such difference has been shown by a preponderance of the evidence, together with six per cent. interest thereon from the date of such breach to this date."—Approved: Lanier & Co. v. Little Rock Cooperage Co., 88 Ark. 557, 115 S. W. 401.

(c) "The court instructs the jury that in the second count of the plaintiff's petition the plaintiff sues the defendant for loss alleged to have been sustained by plaintiff because of the alleged failure of defendant to specify and accept under the contract mentioned in the first instruction the whole amount of said one thousand net tons of bar iron, and if the jury believe from the evidence that during the time between June 3, 1903, and December 31, 1903, inclusive, the defendant refused to furnish specifications for the total amount of said one thousand net tons of iron and had not received said amount from the plaintiff as provided in said contract, then the jury will find in favor of the plaintiff and against the defendant on the second count of the petition and assess the plaintiff's damages thereon at such a sum as the jury believe from the evidence is the difference in value for the amount of iron which the defendant so refused to specify and accept under said contract between the price mentioned in said contract and the reasonable market value of such bar iron on the 31st day of December, 1903, if delivered and manufactured in the manner provided in said contract."—Approved: Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co., 210 Mo. 715, 109 S. W. 47.

§ 3427. Difference between Contract Price and Market Value at Nearest Point Less Freight.

(a) "If the jury find for plaintiff under instruction No. 1, they will allow him by way of damages the difference in the contract price of the

logs undelivered, if any, at the point of delivery in Knox creek, and the fair market value of said logs at the nearest available market for same, less the reasonable cost of transportation of same to said market, not exceeding $6,404.89."—Approved: Thomas v. Charles (Ky.), 119 S. W. 752.

(b) "If the jury believes lumber of the dimension mentioned in the contract in evidence could not be obtained at Ashland, the place of dealing mentioned in said contract by the plaintiffs, to be taken to the market at the time when the lumber was by said contract to have been delivered, then they may consider what was the then price of such lumber at Quebec, and the expense of transporting the same from Ashland to Quebec, together with the cost of inspection, and in that way ascertain the value of such lumber to the plaintiffs at Ashland, and the damages which the plaintiffs have sustained by the non-fulfilment of the contract."—Approved: Cockburn v. Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49.

§ 3428. If Property Has Advanced Purchaser Recovers Difference as of Date for Delivery.

"In an action for breach of an executory contract to deliver personal property, in the absence of fraud or stipulation to the contrary, the rule is actual compensation. The injured party may recover his loss sustained. In such case if the value of the property sold has advanced, the damage is the difference between the contract price and the market price at the time and place of delivery, and, in case of payment by the buyer of all or part of the purchase price, he is entitled to such difference between the contract and market prices, in addition to the sum paid on the contract, and seven per cent. interest on the sum paid on the contract, from the breach thereof."—Approved: Post v. Garrow, 18 Neb. 682, 26 N. W. 580.

§ 3429. When Seller Has Shipped May Sell for Best Price and Recover Difference of His Expense.

"If you find for the plaintiff, the measure of his damages is the difference between the price the defendant agreed to pay him for the sheep and the actual market value of the sheep at the time and place they were to be delivered; and if you find that the plaintiff in good faith shipped the two car loads of sheep which had been taken to the station at Millerton to market, and sold them for as high a price as he could reasonably obtain therefor, then you should consider the net amount which he received for the two car loads of sheep, after allowing for the reasonable and necessary expenses of their shipment and sale to be their actual value at the time they were to be delivered; and if you find, from the whole evidence in the case, that the actual market value of the 2,000 sheep at the time and place they were to be delivered was less than the contract price agreed upon between the parties, then the difference would be the plaintiff's damages in this case. On this amount you should allow interest from the 24th day of November, 1897, to the 14th day of November, 1898, at seven per cent. per

annum."—Approved: Schaaf v. Hamilton, 2 Neb. Unoff. 577, 89 N. W. 614.

§ 3430. Refusal to Accept Gravel—Difference between Contract Price and Cost to Furnish.

"You are instructed that uncontroverted evidence in this case shows that there was delivered by the plaintiff to the defendant, under the contract sued on, 21,816 yards of gravel, and that amount was received and paid for by the defendant. Now, if you find for the plaintiff, you will determine from the evidence the amount of plaintiff's damages in the following manner: You will determine from the evidence what it would cost the plaintiff to have furnished and delivered to the defendant, within the time limited in the contract, the balance of 50,000 cubic yards of gravel contracted for, and if you find such cost would have been less than the contract price between plaintiff and defendant, under said contract, you will deduct such cost of furnishing and delivering the gravel from the contract price; upon this difference between the cost and contract price you will calculate simple interest at the rate of seven per cent. per annum from October 5, 1895, to the 6th day of March, 1895, that being the first day of the present term of this court, and this interest you will add to the difference between the contract price and the cost price, and the sum resulting therefrom will be the amount of damages you should return in favor of the plaintiff."—Approved: Parkins v. Missouri Pac. Ry. Co., 76 Neb. 242, 107 N. W. 260.

§ 3431. Warranty—Difference in Market Value of that Delivered and that Agreed to be.

(a) "If you shall find from the testimony that the plaintiffs guarantied that the unscreened gravel, which they were to furnish the defendants, should be of a certain quality, and also that it was not of such quality, and if you can ascertain from the testimony what additional expense, if any, the defendants were put to, in order to prepare such gravel for the use for which it was furnished, which they would not have been put to if it had been such as the guaranty called for, then, and in that case, you may allow such additional expense as damages to the defendants. If, however, the testimony is not sufficiently definite to enable you to make such computation, then you may, if you shall find as above stated, allow as damages to the defendants the difference between the market value at Lincoln of the material as it was contracted for and of the quality contracted for and the market value of the material at Lincoln as it was when delivered to the defendants." Approved: Clarke v. Van Court, 34 Neb. 154, 51 N. W. 756.

(b) "If you find and believe from the evidence that the defendants, W. M. Miller and T. S. Miller, Jr., contracted and agreed to sell and deliver to plaintiff twenty-one head of cattle, which said cattle defendants agreed and contracted were to be Jersey cattle, and that said defendants agreed and promised that registration papers would accompany said cattle and be delivered to plaintiff with said cattle or in

a reasonable time thereafter; and you further find from the evidence that the defendants failed and refused to deliver to plaintiff the number of registered Jersey cattle and registration papers as agreed and contracted by defendants with plaintiff, if you find any agreement and contract as alleged by the plaintiff was made by defendants, and you further find and believe from the evidence that such failure and refusal of defendants, if any, was the direct and proximate cause of loss, injury, and damage to plaintiff, then you will find for plaintiff, and his measure of damages would be the difference, if any, in the reasonable market value of cattle delivered to plaintiff unregistered and without registration papers and the market value of cattle defendants agreed, if any, would be registered cattle and delivered with registration papers, at time and place of delivery."—Approved: Miller v. Mosley (Tex. Civ. App.), 91 S. W. 648 (not reported in state reports).

§ 3432. Diseased Cattle—Difference in Value Plus Loss in Effort to use same.

"The detriment caused by the breach of a warranty of the fitness of personal property for a particular use is deemed to be the excess, if any, of the value which the property would have had, at the time to which the warranty referred, if it had been complied with, over its actual value at that time, together with a fair compensation for the loss incurred by an effort in good faith to use the property for the purpose for which it was purchased. That is, the measure of damages in this case, if you find that the plaintiff is entitled to recover any damages, will be the excess, if any, of what the cattle would have been worth had they been sound and free from any infection, over their actual value at the time of the purchase, together with a fair compensation for the loss incurred by the plaintiff in an effort in good faith to use the cattle for the purpose for which he purchased the same; but, before the plaintiff can recover damages for the loss incurred in an effort to use the cattle for the purpose for which he purchased them, he must show by a preponderance of the evidence that the defendant knew, or had reasonable grounds to know, the purpose for which the plaintiff intended to use them."—Approved: Puls v. Hornbeck, 24 Okla. 288, 103 Pac. 665.

§ 3433. Difference in Actual Value of that Sold and that Delivered.

(a) "I further instruct you that in ascertaining the value of the horse as he would have been had he been of pure Clydesdale stock it is not necessary that you should take the price at which he was sold, for plaintiff is entitled to receive the benefit of the value of such a horse as was indicated by the purported certificate of pedigree, even though he was worth more than $500; the measure of damages being limited, however, to the sum of $500, as set up in the complaint. As an illustration of the foregoing principle, and as an illustration only, if you find that the horse in question would have been worth $500 if he had been as represented by the defendants, and by the purported certificate of pedigree, and if you find that a grade horse of the age and condition of the one sold would be worthless for stock purposes,

then the amount of damages would be the sum of $500, and if you find that a horse such as was represented by the defendants and by the purported certificate of pedigree was of a greater value than that actually paid by plaintiff to defendants you have a right to fix whatever value you think the evidence will warrant and deduct therefrom what would be the value, if any, of a similar horse, except that he be of mixed blood and without a pedigree, and the difference will be the amount of the recovery for the plaintiff, if you find for the plaintiff at all."—Approved: McCabe v. Desnoyers, 20 S. D. 581, 108 N. W. 341.

(b) "If you find for the plaintiff, then you will turn to the matter of damages, and you are instructed that the damages plaintiff is entitled to recover will be the difference between the value of the heating plant as warranted and its value as it actually was. You are to arrive at your verdict solely by the evidence that has been offered and received upon the trial, being governed by the instructions of the court. You should permit nothing else to influence you."—Approved: Cooper v. Scott Co., 143 Iowa, 744, 120 N. W. 631.

(c) "In this case you are instructed that the measure of damages as to the warranty, if you find there was one, is the difference between the value of the carriage which the defendant actually received and the one which was contracted for; and in estimating any damage for defendant you will be governed by this rule."—Approved: Miller v. Greenleaf (Tex. App.), 18 S. W. 89 (not reported in state reports.)

§ 3434. Boiler—Difference in Value Plus Loss from use of Unsuitable Article.

"If you find under the instructions already given that the plaintiff was guilty of a breach of contract, then the defendants will be entitled to recoup in this action the difference between the value of the boiler furnished and its value as it would have been if the boiler had been reasonably suitable for the purpose for which it was purchased, and also the loss the defendants necessarily sutained in the operation of their steamship, and which was caused solely by reason of the boiler being unsuitable for the purpose for which it was purchased, provided the defendants acted with reasonable prudence, care, and discretion, and discontinued the use of the boiler at a reasonable and suitable time, so as to make the loss as small as practicable."—Approved: Detroit Shipbuilding Co. v. Comstock, 144 Mich. 516, 108 N. W. 286.

§ 3435. Right to Recoup for Difference in Values in Action for Price.

"If you find that the plaintiff agreed to deliver a mill to Mr. McIntyre that would cut 25,000 feet of lumber per day, in a good and workmanlike manner, with the ordinary skill to run a sawmill of that kind, and you find that such a mill was not furnished, then the defendants are entitled to recoup the difference in value between the mill furnished and the one agreed to be furnished; taking the value of the mill agreed to be furnished at $1,700, the price agreed upon in the contract."—Approved: Sinker, Davis & Co. v. Diggins, 76 Mich. 557, 43 N. W. 674.

§ 3436. Difference between Market Value of Land and as Represented to be.

(a) "If you find for the plaintiff, you should allow him as damages that sum which will represent the difference in the reasonable market value of the land as it in fact was at the time of the purchase in the particular or particulars represented, and what would have been its reasonable market value at said time if it had been as represented in such particular or particulars. For example, if you find from the evidence that defendant represented that there was no gumbo on said land, and you find that there in fact was gumbo thereon, and you find all the other facts necessary to entitle plaintiff to recover, as explained in these instructions, you should allow plaintiff the difference in the reasonable market value, if any, between such land with such gumbo thereon as is shown by the evidence, and what would have been its reasonable market value if there had been no gumbo on said land; such value to be fixed at the time of the purchase. In determining such questions you should consider only such evidence as affects the value of the particular or particulars in which you find the defendant made the representations complained of."—Approved: Long v. Davis, 136 Iowa, 734, 114 N. W. 197.

(b) "In such case plaintiff's measure of damages is the difference between the market value of the house as a residence without a street on the north, and what the market value would be as a residence in case there was a street on the north. In fixing the damages on this branch of the case you will take the actual difference in the market value of said house as a residence with a street on the north, and without one, and allow plaintiff such in addition to the amount you may allow him for the difference in the market value of the lot, if any, before the improvements were made. You will allow plaintiff no speculative or imaginary damages, but such actual damages as he has sustained, if any, by reason of such false representations, if any; such actual damages as are the direct result of such false representations, if any."—Approved: White v. Smith, 54 Iowa, 233, 6 N. W. 284.

(c) "If you find for the plaintiff, then your verdict should be for the difference in value, if any, that you find from the evidence to be, between the reasonable market value of the Dimmit county land on November 25, 1903, without a gusher of water, that is; a strong, flowing well of water on same, and the reasonable market value of said land on said date, with a gusher of water, that is, a strong flowing well of water on same, of the kind that you find from the evidence was represented by George, if you find he made such representation."—Approved: George v. Hesse, 100 Tex. 44, 93 S. W. 107.

§ 3437. Failure of Title to Land—Purchase Price and Value of Improvements Made.

"Now if you find that he is entitled to recover in the action, he would be entitled to recover back the purchase price he has paid, together with interest thereon at the rate of 6 per cent. from the date of payment until the present time. He would also be entitled to recover for the reasonable value of the improvements that he has put upon the premises, after taking possession and before learning of the defective

title."—Approved: Snarski v. Washington State Colonization Co., 53 Wash. 221, 101 Pac. 839.

§ 3438. Delay—Frames for Distillery—Profits Lost by Idleness.

"The court instructs the jury that they should find for the plaintiff in the sum of $1,638, with interest from the 11th day of January, 1902, the contract value of the steel frames delivered by the plaintiff to the defendant, less cost of transportation, unless they shall believe from the evidence that the failure of the plaintiff to deliver the said steel frames to the defendant at Owensboro, Ky., within 45 working days after the 12th day of September, 1901, the date of the contract sued on, was not caused by a strike or strikes, or delays in transportation, beyond the reasonable control of the plaintiff, or for any other circumstances beyond the plaintiff's reasonable control.

"But if the failure to deliver the said frames was not caused by a strike or strikes, or delays in transportation, nor any other circumstances beyond the plaintiff's reasonable control, as mentioned in instruction No. 1, and the plaintiff was informed or had notice from the defendant when the said contract was entered into that the defendant's distillery could not begin to operate until the said frames were delivered to it, and the delay in starting up the distillery after the day when the said frames should have been delivered by the terms of the contract was caused wholly by the failure of the plaintiff to deliver them, then they should find for the defendant on its counterclaim in such a sum as they may believe from the evidence it is reasonably certain the defendant would have realized as profits from the products of the said distillery; that is, the whiskey and storage charges thereon and the slop therefrom, if any, which it is reasonably certain the defendant could and would have made during the period, if any there was, that the distillery was idle wholly by reason of the failure of the plaintiff to deliver the said frames on the contract time, not exceeding the sum claimed in the cross-petition in that behalf."—Approved: American Bridge Co. v. Glenmore Distilleries Co. (Ky.), 107 S. W. 279 (not reported in state reports).

§ 3439. Delay in Furnishing Materials for Building—Recoupment.

"If the defendant is entitled to damages, he is entitled to recoup against the plaintiffs' claim for the net rental value for the particular time you may find the completion of the building was delayed by reason of plaintiffs' default in the shipment of material which it contracted to furnish. It is claimed on the part of the defendant that the delay in the completion of the building, by reason of the plaintiffs' default, was from three to four months, more or less, and that such time was in the winter of ———. It is for you to say for the evidence whether or not this claim is supported in whole or in part."—Approved: Carnegie, Phipps & Co. v. Holt, 99 Mich. 606, 58 N. W. 623.

§ 3440. Stoppage of Work—Services Performed—Profits from Complete Performance.

"If you find in favor of the plaintiff in this case, then I instruct you that the plaintiff would be entitled to recover, as damages, the amount

of his expenditures in the performance of the contract up to the time of the stoppage; that is to say, he would be entitled to reimbursement for his expense in so far as he proceeded with the performance of the contract, and, in addition to his expenses, he would be entitled to recover the profits which he would have realized by performing the whole contract, if he had performed it. The plaintiff's recovery, if he recovers at all, should include these two items, namely, the expense incurred in part performance, with a further item of the profits which he would have made by the performance of the whole contract."—Approved: Anderson v. Hilker, 38 Wash. 632, 80 Pac. 848.

§ 3441. Breach of Agreement to Give Farm—Value of Services.

"If you believe from the evidence that the plaintiff made and entered into a contract with Sallie A. Stout, whereby she agreed with the plaintiff that if he would go to the state of California with her and look after her business and children that she would give him a ranch or farm on which he could make a livelihood for himself and family, and that he did go with her and look after her business and children, then you should find for the plaintiff such sum as you believe from the evidence is the reasonable value of the services rendered to her in looking after her business and children for and during the time he rendered same, not exceeding the sum of $3,000; and, if you do not so believe from the evidence, you will find for the defendant."—Approved: Stout's Adm'r. v. Royston (Ky.), 107 S. W. 784 (not reported in state reports).

§ 3442. Exclusive Agency—Commissions Diverted.

(a) "If at any time while the contract was in force the defendant sold any of the ice which plaintiffs had the right, at the time of the sales, to sell under the contract, in territory being worked by them, this would constitute a breach of the contract. If they have shown by the evidence that defendant did make such sales to the persons named in their petition, or any of them, in territory worked by them, while the contract was in force, and have further shown that said parties making the purchases would, but for the act of defendant in selling to them, have purchased through them, they are entitled to recover from defendant the same proportion of the money received by defendant on account of such sales as they would be entitled to had they made the sales themselves."—Approved: Hall & Spencer v. Stewart, 58 Iowa, 681, 12 N. W. 741.

(b) "If, upon inquiring as before directed, you find that the defendants are entitled to damages, you will then proceed to determine the amount you will allow. The measure of defendants' damages for a refusal to sell them vehicles under the contract is the difference in the contract price of the vehicles refused to be furnished and their market value in the City of Des Moines, with the exclusive privilege of selling that make in the counties named, less the expense of bringing said vehicles from Cincinnati, Ohio, and fitting them up for the Des Moines market."—Approved: Cook Manuf'g. Co. v. Randall, 62 Iowa, 244, 17 N. W. 507.

§ 3443. Sale of Good Will—Loss of Profits During Entire Period.

"The court instructs the jury that, if they believe from the evidence that the defendant, between the 4th day of November, 1901, and the 26th day of March, 1904, directly or indirectly was engaged in general mercantile business at St. Lawrence, Ky., they should find for the plaintiffs such damages as they sustained thereby, and in estimating the damages, they may consider the entire time, five years from the date of the contract, they should find such a sum as will fairly compensate the plaintiffs for loss of profits and good will of the business bought by them of the defendant as naturally and necessarily resulted from defendant's breach of his contract, if they believe from the evidence that the defendant did break it, not exceeding the sum of $3,000, the amount claimed in the petition."—Approved: Long v. O'Bryan (Ky.), 91 S. W. 659 (not reported in state reports).

§ 3444. Contract for Services—Profits that would have been Earned.

(a) "The court instructs the jury, if they believe from the evidence that the plaintiff is entitled to recover, the measure of damages is the amount of money he would have received had he been allowed to complete the performance of his contract, less the value of such services as he would have been required to render, and also deducting any expense which he would have been compelled to incur in carrying out the contract on his part."—Approved: Weil v. Fineran, 78 Ark. 87, 93 S. W. 568.

(b) "If you find for the plaintiff you will allow him whatever sum, if any be shown by the evidence to be due him for commissions earned and not paid, and you will also allow him whatever profits he would have made, if any be shown by the evidence, had the contract been carried out according to its terms."—Approved: Spencer Medicine Co. v. Hall, 78 Ark. 326, 93 S. W. 985.

§ 3445. Failure to Properly Pack Fruit—Diminution in Value.

"In the event the jury find that the defendant did not use ordinary diligence, skill, or care in drying, curing, packing, and handling said fruit, the damage to plaintiff is the difference between the market value of such fruit at the time of the sale, had ordinary diligence, skill, and care been used by defendant in drying, curing, packing, and handling the same, and the sum for which the same was sold."—Approved: Arnold v. Producers' Fruit Co., 141 Cal. 738, 75 Pac. 326.

§ 3446. Liquidated Damages.

"The court instructs the jury that the plaintiff, by the terms of the written contract introduced in evidence in this case, agreed to convey certain real estate mentioned therein to the defendant John Westbay, and the defendant executed a note signed by himself and John Gazzola for $100. Said note was stipulated damages to be paid to the plaintiff in the event of failure on the part of the defendant to accept money and deed to the land mentioned in the contract and pay for same in the manner mentioned in said contract, and if you find from the evidence that the plaintiff tendered said deed and money, in accordance

with the terms of said contract, and the defendant refused to accept the same and refused to pay for said land according to the terms of said contract, by conveying to plaintiff land mentioned in said contract, then, and in that event, the plaintiff is entitled to recover in this action the amount of the note sued on. If you find from the evidence that the plaintiff did not comply with his part of the contract, then he would not be entitled to recover in this action, and your verdict would be for the defendants."—Approved: Westbay v. Terry, 83 Ark. 144, 103 S. W. 160.

§ 3447. Breach of Agreement to furnish Water for Irrigation.

"The court charges you that the only damages claimed in this case are damages resulting from the loss of the crop in question. The court instructs you upon this point that the measure of damages in this case is the value of the crop at the time it was destroyed, if it was destroyed through the fault of the defendant, and the value at maturity and the labor necessary to put the crop in a condition for marketing are the data from which to estimate this value. The value of the crop at maturity would be its value on the farm where it is produced or at the closest market. If you find from the evidence that by the negligence or failure of the defendant to furnish water sufficient to irrigate the crops of the plaintiff that said crops were wholly destroyed, or were destroyed to such an extent as to be worthless, then the plaintiff's damages, if any, would be the value of such crops on the market at maturity, less the cost of labor, care and attention necessary to put the crops in condition for the closest market and upon such market. The court charges you that in determining this branch of the case it becomes material what the value of such crops would be at maturity, you have a right to take into consideration the results which came from crops situated upon similar land in that immediate vicinity under irrigation, and from this data you are permitted, and it is your duty, to proceed to the determination of what would have been the results in the crops upon the land in question. And from the value of the crops upon the adjacent lands or similar lands you may determine what would have been the value of these crops on the property in this section. You have a right to take into consideration from the experience of crops upon neighboring lands to what extent these crops, if they had been allowed water, would have arrived at maturity, and, if you find from the evidence that the crops upon adjoining lands to a considerable extent did not reach to maturity by reason of the character of the season or otherwise, these are circumstances you have a right to consider in determining to what extent, if any, the plaintiff had been damaged in this case."—Approved: Smith v. Hicks (N. Mex.), 98 Pac. 138.

§ 3448. Wrongful Discharge of Attorney.

"If the jury believe from the evidence that the defendant contracted with the plaintiff, Weil, as an attorney at law, to pay him 20 per cent. of her interest in the estate of Margarite J. Greenwood, in case he should establish her right thereto, and recover same for her, and by

power of attorney, constituted and appointed plaintiff her agent and attorney to procure such interest, and also agreed to pay him $100 for his services in making search for defendant and proving her identity and establishing her to be an heir of deceased, and also promised to reimburse plaintiff for all sums expended by him in finding her and all sums expended in her interest, and 'if the jury further believe from the evidence that the plaintiff did make such search, locate and develop defendant to be the daughter and heir of the deceased, and entitled to share in her estate, and if then the plaintiff while he was taking all necessary steps in her behalf towards a recovery of her interest in said estate was prevented by defendant from doing so by revoking his employment as such attorney, then plaintiff is entitled to a verdict in his favor for all sums expended by him and which she agreed to repay, and also the sum of $100 for his services in making search for defendant and showing her to be an heir of deceased, and is also entitled to recover damages for a breach of his contract of employment in any sum which the jury may feel warranted from the evidence in awarding to him, not exceeding $1,000. And in arriving at such verdict the jury may take into consideration the value of the estate of deceased, as it may have been proven in evidence."—Approved: Weil v. Fineran, 78 Ark. 87, 93 S. W. 568.

D. Carriers of Freight and Telegraph Companies.

§ 3449. Injury to Freight—Difference in Market Value.
3450. Delay in Arrival—Decrease in Market Value.
3451. Diversion from Destination—Difference in two Markets less Freight.
3452. Injury to Freight—Decrease in Actual Value.
3453. Failure to Deliver Message which does not Apprise of Special Damage.
3454. Cost of Message and Compensation for Physical and Mental Suffering.
3455. Want of Care by Plaintiff affecting Elements of Recovery.
3456. Failure to Deliver Message announcing Wife's illness.
3457. Additional Anguish Caused by Failure to Deliver Message.
3458. Fluctuation in Market Value During Delay in Delivery of Message.
3459. Delay in Transporting Live Stock—Condition on Arrival.
3460. Injury to Mules Causing Death.

§ 3449. Injury to Freight—Difference in Market Value at Destination.

"If you find in favor of the plaintiff, the measure of his damage is the difference between the market value of the dead hogs at the time the load of hogs should have arrived in market by due course of shipment and their market value if they had arrived at Kansas City alive and in good condition."—Approved: St. Louis, I. M. & S. Ry. Co. v. Keys, 6 Ind. T. 396, 98 S. W. 138.

§ 3450. Delay in Arrival—Decrease in Market Value.

"If you find for the plaintiffs, the measure of their damages will be the difference between the cash market value of said animals at the time they should have arrived at Waco, if the same had been shipped in a reasonable length of time, and the cash market value of said animals at the time they were delivered at Waco in the condition they were in and the condition the market was in and the time said mules were delivered."—Approved: Missouri, K. & T. Ry. Co. v. Hood (Tex. Civ. App.), 120 S. W. 236.

§ 3451. Diversion from Destination—Difference in Two Markets less Freight.

"If you find for the plaintiff, the measure of damages, if any, will be the difference between the prices which he could have obtained for said cattle in Houston, if any, and the amount which he actually received in New Orleans, after deducting such expenses as were rendered necessary by reason of the shipment of said cattle from Houston, the care, feed, and sale of the cattle in New Orleans, with interest on the amount of such difference from the 12th day of June, 1903, at the rate of six per cent. per annum."—Approved: International & G. N. R. Co. v. Griffith (Tex. Civ. App.), 103 S. W. 225 (not reported in state reports).

(b) "If you find for the plaintiff, the amount of your verdict should be the amount of the difference, if any, between the market value of the plaintiff's cattle at Ft. Worth at the time when they should have arrived at that place and the price at which the same were sold in St. Louis, and also the difference in freight charges, if any, paid by the plaintiff between Cameron and St. Louis and Ft. Worth and St. Louis, such difference, if any, in either case to be determined by you from the evidence in the case."—Approved Gulf, C. & S. F. Ry. Co. v. Looney, 51 Tex. Civ. App. 381, 115 S. W. 268.

§ 3452. Injury to Freight—Decrease in Actual Value.

(a) "If the jury believe from the evidence that the plaintiff sustained any damages by loss of clothing, jewelry, money, etc., or by any of the clothing being damaged while her trunk was being transported from Waco to Brenham by defendant or its connecting lines, then the jury will estimate such damages as the evidence shows the plaintiff to have sustained, if any damages are shown, and return a verdict for such amount. But if the jury believe from the evidence that only a portion of the goods in said trunk were damaged, if any were damaged, and that, within a reasonable time after said trunk arrived at its destination, the trunk and contents were tendered to the plaintiff, then it was the duty of the plaintiff to accept said trunk, and its contents; and if you believe such tender was made to plaintiff, then she can only recover damages for such goods as were shown to have been lost, and for such of the goods as were damaged at the time, if any were damaged." Approved: Gulf, C. & S. F. Ry. Co. v. Jackson (Tex. App.), 15 S. W 128 (not reported in state reports).

(b) "If you should find, as a matter of fact in this case, that the

plaintiff is entitled to recover, he would be entitled to recover such damages as he has sustained, and the measure of damages would be the difference between the value—the market value—of that automobile in the actual condition in which it was when it arrived at Fairmont in that broken condition and the condition it was in before it was so injured and damaged and broken."—Approved: Paterson v. Chicago, M. & St. P. Ry. Co., 95 Minn. 57, 103 N. W. 621.

§ 3453. Failure to Deliver Message Which does not Apprise of Special Damage.

"A party to a contract is only liable in case of a breach for such damages as he can see or is advised are likely to flow from the breach. In this case there is nothing in the message to indicate that Dr. March was expected to come to Little Rock to attend the operation, or that the operation would be postponed if he failed to come; and it is not shown that the plaintiff communicated either of those facts to the defendant at the time of the delivering of the message for transmission. There can, therefore, be no recovery in this case for more than the price of the telegram."—Approved: Western Union Tel. Co. v. Raines, 78 Ark. 545, 94 S. W. 700.

§ 3454. Cost of Message and Compensation for Physical and Mental Suffering.

"The jury is further instructed that in estimating damages, if you find for the plaintiff, you can only find in addition to the sum of 30 cents, which defendant offers to confess judgment for, such a sum as will fairly and reasonably compensate the plaintiff for such mental and physical suffering as is shown to be the direct and proximate result of the negligent failure of the defendant to deliver the said telegram, in all not exceeding the sum of $1,500."—Approved: Postal Tel. Cable Co. v. Terrell, 124 Ky. 822, 100 S. W. 292.

§ 3455. Want of Care by Plaintiff Affecting Elements of Recovery.

"If, however, the jury shall believe from the evidence that the defendant used ordinary diligence in its effort to deliver said telegram within a reasonable time, then it was not guilty of negligence in failing to so deliver, and, in that event, the jury should find for the plaintiff in the sum of 30 cents. It was, however, the duty of plaintiff, when her friends failed to meet her at the depot as alleged and proven, to exercise that degree of care for her own safety and comfort which ordinarily prudent persons usually exercise under like circumstances, and, if you believe from the evidence, that she failed to exercise that degree of care and caution, then she cannot recover in the action for any mental or physical suffering endured by her in consequence of such failure upon her part, if any, even though you may believe the defendant was negligent as stated in instruction No. 1."—Approved: Postal Tel. Cable Co. v. Terrell, 124 Ky. 822, 100 S. W. 292.

§ 3456. Failure to Deliver Message Announcing Wife's Illness.

"If the jury find for the plaintiff, they should, in fixing the amount of his damages, take into consideration the grief and mental anguish he

suffered, if you find he suffered any by reason of his not being with his wife during her last moments, and at her death, funeral, and burial; provided you believe his failure to be with her at said time was caused by the negligent failure of the defendant to deliver to him the message in question, and fix the amount at whatever sum you conclude resulted from said failure of the defendant to deliver the message."—Approved: Arkansas & L. Ry. Co. v. Stroude, 82 Ark. 117, 100 S. W. 760.

§ 3457. Additional Anguish Caused by Failure to Deliver Message.

"If the jury find for the plaintiff, then you are instructed that in estimating the amount or measure of damages, if any, to which plaintiff may be entitled, by reason of the alleged negligence of the defendant company, its agent, servant, and employe, in failing to transmit and deliver said telegram from Dr. of Mrs. Braswell to Mrs. Annie J. Carter, with due diligence, if you find there was such failure, you should consider and estimate only such damages as plaintiff may have sustained by reason of such negligence, if any. You are instructed further, however, in estimating the plaintiff's damages, if any, you find she is entitled to recover, you may consider the mental suffering, sorrow, and anguish, if any, suffered by the plaintiff by reason of the negligence of the defendant company, if any; but in this connection you are instructed that you should not estimate or award any damage to the plaintiff on account of any anguish, sorrow, and mental suffering caused by the death of her husband, or for causes other than those resulting from the wrongful and negligent acts, if any, of the defendant company, its agent, servant, and employe, or one so held out by it to the public. But, you may consider whether or not the plaintiff suffered any additional pain, anguish, sorrow, and mental suffering by reason of such negligence, if any, on the part of defendant company, and such damages, if any, you may consider as an element of actual damages to such an amount as you may deem to be reasonable compensation for such additional sorrow, pain, and mental anguish, if any."—Approved: Western Union Tel. Co. v. Carter, 42 Tex. Civ. App. 224, 94 S. W. 205.

§ 3458. Fluctuation in Market Value During Delay in Delivering Message.

"If you find the plaintiff entitled to recover, then the measurements of his damages will be the difference between the market value of such cattle as he purchased on the 27th day of June, 1888, when he received his last report, and what they were on the 29th day of the month at the Union Stock Yards, Chicago, Illinois, with interest at six per cent. from June 29, 1888, to the present time."—Approved: Garrett v. Western Union Tel. Co., 92 Iowa, 449, 58 N. W. 1064.

§ 3459. Transporting Live Stock—Condition on Arrival.

"If you find for the plaintiff, you will assess his damages, if any, at the difference between the market value of the cows and bulls at the National Stockyards, East St. Louis, Ill., at the time and in the condition they arrived there, and their market value at the same point at the time and in the condition they should have arrived there, had they

not been delayed in transportation by the carriers, or any of them, if they were delayed, to which you will add the difference between the market value of the calves at East St. Louis, Ill., at the time and in the condition they should have arrived by the exercise of ordinary care upon the part of the carriers, and the amount said calves sold for on the market in Chicago, Ill."—Approved: Texas & P. Ry. Co. v. Coggin, 44 Tex. Civ. App. 474, 99 S. W. 431.

§ 3460. Injury to Mules Causing Death.

"If the jury shall find for plaintiffs, they should find for them in such a sum as they shall believe from the evidence will represent the fair market value of the three mules in question that died at the time of their death in Charlestown, W. Va., not exceeding $430, the amount claimed in the petition."—Approved: Baltimore & O. S. W. R. Co. v. Wood & Co., 130 Ky. 839, 114 S. W. 734.

E. Personal Injury—Measure of Damages.

§ 3461. Burden of Proof to Show Injury and Extent.
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3489. Compensation for Pain, Expenses, Loss of Time.
3490. Compensation for Future Suffering, Reasonably Probable to Result.
3491. Or Reasonably Certain as a Direct Result of Injuries.
3492. Injury to Person and Property in one Recovery.
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3494. Must be for Damages and Injuries Alleged in the Petition.
3495. Reasonable Value for Time Lost and Diminished Capacity.
3496. Compensation for Future Loss of Earnings Caused, to a Reasonable Certainty, by the Injury.
3497. Reasonable Value for Time Wholly Lost and for Decreased Capacity in the Future.
3498. Reasonable Value if Paid now of Diminished Earning Power.
3499. Compensation for any Permanent Reduction of Power to Earn Money.
3500. Such Damages, if any, as he may sustain in the Future as the Direct Effect of such Injury.
3501. Age of Plaintiff and Reasonable Expectancy of Life to be Considered.
3502. Deformity Caused by Injury—Humiliation.
3503. Deafness Depriving One of Social Companionship.
3504. Loss of Accomplishments—Ability to Play Musical Instruments and Sing.
3505. Inability to have Children.
3506. Damages Apportioned in Separate Verdicts against Defendants.
3507. Comparative Negligence—Damages Reduced.

§ 3461. Burden of Proof to Show Injury and Extent.

"Should you find for the plaintiff, you are instructed that he can only recover for such injuries as the proof shows affirmatively that he has sustained as a direct result of the negligence of the defendant, and unless it is shown affirmatively by a fair preponderance of the evidence that the plaintiff's injuries are of a permanent character, you will disallow his claim for injuries of that character."—Approved: Texas Trunk R. Co. v. Ayres, 83 Tex. 268, 18 S. W. 684.

§ 3462. Same to Show Proximate Cause.

"The jury are instructed that, even though the defendant were liable for the accident in question, still you are instructed that she could not recover in this case for any damage which was not the natural and necessary result of the accident and injury then sustained, if you find, from the evidence, she sustained injury at the time of the accident; and if you find, from the evidence, that the plaintiff has now, or has had, any

other disability resulting from conditions which existed in the plaintiff prior to said accident, and of which the accident in question was not the proximate cause, then you are not permitted by law to allow her anything for such disability, and should not do so from motives of sympathy or any other motive."—Approved: Chicago City Ry. Co. v. Saxby, 213 Ill. 274, 72 N. E. 755.

§ 3463. Pre-existing Ailments not Basis for Recovery.

"The jury are instructed that with respect to the ailments and disabilities claimed for the plaintiff in this case the burden of proof is upon the plaintiff in that respect, as it is with respect to the question of liability, to show, by a preponderance of the evidence, not only that such ailments really exist or have existed, but also that such ailments and disabilities are the result of the action in question; and the burden of proof is not upon the defendant to show that such alleged ailments do not proceed or arise from any other cause. The jury are further instructed that they have no right to guess or conjecture that any ailment complained of by the plaintiff is the result of this accident. (Whether it is or not must be determined by the jury from the evidence.) The jury are not to understand from this (or any other) instruction that the court intends to intimate any opinion upon that or any other question of fact in this case. (All such questions and matters are solely and exclusively for the jury, and they must determine them from the evidence, and from that alone.)"—Approved: Chicago Union Trac. Co. v. Fortier, 205 Ill. 305, 68 N. E. 948.

§ 3464. But it is no Defense that Aggravation was Caused Thereby.

"If you find from the evidence that the plaintiff was caused to fall by a defect in the sidewalk negligently permitted to exist by the defendant, the defendant is responsible for all ill effects which naturally and necessarily follow the injury in the condition of health in which plaintiff then was at the time of such fall, and it is no defense that such injury may have been aggravated and rendered more difficult to cure by reason of plaintiff's state of health at that time, or that by reason of latent disease the injuries were rendered more difficult to cure by reason of plaintiff's state of health at that time, or that by reason of latent diseases the injuries were rendered more serious to her than they would have been to a person in robust health."—Approved: Jones v. City of Caldwell (Idaho), 116 Pac. 111.

§ 3465. Aggravation, but not Former Disease, Basis of Recovery.

(a) "If you find that the plaintiff had been injured in his back prior to the time he claims to have been injured at Carrolton, or that he had any disease of the back prior to that time, and that he was suffering therefrom at the time of the alleged accident at Carrolton, and you further find that he was injured in the back at Carrolton while alighting from the train, and that the defendant is responsible for such injuries, and that the injuries received at Carrolton simply aggravated or increased his existing trouble, then the plaintiff would be entitled to recover, if at all, under the other instructions given you, only for the

increase or aggravation of the troubles which existed at the time he received such injuries at Carrolton."—Approved: St. Louis Southwestern Ry. Co. v. Johnson, 100 Tex. 237, 97 S. W. 1039.

(b) "The jury are instructed that if they believe from the evidence that, previous to the accident complained of, the plaintiff was suffering from varicose veins in the left leg, or from any other physical disability, and that his previous physical disability was aggravated by want of ordinary care upon his part in attending or caring for any injury received by him while a passenger upon one of defendant's trains, the plaintiff is not entitled to recover from the defendant any damages because of such aggravation of his previous physical disability.

"The jury are further instructed that if they believe from the evidence that, previous to the accident complained of, the plaintiff was suffering from varicose veins in the left leg, or from any other physical disability, and that such varicose veins or physical disability were aggravated by the injury complained of, and that the plaintiff used reasonable care in attending and treating said injury, then the plaintiff would be entitled to recover such an amount as would compensate him for the aggravation of the previous disability through the injury received. And, in determining whether the plaintiff used reasonable care, you are instructed that reasonable care is such care as a person of ordinary intelligence and prudence would use under the circumstances of the case."—Approved: Murphy v. Southern Pac. Co. (Nev.), 101 Pac. 322.

(c) If you find the plaintiff was suffering on January 3, 1907, at the time of the accident, from a disease of his nervous system known as 'neurosis,' and that disease and injuries received on January 3d account for some portion of the condition he complains was caused by the defendant, that alone will not bar his recovery of all damages in this case, but does bear upon and affect the question of the amount of damages he has sustained on account of injuries he claims to have received at the hands of the defendant. In case plaintiff was suffering from an existing nervous disease when injured on January 3, 1907, and such disease with the injuries so received have caused him pain, suffering and disability, then defendant can only be held for the pain, suffering and disability to plaintiff arising and resulting from the injuries actually received by plaintiff, and established by the evidence as having occurred on January 3d. And it is your duty in case of existing nervous disease in plaintiff at that time to determine from all of the evidence what pain and suffering and disability, if any, the plaintiff has and will suffer from the injuries, if any, to his liver, spleen, ribs, stomach, and bowels, and only allow him damages for such portion of his pain and suffering and disability due to the injuries in question, but will allow reasonable compensation for such pain and suffering and disability and medical expense traceable to the injuries of January 3d, and not due to his nervous disease, if any existed, when he was so injured. Plaintiff does not ask for damages for an aggravation of an existing disease. He does ask damages for pain and suffering and disability caused by injuries to his liver, spleen, ribs, stomach, and

bowels, and he cannot be permitted to recover damages for an aggravation of an existing disease because he denies the existence of such disease, and he does not ask you for damages on any such theory. He does ask for damages for pain and suffering and disability arising from the injuries to his liver, spleen, ribs, stomach, and bowels, and, if he gets damages, it must be for the injuries so alleged, and not for disease, if any existed, when he was injured, or for an aggravation of such existing disease, if any."—Approved: Fillingham v. Michigan United Rys. Co., 154 Mich. 233, 117 N. W. 635.

§ 3466. Injury Hastening Disease—Recovery for Condition Produced.

"If you find from the evidence that the plaintiff received the injury complained of by reason of defendant's negligence alleged in the complaint, and at the time of the reception of said injury the plaintiff was suffering from some disease, and you further find that said injury hastened the development of such disease, and that thereby, without the fault of plaintiff, her present condition, whatever you may find that to be, has resulted from such injury, then I instruct you that the plaintiff is entitled to recover such damages as you may determine she has sustained from the injury."—Approved: Campbell v. Los Angeles Trac. Co., 137 Cal. 565, 70 Pac. 624.

§ 3467. Aggravation through Negligence of Plaintiff—No Recovery for.

"Right here counsel on both sides agree that an aggravation of the damages, occasioned by reason of negligence, if any such neglect existed, in caring for the arm after the injury, should not be allowed. I so instruct you. But if there was employed to care for his arm a reputable physician, who treated him so long as such physician deemed necessary, and until he discharged himself, and from that the boy and his parents followed the directions of such physician as to the use and treatment of his arm, he cannot be charged with negligence affecting his right in this case because the result is not as expected. But if he has negligently failed to follow directions as to use and treatment of his arm, and thereby his damages have been aggravated, that aggravation should be considered, and should reduce his claim."—Approved: Strudgeon v. Village of Sand Beach, 107 Mich. 496, 65 N. W. 616.

§ 3468. Greater Susceptibility to Injury—No Excuse for More Serious Effect.

"The court instructs the jury that even though you should find and believe from the evidence that plaintiff had tuberculosis in her right knee or in her right leg, or in her system generally, or had any other disease latent in her system, still, if you find and believe from the evidence that she was injured under the conditions and at the time and place set out in instruction number one (1), then the court instructs you that defendant is responsible to plaintiff for all effects which naturally and necessarily follow the injury, if any, in the condition of health in which plaintiff was or plaintiff's said right leg or right knee was at the time, and it is no defense that the injuries, if any, may have been aggravated and rendered more difficult to cure by

reason of plaintiff's state of health or that by reason of latent diseases the injuries, if any, were rendered more serious to her than they would have been to a person of robust health."—Approved: Smart v. Kansas City, 208 Mo. 162, 105 S. W. 709.

§ 3469. Former Impaired Capacity not Aggravated—No Recovery Therefor.

"If you find for plaintiff, you will allow him such sum as you may believe from the evidence will, as a present cash payment, reasonably and fairly compensate him for mental and physical pain, if any, which he has suffered as the result of such injury, if any; also, the reasonable value of his services for the time lost, if any, by reason of his injury, if any; also, for his diminished capacity to labor and earn money in the future, if any, by reason of his injury, if any; also, for the physical and mental pain, if any, it is reasonably probable he will suffer in the future by reason of the injury, if any. In this connection you are instructed that plaintiff has testified to certain conditions of his eyes existing prior to said alleged injury. You cannot allow plaintiff anything for any physical or mental pain, for any diminished capacity to labor and earn money, or for any time lost that you may believe from the evidence resulted or will result from such former condition of his eyes. You can only take into consideration that which resulted from the injury, if any, received on the occasion in question."—Approved: Missouri, K. & T. Ry. Co. v. Bush (Tex. Civ. App.), 120 S. W. 224.

§ 3470. Subsequent Illness not Caused by Accident not to be Considered.

"It is not essential to the plaintiff's right of recovery in this action that all of the sickness that she has had since the date of her alleged injury was caused by said injury. It is sufficient to entitle her to a verdict in her favor if she has proven to your satisfection, by a fair preponderance of the evidence, that she sustained an injury by the negligence of the defendant, its agents, and servants, and without any negligence on her part, at the time and in the manner alleged in her complaint. The fact, if it is a fact, that she after such injury fell sick from causes unconnected with her injury, if you find from a fair preponderance of the evidence she sustained an injury, should not, nor should the symptoms resulting from such sickness, be considered by you in assessing her damages."—Approved: Terre Haute Trac. & Light Co. v. Payne (Ind.), 89 N. E. 413.

§ 3471. Plaintiff Must Use Reasonable Care to Cure Himself.

(a) "The jury are instructed that, where a person becomes injured through the fault of another, it is the duty of the person receiving the injury to use reasonable means and care to protect himself against any aggravation of the injury, and to do all things reasonably necessary to cure such injury; and if the jury believe from the evidence in this case that any injury received by the plaintiff while a passenger upon one of the defendant's trains was not serious, or of great extent at the time of receiving the injury, but that the wound received by plaintiff while

such a passenger became infected as a result of the lack of reasonable precautions and care on the part of the plaintiff, and such infection has caused said injury or wound to become greater and plaintiff's leg to have become more incapacitated than it would otherwise have been, then, and in such event, defendant cannot be held liable in damages to plaintiff for any injury or suffering or physical disability on the part of plaintiff, which plaintiff could have prevented by the use of reasonable precautions and attention in caring for such wound and injury, but the liability of defendant must be confined to such sum in damages as would justly compensate plaintiff for the injury received while upon the train, and the consequences that would naturally or probably result if such injury had received reasonable attention, and plaintiff had used ordinary care to effect a cure thereof."—Approved: Murphy v. Southern Pac. Co. (Nev.), 101 Pac. 322.

(b) "The jury are instructed that if they find from the evidence that the plaiutiff was injured while in the service of the defendant company, and was entitled by virtue of an implied contract with defendant to be transported free of charge to its hospital at Tyler, Tex., for treatment, and that defendant failed or neglected to promptly furnish transportation to plaintiff to go to the hospital, and by reason thereof, plaintiff's injury was increased and you further find that the plaintiff had the means by which he could have paid his way and thereby reached the hospital promptly, it was his duty to have done so, and thereby avoided increased injury, and if you find he did have the means and failed or neglected to use it he cannot recover any sum as damages which resulted from the delay of defendant in furnishing him transportation to the hospital."—Approved: St. Louis S. W. Ry. Co. v. Reagan, 79 Ark. 484, 96 S. W. 168.

§ 3472. But is not Responsible for Errors or Mistakes of Physician.

"The plaintiff is not held responsible for the errors or mistakes of a physician or surgeon in treating an injury received by a defect in the street or sidewalk, providing she exercises ordinary care in procuring the services of such physician. Where one is injured by the negligence of another, or by the negligence of a town or city, if her damages have not been increased by her own subsequent want of ordinary care she will be entitled to recover in consequence of the wrong done, and the full extent of damage, although the physician that she employed omitted to employ the remedies most approved in similar cases, and by reason thereof the damage to the injured party was not diminished as much as it otherwise should have been."—Approved: Selleck v. City of Janesville, 100 Wis. 157, 75 N. W. 975.

§ 3473. Injury Caused by Violation of Physician's Instructions.

"If the jury find for the plaintiff, they will assess her damages at such sum as you may believe will compensate her for her injuries, if any, she may have sustained by reason of the negligence of the defendant, together with such sum, if any, as you believe will compensate her for her suffering, including moneys paid, or which she has obligated herself to pay, for physicians' services and medicines by reason of said

injuries and directly resulting therefrom."—Approved: New v. St. Louis & S. Ry. Co., 114 Mo. App. 379, 89 S. W. 1043.

§ 3474. Means Adopted to Cure Must be Those of Reasonably Prudent Man.

"In arriving at the amount of his damages, you are to say, not only what they are, but whether the means used by the plaintiff to reduce the damages were such as an ordinarily prudent man would use. You cannot say that he should or should not have obtained any particular kind of treatment. As to that, he must alone be the judge. But when he has determined what treatment to take, it will be for you to say if in making that determination he used the means that a reasonably prudent man would take to cure himself of his injury, or to reduce the extent thereof under the same circumstances. If you find that he did not, and you can say that some other treatment would have brought about a cure or reduced the amount of his damages, and that that treatment was one that a reasonably prudent man would have adopted, then you must say that he has not used the care which a reasonably prudent man would use to reduce the damages, and you must take that into consideration in arriving at your verdict, and you fix the standard as to what a reasonably prudent man would do under such circumstances."—Approved: Rowe v. Whatcom County Ry. & Light Co., 44 Wash. 658, 87 Pac. 921.

§ 3475. Consequences that are Preventable no Basis for Recovery.

"If under the instructions of the court the jury finds that there was such physical injury in this case as to permit the recovery of damages for mental suffering or disease also, then in determining the damages to be awarded for mental suffering or disease the jury must eliminate from consideration such of the plaintiff's symptoms or demonstrations, if any, as could have been prevented by the exercise of such self-control as the plaintiff was capable of at the time of such symptoms or demonstrations. If the jury believes that the plaintiff has had fits, spasms, or spells, since the accident, and if the jury also believes that the coming on of such fits, spasms, or spells was always or sometimes under the plaintiff's control in the sense that she could by the exercise of the will power or self-control of which she was capable have always or sometimes prevented them from happening, had she wished to do so, then so far as that was the case she cannot recover for fits, spasms, or spells so preventable, or for their consequences."—Approved: Dooley v. Boston Elevated Ry. Co., 201 Mass. 429, 87 N. E. 586.

§ 3476. Operation for Hernia—Duty of Plaintiff to Have, if Prudence Requires.

"If, under the evidence and rules of law given you in charge, you should find for the plaintiff, then you are instructed that if you should believe from the evidence that plaintiff was injured as alleged, it was his duty to exercise such care and prudence as a man of ordinary care and prudence would, under the circumstances, have used to effect a cure; and if you further believe from the evidence that an operation

for the hernia would probably have brought about a cure, and that a man of ordinary care and prudence would, under similar circumstances, have had such operation performed, then it was plaintiff's duty to have had such operation performed, and in no event can he recover for the results of injuries which may reasonably have been avoided by him by using the degree of care above defined."—Approved: Missouri, K. & T. Ry. Co. v. Hagan, 42 Tex. Civ. App. 133, 93 S. W. 1014.

§ 3477. Fair Compensation for Pain Endured and to be Endured.

(a) "If you believe from the evidence that the plaintiff, Donald Scally, is entitled to a verdict against said defendant, you must assess the amount of damages at a sum not to exceed the amount prayed for in his complaint, as amended, and in so doing you have a right to consider the character of the injuries, if any, sustained by plaintiff; the pain and suffering, if any, endured, and which will be endured, if any, as the result of said injuries, if any, sustained by him; the effect of such injuries, if any, upon said plaintiff; the permanent character of said injuries, if any, if such injuries are permanent; and what, before the injuries complained of, was the health and physical condition of the plaintiff. From all those elements you will resolve what amount will fairly compensate the plaintiff for the injuries sustained by him, if any, provided you find in favor of the plaintiff."—Approved: Scally v. Garratt & Co. (Cal.), 104 Pac. 325.

(b) "If from the evidence the jury find the defendant guilty, then in determining the amount of damages (if any), you have a right to take into consideration the nature and extent of the injury (if any), the pain and suffering of the plaintiff (if any is shown), the length of time the plaintiff has been sick as the result of the injury (if any), and the effect which such injury may have (if any) on the future health of the plaintiff, and award to the plaintiff such a sum as you shall believe from all the evidence to be a fair compensation for the injury sustained."—Approved: Rumpza v. Knickerbocker Ice Co., 148 Ill. App. 433.

(c) "The jury are instructed that a party suing for an injury received can only recover such damages as naturally flow from, and are the immediate results of, the acts complained of. The jury should be governed solely by the evidence introduced before them, and they have no right to indulge in conjectures and speculations not supported by the evidence. If, from the evidence in the case, and under the instructions of the court, the jury shall find the issues for the plaintiffs, and that the plaintiffs have sustained damages, as charged in the complaint, then, in order to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damage; but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their own knowledge, observation, and experience in the business affairs of life. If the jury believe from the evidence that the plaintiff Miriam W. McLean was injured by reason of the defendant negligently failing to keep its sidewalk in reasonably good repair, or negligently allowing the same to remain in an un-

safe condition, as explained in these instructions, and without fault on her part, and that she has sustained damage, then the jury have a right to find for her such an amount of damages as the jury believe from the evidence will compensate her for the personal injury so received, and also for the pain and suffering undergone by her, and any permanent injury, if any such has been proved, not exceeding the amount claimed in the complaint."—Approved: McLean v. City of Lewiston, 8 Idaho, 472, 69 Pac. 478.

§ 3478. Not Lessened Because of Compensation From Independent Source.

"It is immaterial whether the government paid the plaintiff anything or not. That would not affect the rights of the plaintiff in this case to recover against the railroad company."—Approved: N., C. & St. L. Ry. v. Miller, 120 Ga. 453, 47 S. E. 959.

§ 3479. Injury to Nervous System as Direct Consequence of Accident.

"The court further instructs the jury that if, under the evidence and the law as declared in the other instructions of the court, you decide to find a verdict in favor of plaintiffs, and if you further find from the evidence that Mrs. Westervelt sustained an injury to her nervous system as a direct consequence of the facts recited in the first instruction of the court (if you find from the evidence the facts to be as therein recited), and that there has been thereby directly caused to Mrs. Westervelt a hysterical condition which produces sensations and impressions of pain and suffering to her, then she is entitled to recover as part of the damages for her pain of mind reasonable compensation for the kind of pain and suffering last above described (if any) which you may find she has already endured as a direct result of said injury, as well as for such pain and suffering of that nature, if any, as you may find from the evidence she is reasonably certain to endure hereafter."—Approved: Westervelt v. St. Louis Transit Co., 222 Mo. 325, 121 S. W. 114.

§ 3480. Pain and Suffering Naturally Resulting—Medical Expense.

(a) "In this action the plaintiff, if he has shown himself entitled to recover, is entitled to recover for all damages which he has suffered up to the time of the trial, and for all damages that it is reasonably probable that he will sustain in the future, not exceeding the sum claimed in the complaint. In estimating the compensatory damages in cases of this character, all the consequences of the injury, future as well as past, are to be taken into consideration, including the bodily and physical pain and suffering which is shown by the proof to be reasonably certain to have naturally resulted from the injury. The plaintiff, if you find him entitled to recover, should be awarded compensation for all expenses actually paid or incurred for doctor's bills, not exceeding the amount claimed therefor in the complaint. If you find that plaintiff is entitled to recover, and believe from the evidence that the injuries sustained are permanent in their character, this must also be taken into consideration in your estimate of damages, and, if you find for the plaintiff in this action, such sum should be awarded as in your best judg-

ment will fairly and fully compensate him for any injuries received by reason of the alleged negligence and carelessness of the defendant not exceeding in amount the sum claimed in the complaint."—Approved: Hersberger v. Pacific Lumber Co., 4 Cal. App. 460, 88 Pac. 587.

(b) "If you find for plaintiff, you will so say by your verdict, and you will assess her damages at such sum as if paid in cash in hand at this time would under the evidence in your judgment fairly and justly compensate her for such injuries as you may find are the direct and proximate result of defendant's negligence, if any, and, in computing such damages, you may take into account any physical pain and suffering and mental suffering and anguish you may find she has sustained by reason of such injuries, and any reasonable charges for medical treatment and medicines which she has paid or become responsible for by reason of such injuries."—Approved: Houston & T. C. R. Co. v. Cheatham, 52 Tex. Civ. App. 1, 113 S. W. 777.

(c) "If you find for the plaintiff, you will award her such sum in damages, not exceeding $2,000, as you believe from the evidence will fairly compensate her for her physical and mental suffering, if any, caused by her injury, if any, and for her reasonable expenses for medical treatment incurred as a result of her injury, if any."—Approved: Lexington Ry. Co. v. Britton, 130 Ky. 676, 114 S. W. 295.

§ 3481. Amount Recoverable Rests Largely in Sound Discretion.

"If, under the evidence and the rules before given, you find the plaintiff is entitled to recover, she should be allowed such sum, not exceeding the amount claimed, as will compensate her for the pain and inconvenience of body and anguish of mind which she has suffered on account of the injury, if any, sustained by her; and, if the injury be permanent, or if the plaintiff still suffers therefrom, and it is reasonably certain she will in the future so suffer, she should be allowed such sum as will compensate her for whatever pain and inconvenience of body and anguish of mind, if any, which it is reasonably certain from the evidence that she will be subjected to in the future. You should indulge in no speculation, and the amount of damages, if any are allowed, for the pain and inconvenience of body and the anguish of mind must be based upon the evidence, with respect to what, if any, suffering the plaintiff has endured or will endure. The amount to be allowed as such damages is not a matter to be shown in evidence, but is left very largely to your sound discretion, when guided by the testimony. If you find in favor of the plaintiff, then she should be allowed such sum as the evidence shows she has expended or become liable for for medical attendance, on account of the injuries, if any, she received by the accident complained of."—Approved: Rice v. City of Council Bluffs, 124 Iowa, 639, 100 N. W. 506.

§ 3482. Speculative Damages not Allowed, but Merely Compensatory.

"If you find from the evidence in favor of the plaintiff, you will find such an amount of damages as will compensate him for the injuries received. You will allow him no speculative damages by way of punishment, but such as are compensatory. You may take into con-

sideration the character of his injuries, whether permanent or temporary. You may consider such pain and suffering as was occasioned by the injuries, and all the facts and circumstances shown in evidence bearing upon the damages suffered."—Approved: Moore v. Sturm, (Neb.), 130 N. W. 581.

§ 3483. Present Cash Payment That Will Reasonably and Fairly Compensate.

(a) "If, under the foregoing instructions, you find for the plaintiff, you will assess his damages at such sum as you may believe from the evidence will, as a present cash payment, reasonably and fairly compensate him for the mental and physical pain, if any, he has suffered as a result of his injuries, if any, and for the mental and physical pain, if any, which you may believe from the evidence it is reasonably probable he will suffer in the future as a result of such injuries, if any; and for his diminished capacity to labor and earn money in the future on account of his injuries, if any; also for any expenses which he may have incurred for medical services, if any, on account of his injuries, if any, and provided you believe such expenses were necessary and reasonable." Approved: Missouri, K. & T. Ry. Co. v. Craig (Tex. Civ. App.), 114 S. W. 850.

(b) "If under the foregoing instructions you find for plaintiff, you will find such sum as you may believe from the evidence will, as a present cash payment, reasonably and fairly compensate him for the mental and physical pain, if any, he has suffered as a result of such injuries, and for the mental and physical pain which you may believe from the evidence it is reasonably probable he will suffer in the future as the result of his injuries, also for the reasonable value of his services for the time lost, if any, by reason of his injury, and for his diminished capacity to labor and to earn money in the future, if any." Approved: Missouri, K. & T. Ry. Co. v. Reynolds (Tex. Civ. App.), 115 S. W. 340.

§ 3484. Compensation for Pain and Suffering and Loss of Time.

(a) "You are instructed that if you believe under these instructions and the evidence in the case that the plaintiff is entitled to recover damages from the defendant for any injuries which he has proven by a preponderance of the evidence that he has sustained by reason of the facts set forth in his complaint, then you have the right to find for him for such an amount of damages, not to exceed $1,800, as you believe from the evidence will compensate him for the personal injuries so received, if any, and in doing so you have the right to consider the personal injuries received by him, if any have been proved, and any pain or suffering he may have endured in consequence thereof, if any pain or suffering has been proved, and you have the right to consider his loss of time, if any, caused by such injuries, if any have been shown."—Approved: Lehane v. Butte Electric Ry. Co., 37 Mont. 564, 97 Pac. 1038.

(b) "The court instructs the jury that, if they find for the plaintiff

herein, they will award him such sum in damages as will reasonably compensate him for his loss of earnings, if any, resulting immediately from the injuries received, not exceeding the sum of $90, and for such further sum as will reasonably compensate the plaintiff for his pain and suffering of mind and body, if any, the immediate and direct result of the injuries received, not exceeding in all the sum of $1,990, the amount prayed for in the petition."—Approved: Cincinnati, N. O. & T. P. Ry. Co. v. Fortner (Ky.), 113 S. W. 847.

§ 3485. Compensation for Permanent Injury and Impaired Health and Vigor.

"If you find for the plaintiff, you will assess the amount of recovery at such a sum of money as, in your judgment, from the evidence, will compensate him for the pain and suffering, mental and physical, if any, and the diminution of any of his physical health and vigor occasioned by the alleged wrong sued for, if you find such wrong to have existed and to have proximately caused the injury sued for. If you find for defendant, you will simply say so in your verdict."—Approved: St. Louis, I. M. & S. R. Co. v. Hook, 83 Ark. 584, 104 S. W. 217.

§ 3486. Compensation for Impaired Ability to Earn a Livelihood.

(a) "And if you are satisfied from the evidence that the injury that the plaintiff has suffered is permanent in its nature, and will continue to effect his health and physical condition in the future, and cause him pain and suffering in the future, you should allow him, in addition, such sum as will reasonably compensate him for such pain and suffering and impairment of ability to earn a livelihood as he must suffer in the future."—Approved: Kenyon v. City of Mondovi, 98 Wis. 50, 73 N. W. 314.

(b) "If you find for the plaintiff, and believe from the evidence that he was injured substantially as alleged in his petition, you will allow the plaintiff such damages as you believe from the evidence as will fairly compensate him for the injuries sustained, if any; and in estimating the damages, if any, you may taken into considertion the mental and physical pain, if any, suffered by reason of his injury, if any, and if you believe from the evidence that his injuries, if any, are permanent and will diminish his capacity to labor and earn money in the future, then you may take into consideration such diminished capacity, if any, to labor and earn money in the future."—Approved: San Antonio & A. P. Ry. Co. v. Spencer (Tex. Civ. App.), 119 S. W. 716.

(c) "If the jury find a verdict for the plaintiff, the measure of his damage will be a fair and reasonable equivalent in money for the physical pain, if any, and mental suffering, if any, which he has endured, and which it is reasonably certain he will in the future endure, if any, and for any permanent impairment or reduction of his power to earn money, if any, as the direct and proximate result and plain consequence of the injuries sustained by him, if any."—Approved: Louisville & N. R. Co. v. Roth, 130 Ky. 759, 114 S. W. 264.

§ 3487. Compensation for Loss of Means of Livelihood Limited to Amount Shown by Proof.

(a) "If you find for plaintiff then in assessing her damages you may take into consideration all physical pain, if any, and mental anguish, if any, she suffered on account of the injuries, if any, she received by falling over the coal hole in front of 1012 Wyandotte street, on February 26, 1898, if you find and believe from the evidence that she did fall at said time and place. And if you further find and believe from the evidence that plaintiff, on account of said injuries, if any, was compelled to lose her means of livelihood, you may take this into consideration, and allow her such amount therefor, not to exceed seven dollars per week, as you may find and believe from the evidence she is entitled to. And if you also find and believe from the evidence that on account of said injuries it became necessary to amputate plaintiff's right leg, and that the same was amputated on account thereof, then you may take that fact into consideration in assessing her damages, and allow her such sum as you may find and believe from the evidence she is entitled to, not to exceed in all the sum of twenty-five thousand dollars."—Approved: Smart v. Kansas City, 208 Mo. 162, 105 S. W. 709.

(b) "The court instructs the jury that if you find for the plaintiff, then in estimating the amount of damages to be awarded her you may take into consideration the physical pain, if any, or mental anguish, if any, that you may find and believe from the evidence plaintiff has suffered because or on account of such injuries, if any, and allow her such an amount therefor as under the evidence will reasonably compensate her for such physical pain, if any, or mental anguish, if any; and if you further find and believe from the evidence that plaintiff, on account of such injuries, if any, was compelled to lose her means of livelihood, or will in the future be compelled to lose her means of livelihood, you may take this into consideration and allow her such an amount as you may find and believe from the evidence she is entitled to; and if you further find and believe from the evidence that plaintiff will in the future suffer either physical pain or mental anguish on account of such injuries, if any, you may also take that fact into consideration and allow her therefor such an amount as you may believe from the evidence will reasonably compensate her for such future physical pain, if any, or mental anguish, if any, not to exceed, however, in all, the sum of five thousand dollars."—Approved: Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273.

§ 3488. Compensation for Pain, Expense, Loss of Ability to Earn Money.

(a) "If the jury find for the plaintiff, they will award him such a sum in damages as will reasonably and fairly compensate him for his mental and physical suffering, if any of either, the reasonable expense, if any, in the matter of medicines and physicians' bills incurred by him, and for the permanent impairment, if any, of his ability to earn money that may have directly resulted to plaintiff from his injuries, if they were caused by the negligence of defendants' servants, but the

damages altogether should not exceed the sum of $15,150."—Approved: Eilerman v. Farmer (Ky.), 118 S. W. 289.

(b) "If the verdict is for the plaintiff, the jury will take into consideration the nature of her injuries, if any, and whether serious and permanent or otherwise, together with the other facts and circumstances in evidence, and the jury will assess her damages at such sum as they believe from the evidence will fully and adequately compensate her for such injuries, if any, as she sustained on the occasion in question, taking into consideration as elements of damage mental anguish and physical suffering resulting to her therefrom, if any, including such as will in reasonable probability result to her therefrom in the future, if any, and also the reasonable value of her lost capacity to attend to her affairs resulting therefrom down to the trial, if any, and also the reasonable value, if paid now, of her lost capacity and power to earn money and attend to her affairs in the future resulting to her therefrom, if any, and also such reasonable sums as she may necessarily have incurred liability for on account of medicine and medical attention in attempting a cure of such injuries."—Approved: Houston Electric Co. v. Seegar (Tex. Civ. App.), 117 S. W. 900.

(c) "If the jury find for the plaintiff, they should award him such sum in damages as will compensate him for any expenses to which he was put, or medical attention or medicine, not exceeding the sum of $195, the amount claimed in this behalf in the petition, and in such further sum as will reasonably and fairly compensate him for any pain or suffering, mental and physical, caused him by his injury, and for any permanent impairment of his power to earn money, if any there is, directly resulting from his injury, not exceeding in all the sum of $5,195, the sum claimed in the petition. If they find for the defendant, they will say so, and no more."—Approved: Louisville Ry. Co. v. Esselman (Ky.), 93 S. W. 50 (not reported in state reports.)

(d) "If from the evidence and the law given you in these instructions, you find for the plaintiff, you may take into consideration the bodily pain and suffering caused by the injury, if any has been shown, and the pain and suffering which will result therefrom in the future, if you find from the evidence that such will probably be the result; also the probability of the injuries she has received being permanent, and the extent, if any, to which the injury has incapacitated her for labor; also the reasonable expenses paid or incurred for services of a surgeon or physician, made necessary by such injuries—and assess her damages in such sum as you believe, from all the evidence, will compensate her for the injury so sustained. You should allow no speculative damages, but such as are compensatory merely."—Approved: Pomerene Co. v. White, 70 Neb. 171, 97 N. W. 232.

§ 3489. Compensation for Pain, Expenses, Loss of Time.

(a) "If you find for the plaintiff, you will allow her such sum as will compensate her for the injury sustained. In fixing the damages, if you find any, you will take into consideration the physical and mental pain and suffering by the plaintiff, if any, by reason of the injury and

loss of time, if any, the sense of humilation and disgrace, if any, the expense of effecting a cure, including physician's charges and medicines, if any, and from those considerations allow her such sum as will compensate her for the injuries sustained by her, if any."—Approved: Helland v. Bridenstine (Wash.), 104 Pac. 626.

(b) "If the jury find for the plaintiff, they will fix his damages at a reasonable compensation in money for his pain and suffering of body and mind, if any; for the impairment of his ability to labor and earn money, if any; for the amount expended for medical services, if any, not exceeding as to this item $40; and for his loss of time, if any, not exceeding as to this item $600, as the natural and proximate result of his injuries in the proof described—not exceeding in all the amount claimed in the petition."—Approved: Louisville & N. R. Co. v. Carter (Ky.), 112 S. W. 904 (not reported in state reports).

(c) "If the jury find for plaintiff they should assess her damages at such sum as they may believe from the evidence will be a fair compensation to her—

"First, for any pain of body or mind which the jury may believe from the evidence she has suffered or will hereafter suffer by reason of her injuries and directly caused thereby.

"Second, for any loss of the earnings of her labor which the jury may believe from the evidence she has sustained or will hereafter sustain by reason of her injuries and directly caused thereby.

"Third, for any expenses necessarily incurred for medicines, medical or surgical attention or nursing which the jury may believe from the evidence the plaintiff has incurred by reason of her injuries and directly caused thereby."—Approved: Flaherty v. St. Louis Transit Company, 207 Mo. 318, 106 S. W. 15.

§ 3490. Compensation for Future Suffering Reasonably Probable to Result.

(a) "If you find him entitled to recover, he should be allowed a fair and reasonable compensation for his injuries. In estimating his damage, no precise rule can be given for the amount to be allowed, as they are not in their nature susceptible of exact money valuation. You are to use your own sense and judgment, and be guided by the evidence, in allowing him such sum as will reasonably compensate him. In making up this amount, you should award, as may appear from the evidence, the reasonable value of the time lost because of the injury, the amount he has paid for medical attendance and nursing, and fair compensation for the bodily pain and suffering caused by the said injury; and if you further find that plaintiff's injuries are permanent, and will, to some extent, disable him in the future, and cause him pain and suffering hereafter, you should also allow him such further sum as, paid now in advance, will reasonably compensate him for such future disability, pain, and suffering as the evidence shows it is reasonably probable will result to him in the future from such injuries."—Approved: Cotant v. Boone Suburban Ry. Co., 125 Iowa, 46, 99 N. W. 115.

(b) "If you find for plaintiff, assess his damages at such sum as you believe, from the evidence, will fairly and adequately compensate him

for the alleged injuries sustained on the occasion in question, if any, taking into consideration as elements of damage, so far as shown by the evidence to be the natural and proximate result of such injuries: Mental anguish and physical suffering, including such as he will in reasonable probability suffer in the future, if any; and the reasonable value of his lost time down to the trial, if any; and the reasonable value of expenditures made, or liability incurred by him for necessary medicine and medical attention, if any, in attempting a cure; and the reasonable value, if paid now, of his lost earning power in the future beyond the trial, if any."—Approved: Beaumont, S. L. & W. R. Co. v. Olmstead (Tex. Civ. App.), 120 S. W. 596.

§ 3491. Or Reasonably Certain as Direct Result of Injuries.

"The jury are instructed that the plaintiff claims in her petition that on ———, she was a passenger on a cable train of defendant, and that while she was a passenger on such train it came in collision with another cable train of defendant.

"Now, if you find for the plaintiff, and if you believe from the evidence that she sustained injuries as a direct result of said collision, then you may allow her damages for such injuries, if any, as you may believe from the evidence she has sustained as a direct result of said collision. In estimating such damages you may take into consideration the pain and suffering which you may believe from the evidence she has endured, if any, or is reasonably certain to endure in the future, in any, as a direct result of such injuries, if any. You may take also into consideration the loss of earnings if any, which you may believe from the evidence she has sustained as a direct result of such injuries, if any. You may also take into consideration any sum of money which you may believe from the evidence plaintiff has reasonably become liable for, if any, for necessary medical treatment received by her on account of and as a direct result of said injuries, if any, not to exceed $250.00, for the whole amount of your verdict should not exceed the sum of $15,000."—Approved: Price v. Metropolitan Street Railway Company, 220 Mo. 435, 119 S. W. 932.

§ 3492. Injury to Person and Property in one Recovery.

"If the jury find for the plaintiff, they will award him such damages as they may believe from the evidence he has sustained, including the reasonable value of the horse, wagon, and contents, and clothing injured or destroyed, not exceeding $225 for the horse, $95 for the wagon and contents, and $15 for clothing; for the amount expended, if any, for doctor's bills and medicine in effecting or attempting to effect a cure; and for loss of time directly caused by his injuries, not exceeding $150; and for the mental and physical pain, if any, that he has suffered or may suffer as the direct cause of the injuries sustained, and for any permanent impairment of his power to earn money, if any, not exceeding in all the sum of $10,000."—Approved: Cross v. Illinois Cent. R. Co., 33 Ky. Law Rep. 432, 110 S. W. 290.

§ 3493. Expense for Medical Treatment Reasonable and Necessary.

"The court instructs the jury that, if you find for the plaintiff, you should allow her damages at such a sum, not exceeding $20,000, as you believe from the evidence will be a fair and reasonable compensation to her, first, for whatever pain of body and mind she has suffered by reason of her said injuries, and that she will hereafter suffer, if you find from the evidence she has suffered or will suffer any; second, for the loss of wages heretofore occasioned by said injuries and shown by the evidence, and any loss of her earnings you may find from the evidence, if any, she will hereafter suffer by reason of said injuries; and, third, for any reasonable and necessary expense that you may find from the evidence she has or may hereafter incur for medical treatment on account of her said injuries."—Approved: Sotebier v. St. Louis Transit Company, 203 Mo. 702, 102 S. W. 651.

§ 3494. Must be for Damages and Injuries Alleged in the Petition.

"The court instructs the jury that if you find for the plaintiff you will be required to determine the amount of her damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to and they should take into consideration all the facts and circumstances as proven by the evidence before them; the nature and extent of plaintiff's physical injuries and resulting from the street car collision in question, if any, so far as the same are shown by the evidence; her suffering in body and mind, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe, from the evidence before them in this case, she has sustained or will sustain by reason of such injuries; her loss of time and inability to work, if any, on account of such injuries; and may find for her such sum as, in the judgment of the jury, under the evidence and instructions of the court in this case, will be a fair compensation for the injuries she has sustained or will sustain, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration."—Approved: Chicago & Milwaukee Electric Railway Company v. Ullrich, 213 Ill. 170, 72 N. E. 815.

§ 3495. Reasonable Value for Time Lost and Diminished Capacity.

"If you find for the plaintiff and allow him damages, you will allow him such sum, if paid now, as you believe from the evidence will be a fair compensation for the injuries sustained by him; and in estimating his damages you will take into consideration the mental and physical pain suffered by him in consequence of his injury; and if you believe from the evidence that, in consequence of his injury, he will suffer pain in the future, you will take that into consideration in estimating his damages; and if you believe that in consequence of his injury he has heretofore been prevented from laboring and earning money, and has lost time, you will take that into consideration in estimating his damages, and allow him the reasonable value of the time so heretofore lost by him, if any, in consequence of his injury; and if you believe from the evidence that in consequence of his injury his ability to labor and earn money in the future has been lessened, you will take that also into

consideration in estimating his damages, and allow him such sum, if paid now, as you believe from the evidence will be a fair compensation for his diminished capacity, if any, to labor and earn money in the future."—Approved: El Paso & S. W. R. Co. v. O'Keefe, 50 Tex. Civ. App. 579, 110 S. W. 1002.

§ 3496. Compensation for Future Loss of Earnings Caused, to a Reasonable Certainty, by the Injury.

"If you find for the plaintiff, under the evidence and these instructions, in determining the amount of his recovery you should take into consideration the nature and extent of his injuries, the fact that certain injuries are permanent, plaintiff's natural expectancy of life, any mental or physical pain which you find from the evidence he has suffered resulting from the injury, any expense necessarily incurred on account of the injury for surgical and medical care and hospital fees, as shown by the evidence, his loss of earnings in the carrying on of his business since the injury, which the evidence shows to have been caused by the injury, together with such future loss of earnings due to the injury, as you find from the evidence, to a reasonable certainty, will be caused by the injury, and return a verdict for the plaintiff in such amount as you so find, under the evidence and these instructions, will be a fair and reasonable compensation for such expense, loss of earnings in the past, and such loss of earnings in the future as you find, to a reasonable certainty, will result from his injuries, together with fair and reasonable compensation for such pain and sufferings as you find to be established by the evidence. If you find for the defendants, or either of them, you will so state in your verdict."—Approved: Union Pacific Ry. Co. v. Connolly, 77 Neb. 254, 109 N. W. 368.

§ 3497. Reasonable Value for Time Wholly Lost and for Decreased Capacity in the Future.

"If you find the plaintiff entitled to recover, under these instructions, you will then proceed to assess and determine the amount of his damages. You will first allow him for all that time which he could not work, at all the reasonable value of such time, by which is meant the amount of money he could have earned during that time if he had not been injured. You will next allow him for any decreased capacity to earn money in the past, by which is meant such an additional amount as, added to what he can earn in his present condition, will make that amount of money which he could have earned, had he not been injured. You will allow, in addition to such sum, a reasonable sum for the pain and suffering which he has undergone."—Approved: Haden v. Sioux City & P. R. Co., 92 Iowa, 226, 60 N. W. 537.

§ 3498. Reasonable Value if Paid Now of Diminished Earning Power.

"If your verdict is in favor of the plaintiff, then assess his damages at such sum as you believe from the evidence will fairly and adequately compensate him for the alleged injuries which you may find he sustained, taking into consideration as elements of damage, so far as shown by the evidence to result, naturally and probably, from such

injuries, the following: First, mental anguish and physical suffering to him therefrom, if any, including such, if any, as you may believe from the evidence will in reasonable probability ensue to him therefrom in the future; second, the reasonable value of his lost time therefrom, if any, until now; and, third, the reasonable value, if paid now, of his diminished earning power from such injuries in the future, if any."—Approved: Texas & N. O. R. Co. v. Jackson, 51 Tex. Civ. App. 646, 113 S. W. 628.

§ 3499. Compensation for any Permanent Reduction of Power to Earn Money.

(a) "The jury are instructed that if they find for the plaintiff they should find for him the value of the time lost by him, if any, by reason of said injury, if any, or which it is reasonably certain he will hereafter lose as a direct result of said injury, and a fair compensation for the physical and mental suffering, if any, endured by him, or that it is reasonably certain he will endure as a direct result of said injuries, if any, as well as for any permanent reduction of his power to earn money by reason of said injuries, not exceeding in all the sum claimed in his petition, $10,000."—Approved: Louisville & N. R. Co. v. Barrickman (Ky.), 104 S. W. 273 (not reported in state reports.)

(b) "If you find for the plaintiff, and believe from the evidence that he was injured as alleged in his petition, you will return a verdict in his favor for such sum as you believe from the evidence will compensate him for the injuries sustained, if any, and in estimating such damages, if any, you may take into consideration the mental and physical pain suffered consequent to his injuries, if any, the value of the time lost during the period of his disability, if you find that he has been disabled, and that by reason thereof he has lost any time, and if you believe from the evidence that his injuries are permanent, and that they will disable him to labor and earn money in the future, then you may allow him such sum as if, paid now, you may believe from the evidence will be fair compensation for his diminished capacity, if any, to labor and earn money in the future, and as to whether he has received such injuries and has suffered damage in any respect named, and as to what extent they have disabled him or may disable him to labor and earn money in the future, if at all, and as to what particular sum may be fair compensation if now paid, are questions altogether for your determination from the evidence in the case, governed by the law as given you in the charge of the court."—Approved: St. Louis Southwestern Ry. Co. v. Marshall (Tex. Civ. App.), 120 S. W. 512.

§ 3500. Such Damages as he May Sustain in the Future as the Direct Effect of Such Injury.

"The court instructs the jury that if you find for the plaintiff, you will in assessing his damages take into consideration his age, his condition in life, the injury sustained by him, if any, the physical pain and mental anguish suffered and endured by him on account of said injury, if any; his loss of time, if any; such damages, if any, as you may believe from the evidence he may sustain in the future as the direct

effect of such injury; together with all the facts and circumstances in the case—and assess the damage at such sum as from the evidence you my deem proper, not exceeding nineteen thousand five hundred dollars, the amount sued for."—Approved: Phelps v. Conqueror Zinc Company, 218 Mo. 572, 117 S. W. 705.

§ 3501. Age of Plaintiff and Reasonable Expectancy of Life to be Considered.

(a) "If you find from the evidence and these instructions that the plaintiff is entitled to recover, it will then be your duty to find and ascertain from the evidence the amount to which he is entitled. You should carefully consider all of the evidence as to the nature, character, and extent of the injury, and the result, whether the disability, if any, resulting from the injury, was permanent or temporary, its extent, either total or partial. If any permanent disability, you should consider plaintiff's age, his reasonable expectancy of life, how much money he could earn before the injury and how much, if any, he could earn after the injury, with his reduced capacity, if any there was on account of the injury received, remembering no reduction of capacity on any other account is to be considered by you, and allow him a reasonable compensation for any loss of time and capacity resulting from the injury. You are further instructed that you should also allow him for pain and suffering. The law lays down no rule for estimating his damages on account of pain and suffering, but leaves it to your sound discretion and judgment. You should also allow him for any moneys paid or contracted to be paid for the services of physicians or medicines, if any such is shown."—Approved: Olmstead v. City of Red Cloud, (Neb.), 125 N. W. 1101.

(b) "If you find plaintiff was injured by reason of the defendant's negligence, and without negligence on his part which contributed to his injury, you may then proceed to a consideration of the plaintiff's damages. In fixing such amount you should allow him such sum as will fairly and reasonably compensate him for the injury received. In so doing you may take into consideration the pain and suffering of body and mind incident to such injury; the injury to the knee, and internal injuries, if they are shown; his expenses incurred for medical care and attendance and medicine; and, if you find such injury continuing and permanent, that prior to such injury he was capable of earning wages by manual labor, and that such injury has in whole or in part incapacitated him from performing manual labor, then such diminished earning capacity may be taken into consideration in estimating plaintiff's damages. And in this connection plaintiff's expectancy of life, as shown by mortality tables, may be considered. But in this connection regard should be had to the probable time during such expectancy of life that plaintiff might be expected to be capable of performing manual labor on account of age and natural infirmities incident thereto. And if the jury find that the plaintiff is suffering from disease or infirmities not caused by the accident complained of, such fact should not be considered to the enlargement of the damages allowed."—Approved: Greenway v. Taylor County, 144 Iowa, 332, 122 N. W. 943.

§ 3502. Deformity Caused by Injury—Humiliation.

(a) "It is a question in determining which you have the right to take into account the sufferings and pain caused by the injury and wounds, the deformity caused thereby, and the humiliation which would naturally follow by reason of such injury, the permanent (in so far as you find them to be permanent) annoyances resulting from the mutilation and crippling of the plaintiff. And you are also to take into account the extent it has injured the plaintiff and prevented him from following the ordinary pursuits of life—of men in his position in life; the extent, in other words, to which the plaintiff is restricted in his choice of occupation, and limited in his ability to work, by the injuries."—Approved: Blakeslee v. Consolidated St. Ry. Co., 105 Mich. 462, 63 N. W. 401.

(b) "If you find, under the evidence and the rules of law I have given you, that the plaintiff is entitled to recover, it will be your duty to assess the amount of damages which, in your judgment, he should recover. In assessing this amount every particular and phase of the injury may enter into the consideration of the jury in estimating his damages, loss of time with reference to his condition and ability to earn money in his business or calling, his loss from permanent impairment of his physical powers, his pain and suffering, both physical and mental, already endured, and that may be endured from his injuries in the future, his personal disfigurement, and the jury should give the plaintiff such a sum as will compensate him for the injuries received, taking into consideration all the facts proved in the case."—Approved: Evansville Hoop & Stave Co. v. Bailey, 43 Ind. App. 153, 84 N. E. 549.

§ 3503. Deafness Depriving One of Social Companionship.

"The court instructs you that if a person or corporation negligently causes an injury to another who is without fault, which makes the latter an object of pity to his fellow men and an object of ridicule to the thoughtless and unfeeling and deprives him of the comfort and companionship of his fellows should respond in damages for the injury sustained. Therefore if you find for the plaintiff and further find that among other injuries either or both of his ears were impaired at the time so that his hearing is impaired and a considerable degree of deafness has ensued which is more or less permanent, and as a consequence the plaintiff's ability to gain remunerative employment has been lessened or decreased, then you may not only allow him such sum as damages therefor as in your sound judgment will reasonably compensate him for the difference between his lessened earning capacity on account of such deafness, if any, and what it would be if his hearing was not impaired, but also compensation for any probable distress of mind or mental suffering, if any, that he may endure by reason of having such deafness."—Approved: Cole v. Seattle, R. & S. Ry. Co., 42 Wash. 462, 85 Pac. 3.

§ 3504. Loss of Accomplishments—Ability to Play on Musical Instruments and Sing.

(a) "In arriving at a verdict in this case, if you find that the plaintiff Mary Jane Doolin sustained any injuries whatever through any

negligence of the defendant or its employe, you must take into consideration the physical and mental condition of Mrs. Doolin before the occurrence of the accident, her accomplishments, if any, her ability to play musical instruments and sing."—Approved: Doolin v. Omnibus Cable Co., 140 Cal. 369, 73 Pac. 1060.

(b) "You will assess such sum as will fairly and reasonably compensate the plaintiff for the pain and suffering the injury caused him, the humiliation or mental suffering, if any, the deformity has caused him, and such, if any, as it will cause him in the future. Such inconvenience it has caused, and such, if any, as it will cause him in the future, the extent, if any, to which it has diminished his earning capacity, and the extent, if any, to which it has affected his ability to play the piano or engage in other pastimes."—Approved: Sharon v. Winnebago Furniture Mfg. Co., 141 Wis. 185, 124 N. W. 299.

§ 3505. Inability to Have Children.

"The court instructs the jury that if under the evidence they find the defendant guilty as in the amended declaration alleged, then, in estimating the damages of the plaintiffs, they have the right to take into consideration the personal injuries upon the plaintiff Annie Normile, in consequence of the defendant's wrongful acts, if any such injuries are proved, and the pain and suffering, both mental and physical, undergone by her in consequence of such injuries, if such pain and suffering have been proved; and if they further believe from the evidence that the said injuries are permanent, and that they include an inability to have any child or children, these facts may also be included in their estimate, if they further believe from the evidence that such permanent injury, including such inability, resulted from such wrongful acts."—Approved: Normile and Husband v. Wheeling Traction Co., 57 W. Va. 132, 49 S. E. 1030.

§ 3506. Damages Apportioned in Separate Verdicts against Defendants.

"If the jury believe from the evidence that both of the defendants were negligent, under the instructions above given, and that such negligence, if any, of both defendants concurred in producing the injury to plaintiff, if any, and that plaintiff ought to recover damages against both defendants under the instructions herein, they may find a joint verdict against the Louisville & Nashville Railroad Company, and the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company, and they may then apportion such amount as they may so find between the defendants, and find a separate verdict against each defendant for the amount so apportioned against it; but in no event shall the recovery against both defendants exceed the sum of $20,000, the amount claimed in the petition."—Approved: Louisville & N. R. Co. v. Roth, 130 Ky. 759, 114 S. W. 264.

§ 3507. Comparative Negligence—Damages Reduced.

"If the deceased and the agents of the defendant company were both at fault, and the deceased may have in some way contributed to the injury which resulted in his death, but could not by the use of ordinary

care and diligence have avoided the consequences caused by the negligence of the defendant, the plaintiff may recover, even if you find that the deceased was negligent; but the amount of the damages would be diminished in proportion to the amount of default attributable to the negligence of the deceased. In other words, if you believe that the railroad company was negligent and that the deceased was negligent, but the deceased could not have avoided the consequences of the defendant's negligence by the exercise of ordinary and reasonable care and diligence, if you believe that to be the truth of the transaction, then I charge you the plaintiff in this case would be entitled to recover, but the amount of the recovery would be reduced by the amount of negligence attributable to the deceased, William Gornto."—Approved: Wrightsville & T. R. Co. v. Gornto, 129 Ga. 204, 58 S. E. 769. This instruction depends, of course, upon the doctrine of comparative negligence being recognized as correct in the court where given.

F. Personal Injury to Minors—Measure of Damages.

§ 3508. Compensation for Pain and Suffering Present and Prospective.
3509. No Compensation to Minor for Loss of Earnings during Minority.
3510. Unless the Minor has been Emancipated.
3511. No Rule to Fix Amount for Bodily Pain and Mental Anguish.
3512. Compensation for Impairment from majority for Probable Duration of Life.
3513. Evidence of Present Earning Capacity not Needed to Warrant Finding for Deceased's Capacity after Majority.
3514. Rule of Recovery for Decreased Earning Capacity Applied to Female Minor.
3515. Parent may Recover for Medicine, Expense, Nursing and Loss of Services.

§ 3508. Compensation for Pain and Suffering Present and Prospective.

"If you find for the plaintiff, Joe Honaker, you will assess his damages at such a sum, not exceeding the sum sued for in the complaint, which is $2,000, as will from the evidence, in the judgment of the jury, compensate him for the pain and suffering, mental and physical, which he suffered, if any, arising from the injury, whether such pain and suffering be past, present, or prospective, and for the inconvenience and diminution of capacity to earn a livelihood, if any, arising from the injury existing after he arrives at 21 years of age, if you find any such will then exist from the injury."—Approved: Western Coal & Mining Co. v. Honaker, 79 Ark. 629, 96 S. W. 361.

§ 3509. No Compensation to Minor for Loss of Earnings during Minority.

"If the jury find for the plaintiff they should assess his damages at such sum as they may believe from the evidence will be a fair compensation to him:

"For any pain of body or mind which the jury may believe from the evidence he has suffered or will suffer by reason of said injuries and directly caused thereby.

"For any loss of the earnings of his labor after he shall have arrived at the age of twenty-one years which the jury may believe, from the evidence, the plaintiff has sustained by reason of said injuries and directly caused thereby.

"But you will not allow any sum for any earnings of his labor you may believe he may lose up to the time he becomes twenty-one years of age, and you will not allow any sum for loss of earnings of his labor thereafter unless you believe and find, from the evidence, that he will be disabled from labor and lose the earnings of his labor after he arrives at the age of twenty-one years as a direct result of his alleged injuries."—Approved: Wise v. St. Louis Transit Company, 198 Mo. 546, 95 S. W. 898.

§ 3510. Unless the Minor has been Emancipated.

"The court instructs the jury that the minor cannot recover damages on account of the diminution of earning power or capacity during minority, unless emancipation be shown, but they may consider such diminution after he attains his majority."—Approved: Geibel v. Collins, Co., 54 W. Va. 518, 46 S. E. 569.

§ 3511. No Rule to Fix Amount for Bodily Pain and Mental Anguish.

"If you find for the plaintiff, it will be your duty to determine from the evidence the amount of his damages, which should be actual compensation for his injuries. In doing so, you should carefully consider, from the evidence, the nature, extent, and character of the injuries sustained; you should also determine whether or not the injuries to the plaintiff are permanent; and you should allow him for all damages which naturally and directly result from his injuries, whether in the past or in the future. You should allow him such damages for bodily pain and mental anguish as, under the evidence, you believe him entitled to; and you should allow him such damages for physical and mental disability, if any such there be, as, from the evidence, you believe him entitled to. The law establishes no rule by which to fix the amount of damage for bodily pain and mental anguish, but leaves it to you to determine from the evidence the reasonable amount thereof. If you should find from the evidence that the plaintiff will suffer damage by reason of impaired capacity to earn money, if any such impaired capacity you find, then, in estimating this element of the plaintiff's damage, you must bear in mind the fact that under the law the plaintiff would not be entitled to his earnings until after he became twenty-one years of age, and you should not allow plaintiff any damages for what he might otherwise have earned before coming of age. There is no testimony in this case upon which you can allow plaintiff anything for expenses occasioned by his injuries."—Approved: City of South Omaha v. Sutliffe, 72 Neb. 746, 101 N. W. 997.

§ 3512. Compensation for Impairment from Majority for Probable Duration of Life.

"Now, if, under the foregoing instructions, you shall find in favor of the plaintiff, you will allow him such a sum of money by your verdict as in your judgment will be a fair and reasonable and just compensation for the injury, if any, which has been sustained, and in measuring the same you will consider the pain and suffering that he has undergone, both mentally and physically, if any, in consequence naturally and probably of the injury sustained by him, and such pain and suffering, if any, both mental and physical, as the evidence may show you he reasonably and probably will suffer in future consequence of such injury, if any; and, if you find from the evidence that the injury sustained by him was of a permanent nature, and that on account thereof his capacity to labor and earn money has been diminished and permanently impaired, then, in addition to such damages as you may allow him for the pain and suffering, as above explained, you will also allow him such a sum of money as, if paid now, would be a just, fair, and reasonable compensation to the extent of his impairment or diminished capacity to labor and earn money in the future, between the time that he will have arrived at the age of 21 years, and so long as you find from the evidence he will probably live. But you cannot allow him anything for loss of time between the date he was injured and the time when he will be 21 years of age, or for his diminished capacity to labor and earn money during that period of time, if any."—Approved: Industrial Lumber Co. v. Bivens, 47 Tex. Civ. App. 396, 105 S. W. 831.

§ 3513. Evidence of Present Earning Capacity not Needed to Warrant Finding for Decreased Earning Capacity after Majority.

"If you resolve all these questions, gentlemen of the jury, in favor of the plaintiff, you will then consider the question of damages. I charge you, first, as to what damages he cannot recover. He cannot recover for any medical attendance or doctor's bills, to start with. He cannot recover for any time lost during the time that he was ill. I think the testimony shows that there was about a year that he was unable to get work. He is an infant, and under the law his time, at this time, would belong to his father, and there is no evidence in the case that his father manumitted to him, or gave him his own time, so that that element of damage is not in the case for your consideration. He is entitled to recover, gentlemen of the jury, if you find under my instructions that he is entitled to recover. He is entitled to recover for his pain and suffering, not alone what he has suffered in the past, but what you find he will suffer in the future, as the direct and necessary result of the accident. He is entitled to recover for the inconvenience and the humiliation which you find that he will suffer by reason of his crippled condition, if you find that his condition will entail either inconvenience or humiliation in the future. Now, gentlemen of the jury, both of these elements of damage are elusive. It is hard to determine accurately what the plaintiff is entitled to for the value of that pain

or suffering or inconvenience and humiliation. As I have said before, they can neither be weighed nor measured. They ought never to be oppressive, but they ought to be full and fair compensation for those elements. They must, in the last analysis, be referred to the exercise of the judgment of 12 honest men, intent only upon doing the right thing between these two parties. He is entitled further, gentlemen of the jury, to recover damages for his decreased earning capacity, if you find from the evidence in this case, and from your observation from the injured limb, that during his lifetime his earning capacity will be decreased by reason of the injury. There is no testimony in the case tending to show that, since the happening of the injury up to the present time, his earning capacity has been decreased. But I am still of the opinion that you may, viewing the foot and taking into consideration the condition in life of the plaintiff, that you are the judges as to whether or not such an injury will result in a decreased earning capacity through the life of this boy; and if you find that the injury is such a one as to decrease his capacity to earn a livelihood, then your verdict should include such a sum as will fairly compensate him for that decrease, if you find it to exist."—Approved: Braasch v. Michigan Stove Co., 153 Mich. 652, 118 N. W. 366.

§ 3514. Rule of Recovery for Decreased Earning Capacity Applied to Female Minor.

"If the jury shall find for the plaintiff, they should award her such a sum in damages as they shall believe from the evidence will fairly and reasonably compensate her for any pain and suffering, mental and physical, which she has suffered, or which the jury may believe from the evidence it is reasonably certain she will hereafter suffer by reason of her injuries, and for any impairment of her power to earn money directly resulting therefrom after she shall have arrived at the age of 21 years."—Approved: Louisville, H. & St. L. Ry. Co. v. Kessee (Ky.), 103 S. W. 261 (not reported in state reports.)

§ 3515. Parent may Recover for Medicine, Expense and Nursing and Loss of Services of Son.

"If you find any damages for plaintiff you may, if the proof warrants, allow her a just and reasonable compensation for expenses incurred by her for necessary medicines, medical and surgical attention, in the curing of the child, and also a reasonable, just, and proper compensation of such services of said son, if any, as the plaintiff will probably be deprived of by reason of the boy's inability, if any, to labor for her and to do her bidding, before he reaches the age of 21 years, not to exceed the sum sued for."—Approved: El Paso Electric Ry. Co. v. Kitt (Tex. Civ. App.), 99 S. W. 587 (not reported in state reports.)

G. Damages for Torts—Measure of.

§ 3516. Alienation of Affections—Loss to Wife.
3517. Assault and Battery—Compensation for Physical and Mental Suffering.
3518. Assault and Battery—Pain and Suffering—Loss of Time and Medical Expenses.
3519. Breach of Promise—Mortification, etc.
3520. Criminal Conversation.
3521. Conversion—Excessive Sale under Chattel Mortgage.
3522. Same—Fair Market Value of Property.
3523. Ejection from Train and Resulting Illness.
3524. Eviction of Tenant—Deprivation of Leased Premises.
3525. False Imprisonment—Injury and Wounded Feeling.
3526. False Representation as to Quantity of Land Leased—Deduction from Rent.
3527. Fires by Locomotives—Injury to Trees—Difference in Value.
3528. Fire from Negligence—House and Contents—Value of.
3529. Libel—Elements of Damage.
3530. Libel—Repetition of Old Rumors, Impaired Reputation.
3531. Libel—Mental Suffering.
3532. Malicious Defamation of Business—Financial Loss.
3533. Malicious Prosecution—Injury to Reputation and Business. Financial Ability of Defendant Considered.
3534. Same—General Damages—Attorney Fees and Expenses.
3535. Same—Expenses in Defense—Mortification—Injury to Reputation.
3536. Nuisance—Market Value Before and After.
3537. Overflow—Actual Value of Property Destroyed—Injury to Land.
3538. Same—Market Value of Crops—Cost of Repairs, Avoidable Injury.
3539. Same—Injury to Land—Value Before and After.
3540. Same—Fair Compensation for Crops Destroyed.
3541. Same—Defendant's Ditch Increasing Volume.
3542. Pollution of Stream—Diminished Value in Use of Property.
3543. Same—Depreciated Value of Waterwork's Plant.
3544. Same—Damage to Cattle.
3545. Same—Defendant in Control of Source of Pollution.
3546. Physician's Negligence—Pain—Permanent Injury.
3547. Streets—Change of Grade—Difference in Value.
3548. Wrongful Attachment—Expense in Defending Loss and Detention.
3549. Wrongful Replevin—Usable Value of Property.
3550. Water and Water Courses—Preventing Usual Flow—Profits of Saw Mill.
3551. Same—Polluting Irrigating Ditches
3552. Public Records—Destruction—Cost to Restore.

§ 3516. Alienation of Affections—Loss to Wife.

"If you believe from the evidence that the defendant, Florence Scott, by her acts, wiles, or blandishments, intentionally alienated or took away from plaintiff her husband's affections, you will find for plaintiff, and award her such damages as you believe will fairly compensate her for the injury, if any, resulting to her feelings, for the loss of her husband's comfort and society, if there was such loss, and for the loss of her husband's support, if there was such loss, except to the extent that he has contributed, or may by law be compelled to contribute to her support not exceeding the sum of $10,000, the amount asked for. Unless you so believe, you will find for the defendant."—Approved: Scott v. O'Brien, 129 Ky. 1, 110 S. W. 260.

§ 3517. Assault and Battery—Compensation for Physical and Mental Suffering.

"If you find for plaintiff, you may award him such sum by way of compensatory damages, not exceeding $5,000, as you believe from the evidence will fairly compensate him for any physical or mental suffering which he endured as the necessary result of his injuries, if any."—Approved: Renfro v. Barlow, 131 Ky. 312, 115 S. W. 225.

§ 3518. Same—Pain and Suffering—Loss of Time—Medical Expense.

"The jury are instructed that if they, under the instructions of the court, from the evidence, believe that the plaintiff is entitled to recover in this case, then, in assessing his damages, the jury are at liberty to take into account the character and extent of the plaintiff's injuries, so far as they have been proven by the evidence, the pain and suffering endured by him, if any, in consequence of such injury, his loss of time, and the costs of medical attendance, if such loss of time and costs have been proved, and award such damages as the jury from the evidence think proper and right, in view of all the facts and circumstances proved on the trial. The jury can only allow actual damages by way of compensation. In this state, damages by way of punishment is not allowed."—Approved: McClure v. Shelton, 29 Neb. 370, 45 N. W. 689.

§ 3519. Breach of Promise—Mortification, etc.

"If you find for the plaintiff, you shall take in consideration, as may appear by the evidence, the length of the engagement; the depth of plaintiff's devotion, if any; her lack of independent means; her mortification and injured feelings and affections, if any; her loss of marriage; her altered social condition, if any, caused by defendant's conduct; and if you believe from the evidence that defendant's attempt to prove unchaste or improper conduct with others, on the part of plaintiff, was made without reasonable cause to believe that such charge could be proven, and you are satisfied that plaintiff is innocent of such charge, that fact shall be taken into consideration by the jury in aggravation of plaintiff's damages; and you shall assess her damages at such amount as you believe she should recover, not exceeding

twenty-five thousand dollars.—Approved: Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

§ 3520. Criminal Conversation.

"The jury are instructed that, if you find for the plaintiff, in estimating the injury he has sustained the jury may take into consideration the wounded feelings and affections of the husband, the wrong done to him in his domestic and social relations, the stain and dishonor he has sustained, and the grief and affliction suffered, in consequence of the act complained of, and give damages accordingly."—Approved: Smith v. Meyers, 52 Neb. 70, 71 N. W. 1006.

§ 3521. Conversion—Excessive Sale under Chattel Mortgage.

"If, under the foregoing instruction, you find for the plaintiff, you will ascertain from the testimony the fair market value of such of the goods as were sold after a sufficient amount had been realized to satisfy the amount due under the chattel mortgage, with the expenses of the sale, and upon that amount compute interest at the rate of 7 per cent. per annum from the date of the commencement of this action, to wit, May 23, 1889, up to the first day of this term, September 22, 1890."—Approved: Omaha Auction & Storage Co. v. Rogers, 35 Neb. 61, 52 N. W. 826.

§ 3522. Same—Fair Market Value of Property.

(a) "If you find for the plaintiff, the measure of his recovery will be the market value of the property converted by the defendant at the time of such conversion, with interest thereon from the date of such conversion to the 6th day of February, 1893; providing the amount you find was the value of the property at the time of conversion, with interest added, does not exceed the amount you find due plaintiff on his notes, interest added as above explained; and providing, further, that the value of the property must be the fair market value of the property at the time of the conversion, not what it did in fact sell for, unless you find that the price at which it sold was the fair market value in the market for such property. In other words, if you find for the plaintiff, your verdict should be for the plaintiff for such an amount as you find due him from Hospodsky on the mortgage and notes; but the same must be within, and not greater than, the fair market value of the property, as shown by the evidence."—Approved: Kasper v. Walla, 49 Neb. 288, 68 N. W. 476.

(b) "The court instructs the jury that if they believe from the evidence that the defendants in instituting the action and suing out the attachment and levying on the property mentioned and described in the complaint, or in holding the same after demand, were not moved to so do by malicious or oppressive motives, then all that the plaintiff can recover in this action is such damage as you may believe from all the evidence in the case will compensate plaintiff for the loss that he sustained, which is the reasonable market value of the property taken and such actual expense as you may believe the plaintiff to have

incurred in pursuing and trying to regain possession of the property up to the time of the institution of this action."—Approved: Shandy v. McDonald, 38 Mont. 393, 100 Pac. 203.

§ 3523. Ejection from Train—Resulting Illness.

"In case you find for plaintiff, you will award her such sum in damages as you may believe from the evidence will fairly compensate her for any mortification or humiliation, for any inconvenience or discomfort, and for any sickness which you may believe from the evidence she suffered as the direct or proximate cause of being ejected from said train."—Approved: Louisville & N. R. Co. v. Summers, 133 Ky. 684, 118 S. W. 926.

§ 3524. Eviction of Tenant—Deprivation of Leased Premises.

"Where a tenant has paid the rent reserved, and is, by fault of the landlord, deprived of the use of the leased premises, the general rule for the measure of his damages is the full rental value of the leased premises for the term; and if the rent has not been paid, the measure of tenant's damages is the difference between the actual rental value (that is, the value of the use of the premises) and the rent reserved, estimated for the terms of the lease. If, therefore, you find that the plaintiff is entitled to recover on the alleged cause of action set out in his petition, in estimating the amount of his recovery you may allow him the full value of the premises of which you find he was deprived, if any, by the fault of the defendant from the time said dam, in the reasonable diligence, could have been repaired by the defendant, to the expiration of the time at which the rent was paid. You may also allow the plaintiff the difference between the rent reserved and the actual value of the premises during the remainder of the three years from date of lease. If you find the rental values above specified and the rent reserved and unpaid are equal, then you should allow plaintiff no more than nominal damages. By the terms 'rental value', or 'value of the use of the premises,' is meant that amount for which, in the ordinary course of business, said premises would bring, or could be rented for. The fourth and fifth year named in the lease being on contingency of sale, plaintiff cannot recover therefor."—Approved: Leick v. Tritz, 94 Iowa, 322, 62 N. W. 855.

§ 3525. False Imprisonment—Injury and Wounded Feelings.

"If the jury find for the plaintiff, they will assess his damages at such sum as they may believe from the evidence will reasonably compensate him for the injury received, including wounded feelings, mortification, and humiliation, if any, and if they believe from the evidence, the arrest and detention were malicious, they may find punitive damages."—Approved: Rich v. Bailey, 123 Ky. 827, 97 S. W. 747.

§ 3526. False Representations as to Quantity of Land Leased—Deduction from Rent.

"If you find by a preponderance of the evidence that at or before the time the lease was made the plaintiff's agent stated and represented to the defendant that there were sixty-five acres of cultivated

land upon the leased premises, and that defendant believed and relied upon said representation, and was not in a position to know or ascertain for himself the true amount of cultivated land, and in reliance of said representations entered into the lease, and you further find that there was a materially less amount of cultivated land than was so represented, then the defendant is entitled to recover or be allowed in this action the difference between the fair rental value of the premises as they would have been had they been as represented, and the fair rental value of said premises in the condition in which they were in fact at that time. If, however, you do not find that said representations were made, or if they were made and defendant did not rely thereon, or if such representations were made merely as a matter of opinion, and not as an assertion of fact, then no damages can be based on this branch of the defense."—Approved: Ladner v. Balsley, 103 Iowa, 674, 72 N. W. 787.

§ 3527. Fires by Locomotives—Injury to Trees—Difference in Value.

"The court instructs the jury that if you find from the evidence, and under the instructions of the court, for the plaintiff, you will assess the amount of his recovery at the amount of damage the trees sustained by reason of the fire, and this sum is ascertained by determining the value of the trees burned as standing timber with reference to the land in the situation in which they stood, less their value in their burned and charred condition after the fire. * * * "—Approved: Union Pac. R. Co. v. Murphy, 76 Neb. 545, 107 N. W. 757.

§ 3528. Fire from Negligence—House and Contents—Value of.

(a) "You are further instructed that if you find that plaintiff's property was damaged by fire, and that said fire was caused by the negligence of defendants, or either of them, you will then ascertain the market value of plaintiff's house and lot immediately before the fire occurred, and the market value of said lot immediately after the fire, and the difference in these values will be the value of the house destroyed. You will then find the value of the personal property sued for, and, adding the value of said house with the value of said personal property, you will find the amount of plaintiff's damages at the time of the fire, on which you will calculate interest from the date of the fire until the present time at the rate of 8 per cent. per annum, which, added with principal sum, will give you the amount for which you will find for plaintiff, if for any sum."—Approved: Pacific Express Co. v. Smith (Tex.), 16 S. W. 998 (not reported in state reports).

(b) "If the jury find for the plaintiff, they will assess his damages at the value of the building and such portion of its contents as were wholly destroyed, and at such further amount as will, in the judgment of the jurors, under the evidence in the case, compensate the plaintiff for such damages as he may have suffered by reason of injury by fire to that portion of the building or contents which was not wholly destroyed by fire."—Approved: Alabama Great Southern R. Co. v. Sanders, 145 Ala. 449, 40 South. 402.

(c) "If the jury should find for the plaintiff, the measure of damages is the difference in value of the boat just immediately before the burning and the value of the boat immediately after the burning."—Approved: Sharp v. Layne (Ky.), 117 S. W. 292.

(d) "If you find for the plaintiff, you will award him such damages as will justly compensate him for the injury he has suffered by reason of the fire in question having run and burned over his premises hereinbefore described."—Approved: Wickham v. Wolcott, 1 Neb. Unoff. 160, 95 N. W. 366.

§ 3529. Libel—Elements of Damage.

(a) "Plaintiff may recover as actual damages, such sum as, in the fair and impartial judgment of the jury, under all the facts and circumstances shown by the evidence, would fairly and reasonably compensate her for any exposure to public hatred, contempt, or ridicule, and any deprivation to her of the benefits of public confidence and social intercourse, and all as a direct result of the publication of the alleged libelous article."—Approved: Jensen v. Damm, 127 Iowa, 555, 103 N. W. 798.

(b) "The amount of plaintiff's recovery, if any, is to be determined by you from a consideration of all the evidence and circumstances proved in the case. In determining such amount, you will consider the character of the charge, the falsity of the same, and all of the facts and circumstances proved on the trial having reference to this subject."—Approved: Ladwig v. Heyer, 136 Iowa, 196, 113 N. W. 767.

§ 3530. Libel—Repetition of Old Rumors—Impaired Reputation.

"If you find from the evidence that the alleged libelous article consisted wholly or in part of the repetition of current reports of long standing, by which plaintiff's reputation had already become and was then impaired, you may take such fact into consideration in estimating damages, should you find for the plaintiff."—Approved: Hearne v. De Young, 132 Cal. 357, 64 Pac. 576.

§ 3531. Same—Mental Suffering.

"If you find for the plaintiff, then you should award her such compensatory damages as would ordinarily and probably result from the article as published, and in estimating her damages, if any, you may consider plaintiff's mental suffering, if any, caused by the publication of said article, but you cannot allow her any exemplary damages."—Approved: San Antonio Light Pub. Co. v. Lewy, 52 Tex. Civ. App. 22, 113 S. W. 574.

§ 3532. Malicious Defamation of Business—Financial Loss.

"If you find for plaintiffs under paragraph 8 of this charge, you will assess the damages at such sum as will compensate them for the actual financial loss or injury to their business as loan agents sustained by them, and state such amount in your verdict as actual damages; and, in arriving at such sum, if any, you will not take into consideration any damages, if any, which may have been sustained by Brown Bros.

from any other source or cause than from the acts and statements of the defendant, through its officers and agents, if any, as submitted to you in paragraph 8 hereof."—Approved: American Freehold Land Mortgage Co. v. Brown (Tex. Civ. App.), 118 S. W. 1106.

§ 3533. Malicious Prosecution—Injury to Reputation and Business—Financial Ability of Defendant Considered.

"If the jury find for the plaintiff, he will be entitled to recover such actual damages as the jury may believe from the evidence he suffered by reason of the prosecution; and in considering his actual damages, you may take into consideration the reasonable value of the time necessarily employed by him in preparing his defense and the reasonable value of attorney's fees, if any, contracted by him in his defense, and the mental anxiety, if any, suffered by him in consequence of such prosecution, as well as the injury to his reputation and business, as you may believe from the evidence resulted from said prosecution, not exceeding, however, the sum of ten thousand dollars, the amount claimed on that account in the petition; and you may add to such an amount so found such exemplary damages, considering the defendants' financial ability to pay, as you believe from the circumstances and the facts detailed in evidence would serve as a proper punishment to the defendants, or either of them, not exceeding, however, as such punitive damages, the sum of fifteen thousand dollars, the amount claimed in plaintiff's petition."—Approved: Carp v. Queen Insurance Company, 203 Mo. 295, 101 S. W. 78.

§ 3534. Same—General Damages—Attorney Fees and Expenses.

"The court instructs the jury that, although no actual damages may have been proven by the plaintiff in this case, John W. Waldron, as to actual attorney fees and expenses about his defense in the prosecution commenced or pursued against him by the defendant in this case, J. J. Sperry, and although he may have proven no actual damages for loss of time because of the prosecution against him—but of all this the jury are to judge from the evidence in the case—yet the jury may give such damages as they think proper for injury to the plaintiff's feelings, person and character by his detention in custody and prosecution, if they believe from the evidence that there was a prosecution commenced or pursued against him by the defendant; and that said prosecution was instigated by the defendant, Sperry, without probable cause therefor, and with malice express, or implied from the want of probable cause; and that the prosecution was conducted to its termination to the final discharge of the plaintiff, John W. Waldron, without proof as to the amount of such damages, and the jury may give such punitive or exemplary damages, as they may think proper, for the conduct of the defendant, J. J. Sperry, if they believe from the evidence in this case that the said prosecution against John W. Waldron was commenced or pursued for the private ends of defendant, Sperry, or if they believe from the evidence that said prosecution was commenced or pursued with reckless disregard of the rights of the plaintiff, Wal-

dron, and may assess such damages without proof as to the amount thereof. The amount of such damages not to exceed ten thousand dollars."—Approved: Waldron v. Sperry, 53 W. Va. 116, 44 S. E. 283.

§ 3535. Same—Expenses in Defense—Mortification—Injury to Reputation.

"The elements of damage to be considered by the jury, if you find for the plaintiff, are the expenses plaintiff was put to in the prosecution to protect herself, including reasonable attorney's fees, her loss of time, her deprivation of liberty, the loss of society of her family, injury to her good name, her personal mortification at being placed under arrest, her wounded pride, her mental suffering, and the smart and injury of the malicious acts and acts of oppression of the defendant, if you find any such were committed. These are what are known in law as direct damages, actual damages."—Approved: Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574.

§ 3536. Nuisance—Market Value Before and After.

"If you find for plaintiffs, you will assess their damages at a sum equal to the difference, if any, between the market value of their property for the purpose and use to which plaintiffs had appropriated it just before the building and operation by defendant of its said electric light plant and its market value for said purpose just after the building and operation of said plant."—Approved: Sherman Gas & Electric Co. v. Belden (Tex. Civ. App.), 115 S. W. 897.

§ 3537. Overflow—Actual Value of Property Destroyed—Injury to Land.

(a) "If your finding be for the plaintiffs, you will find for them such a sum in damages as will compensate them for the actual value of the injury to or destruction of the land by reason of its being washed, injured, or destroyed, provided your finding shall not exceed $1,000."—Approved: Louisville & N. R. Co. v. Ponder (Ky.), 104 S. W. 279 (not reported in state reports).

(b) "If the jury find for plaintiffs, they should allow them such a sum in damages as they may believe from the evidence will compensate them for the fair market value of crops destroyed on their lands, the reasonable cost of such repairs as were made necessary to fencing and buildings on the land, and such a sum in addition as will fairly compensate them for the diminution, if any, in the value of the use of the lands during or resulting from their overflow, if the foregoing items of damage, or any of them, were shown by the evidence to have been caused by the negligence of defendants as predicated in instruction No. 1."—Approved: Wallingford v. Maysville & B. S. Ry. Co. (Ky.), 107 S. W. 781 (not reported in state reports).

§ 3538. Same—Market Value of Crops—Cost of Repairs—Avoidable Injury.

"If you find that the value of any part of said property was totally destroyed, plaintiff would be entitled to recover the actual cash market

value of such part at the time of such destruction of its value, with 8 per cent. per annum interest thereon to the time of this trial. If you find that any part of said property was permanently injured, but the value thereof is not totally destroyed, plaintiff would be entitled to recover the difference between the actual cash market value of the same at the time immediately preceding the injury and the actual cash market value immediately after the injury, with 8 per cent. per annum interest thereon to the time of this trial. If you find that a crop of cotton growing on said land, and belonging to plaintiff, was damaged by reason of the wrongful acts of defendant in the construction of its railway embankment, and that plaintiff could not have prevented such damage by reasonable diligence, then plaintiff would be entitled to recover, as damages, the difference between the actual cash market value of said crop as it stood upon said land immediately before said injury and the actual cash market value of said crop so damaged immediately after such injury, in addition to the damage to said land. If, however, you find from the evidence that said injury is temporary, then the measure of plaintiff's damage, if any, would be as follows: If you find from the evidence that at the time of the injury, if any, caused by defendant as aforesaid, there was growing on said land belonging to plaintiff certain grass, and that by reason of said injury any of said grass, and the roots thereof, were totally and permanently destroyed, and if you find, by reason of said injury, any trees on said property belonging to plaintiff have died or become worthless, or have been permanently damaged, then plaintiff would be entitled to recover, as damages, the difference between the fair market value of the land on which the same stood immediately before such injury or destruction and fair cash market value of the said land immediately after such injury, but only to the extent that said difference in value was caused solely by said injury or destruction of said grass, and the roots thereof, and said trees. If you find from the evidence that a crop of cotton growing on said land, and belonging to plaintiff, was damaged by the wrongful acts of defendant as aforesaid, and that plaintiff could not have prevented said damage by the use of reasonable diligence, then plaintiff would be entitled to recover, as damages, the difference between the actual cash market value of said crop as it stood upon the ground immediately before the said injury and the actual cash market value of the same immediately after said injury. If you find from the evidence that, by reason of said injury, caused as aforesaid by defendant, plaintiff has been deprived of the use and occupation of any portion of the tillable part of said land at any time since January 1, 1888, then he would be entitled to recover, as damages, the fair rental value of said portion of said land during the time he was so deprived of the use of the same since January 1, 1888. If you find from the evidence that at the time of said injury, if any, caused by defendant as aforesaid, plaintiff had on said land certain ditches necessary to properly drain said land, and that, by reason of said injury caused as aforesaid, said ditches have been filled up with sediment from muddy water caused by said injury, and that plaintiff

has been thereby damaged, then he would be entitled to recover damages to the amount necessary to repair said ditches, and to put them in the condition they were in at the time immediately preceding said injury."—Approved: Dallas & W. Ry. Co. v. Kinnard (Tex.), 18 S. W. 1062 (not reported in state reports).

§ 3539. Same—Injury to Land—Value before and after.

"If you find and believe from the evidence that the defendant so built and constructed its roadbed across Five-Mile creek and the bottom lands adjacent thereto, in such a manner as to obstruct and impound the waters of said stream, and said embankment broke, and the flood caused thereby flowed over and across plaintiffs' lands and injured said land, you will find for the plaintiffs. If you find for the plaintiffs, you will affix the damages at such sum as you may find to be the difference between the reasonable market value of the land before the injury, if any, and immediately after the injury, if any."—Approved: Missouri, K. & T. Ry. Co. v. Chilton (Tex. Civ. App.), 118 S. W. 779.

§ 3540. Same—Fair Compensation for Crops Destroyed.

"The court instructs the jury that, if you find for the plaintiff, then you will assess his damages at a sum that will fairly compensate him for the actual value of the crops at the time of their destruction, with 6 per cent. interest thereon from the date of such destruction, in the event you should find from the evidence that the said crops or any part thereof were destroyed. And in the event you should find from the evidence that said crops or any part thereof were injured and damaged by such overflow, then you will find in favor of the plaintiff in a sum that will fairly compensate him for the actual value of such injury or damage to such crop or any part thereof."—Approved: Little Rock & Ft. Smith Ry. Co. v. Wallis, 82 Ark. 447, 102 S. W. 390.

§ 3541. Same—Defendant's Ditch Increasing Volume.

"If you find for plaintiff, and should further find that said land would have been overflowed and injured in the months of April and May, 1905, by the flow of surface water flowing in its natural drainage regardless of the existence of said ditch, but if you further find that said ditch did divert other surface water from its natural flow, and caused thereby an increased flow of same, over said land to its additional injury, then the plaintiff would only be entitled to recover of defendant such increased or additional injury, if any, in excess of what it would have suffered had the ditch not been constructed, as the evidence might disclose resulted from such increased volume of water so diverted from its natural flow by said ditch, if any."—Approved: Missouri, K. & T. Ry. Co. v. Merritt, 46 Tex. Civ. App. 130, 102 S. W. 151.

§ 3542. Pollution of Stream—Diminished Value in Use of Property.

"If the jury find for the plaintiff, they will award her such damages as they believe will fairly compensate her for the diminution in value of the use of said property resulting from the pollution of the spring

during the time of such pollution up to July 10, 1907, the date of filing this action."—Approved: Cincinnati, N. O. & T. P. Ry. Co. v. Gillispie, 130 Ky. 213, 113 S. W. 89.

§ 3543. Same—Depreciated Value of Waterworks Plant.

"If the jury find for the plaintiff, they will award him such sum in damages as will reasonably compensate him for the depreciation, if any, in the reasonable market value of his waterworks plant, directly due to the contamination of the water by the city's sewers, considering its reasonable market value immediately before the contamination caused by the sewers and its reasonable market value immediately thereafter, but not exceeding $5,000, the sum claimed in the petition." —Approved: Kevil v. City of Princeton (Ky.), 118 S. W. 363.

§ 3544. Same—Damage to Cattle.

"You are instructed at the instance of the plaintiff that if you should find and believe from the evidence that the plaintiff did not under all the circumstances surrounding him use ordinary care in feeding the 50 head of cattle that he is alleged to have put on feed on the 26th day of November, 1904, and which he alleged he sold on the 26th day of January, 1905, and if you should fail to find for him the difference between the amount for which said cattle sold on the 26th day of January, 1905, and what they would have sold for on said day had they not been injured and damaged by drinking said oil and water, and have found against plaintiff on this issue, then and in such case you will next consider whether they were of less value on said date than they would have been had they not been forced to drink said oil and water in said creek, then and in such case you are instructed by the court that if you believe from the evidence that said oil was allowed to escape by the defendant company into East Buffalo creek, and to pass down into the water of said creek upon the land of the plaintiff, and that plaintiff's cattle were forced to drink said oil and water during the year 1904, and that by reason thereof said cattle were damaged, rendered unhealthy and thin in flesh, and were less valuable on the 26th day of November, 1904, than they would have been at said time and place had said oil not been thus mixed with said water, and had they not been forced to drink the same, then and in such case you will find for the plaintiff as damages the difference in the market value of said cattle on the 26th day of November, 1904, at plaintiff's ranch in Johnson county, Texas, and what the market value of said cattle would have been at said time and place had they not been thus damaged by drinking said water."—Approved: Benjamin v. Gulf, C. & S. F. Ry. Co., 49 Tex. Civ. App. 473, 108 S. W. 408.

§ 3545. Same—Defendant in Control of Source of Pollution.

"If, however, you find from the evidence that said hogs died from the effects of drinking said crude oil, but do not find that defendant was in control of the plant during the months of November and December, 1906, you will find for plaintiff the value of the hogs that died during the months of January and February, 1907, if any died

during said time from the effects of drinking said oil flowing from this defendant's premises, while owned or controlled by defendant."—Approved: Mexia Light & Power Co. v. Johnson (Tex. Civ. App.), 120 S. W. 534.

§ 3546. Physician's Negligence—Pain—Permanent Injury.

"The court instructs the jury that if they believe from the evidence that the plaintiff, Lula Warford, engaged the professional services of Dr. S. M. Dorris to treat her injured arm, and that said defendant failed to exercise ordinary care and skill in such treatment and you further believe from the evidence that by reason of such lack of ordinary care and skill upon the part of defendant, if any, plaintiff has been damaged, then you will find for her such actual damages as you may believe from the evidence she has sustained thereby, not exceeding the sum of ten thousand ($10,000) dollars, the amount claimed in the petition; and in estimating such damages, if any, you will consider the bodily pain and mental anguish suffered by plaintiff on account of the negligence of defendant in treating said arm, if any, and any permanent injury you may believe from the evidence has resulted to plaintiff from such negligent treatment, if any."—Approved: Dorris v. Warford, 124 Ky. 768, 100 S. W. 312.

§ 3547. Streets—Change of Grade—Difference in Value.

"In making your estimate, you should consider the fair market value of plaintiff's property just before it was known that said street would be made as it was made, and the fair market value after the making of said street was completed, as shown by the evidence; and if there is a decrease or diminution in value, caused by the making of the street as it was made, you should award the difference in value so found to plaintiff as the amount of the damage to her property by reason of the construction of said street, not exceeding $700, the amount claimed in the petition."—Approved: City of Louisville v. Kaye, 122 Ky. 599, 92 S. W. 554.

§ 3548. Wrongful Attachment—Expense in Defending—Loss and Detention of Property.

"It is admitted by the defendants in this case, that they executed the bond, etc. The only thing for the jury to determine is, the amount of damages actually sustained by the plaintiff, by reason of his property having been attached. The jury will, in assessing damages, allow him for all money necessarily expended in traveling to and from his house to the place of trial, as well as expenses for hotel bills for himself while in attendance on the court defending said attachment, and a reasonable compensation for his time and attorneys' fees, as they may find from the evidence, in defending said attachment; and will also allow plaintiff such damages as they may think from the evidence he has sustained for the loss of the use of his property, or any injury or loss of the same or any part thereof, from the time it was taken on the attachment until the attachment was dissolved."—Approved: William J. Kelly v. Beauchamp, 59 Mo. 178.

§ 3549. Wrongful Replevin—Usable Value of Property.

"You are further instructed that if you find that the plaintiff was the owner and was entitled to the possession of the cow in question at the commencement of this action, and that said cow was in the possession of defendant, the plaintiff is entitled to recover from the defendant, first, the cow; second, either the value of the use of the cow from the date demand was made by the plaintiff on defendant to the date of trial, or legal interest on the value of the cow at the date of demand up to the date of trial. And to determine what your verdict shall be, as to whether plaintiff is entitled to recover the value of the use of the cow, or legal interest on her value at the date of demand, you are instructed that if you find from the evidence that the cow had a value for use, and that the plaintiff intended to and was in a position to use said cow for profit or service, you should so find, fixing the amount of damage, measured by the value of the use. On the other hand, if you should find from the evidence that the cow had not a value for use, or that the plaintiff was not in a position during the period of detention to have used the cow for profit or service, and at no time intended to use the cow, then you should find plaintiff's damage by computing legal interest on the value of the cow at the date of demand, fixing the amount of damage, measured by the legal interest on the value of the cow at date of demand. It is the intention of the court to instruct you that, if you find and assess the damages on the basis of value of use, then that value of use as found by you will constitute the amount of damage to which the plaintiff will be entitled; otherwise, if you find the proper measure of damage to be legal interest on the value of the cow at the date of demand, you are at liberty, and, under the instructions later on given you by the court, it is intended that you should, in addition to the legal interest thus found as a measure of damages, to add the depreciation in value of the cow between the date of demand and the date of trial, if any."—Approved: Smith v. Stevens, 33 Colo. 427, 81 Pac. 35.

§ 3550 Water and Water Courses—Preventing Usual Flow—Profits of Saw Mill.

"The measure of damages is such sum as the use of the mills was worth to the plaintiff during the time in the summer and fall of 1882 as plaintiff was unable to use them by reason of the water being held back. If the jury find for plaintiff they will award him such sum or damages as they find from the evidence that the use of the saw-mill was worth to plaintiff between July 1, 1882, and December 12, 1882, if you find from the evidence that he was unable to run or use his saw-mill between those dates solely on account of defendant's holding the water back; and also such sum as they may find from the evidence that plaintiff has lost by reason of not being able to run the grist-mill to its full capacity between those dates, by reason of defendants' holding the water back."—Approved: Woodin v. Wentworth, 57 Mich. 278, 23 N. W. 813.

§ 3551. Same—Polluting Irrigating Ditches.

"Now, if you find from the preponderance of the evidence in this case, if any, that the plaintiff operated and used the waters of said Mineral Creek for the purpose of irrigating his farm, and the crops, trees, and vines thereon, prior to the bringing of this suit, and prior to the time the defendant began depositing the tailings from their mill there, if they so did, that the depositing of such tailings in said creek by said defendant company, if you so find, polluted the water of said stream, and that such tailings were washed down by plaintiff's land and in his irrigating ditches during the year A. D. 1904, and that thereby the plaintiff's trees, vines, crops, and land were injured, then and in such event you shall find for plaintiff in such sum or sums as will compensate him for the damages sustained by him, if any, during the said year 1904, prior to the bringing of this suit, and claimed by him in his complaint therein, in no event to exceed the amount of damages claimed by plaintiff in his complaint, namely, two thousand dollars."—Approved: Mogollon Gold & Copper Co. v. Stout (N. M.), 91 Pac. 724 (not reported in state reports).

§ 3552. Public Records—Destruction—Cost to Restore.

"The jury are instructed that if, from the evidence in this case, they find for the plaintiff, then the jury will from the evidence find the amount of damage which the plaintiff may be entitled to recover by reason of the damage to or destruction of said books and records. If the jury so find for the plaintiff, the measure of damages would be the reasonable costs and expenses of restoring and replacing said books and records, as nearly as practicable, as they were before the fire, but not to exceed the sum of $1,200."—Approved: Toncray v. Dodge County, 33 Neb. 802, 51 N. W. 235.

H. Sales of Intoxicating Liquors.

§ 3553. Impairment of Husband's Earning Capacity—Life Expectancy.
3554. Sale to Husband and Father—Support of Wife for Life and Children during Minority.
3555. Habits and Income of Husband Prior to Sales—Basis of Estimate.

§ 3553. Impairment of Husband's Earning Capacity—Life Expectancy.

"If you further find from the evidence that, prior to the wrongs complained of in plaintiff's petition, plaintiff's husband was a strong robust man, but that after said wrongs plaintiff's husband was permanently impaired in his earning capacity, then in determining the damages to be allowed plaintiff you may take into consideration the tables of expectancy which have been introduced in evidence."—Approved: Acken v. Tinglehoff, 83 Neb. 296, 119 N. W. 456.

§ 3554. Sale to Husband and Father—Support of Wife for Life and Children during Minority.

"Ida Nolting was entitled to support and maintenance by her husband, the said Joseph Nolting, for and during her natural life or so

long as he should live; and the relators, Edna, Ella and Josephine Nolting, each were entitled to maintenance and support from and by their father, said Joseph Nolting, until they should arrive at the age of twenty-one years respectively, or their death prior thereto. In establishing the injury or damage to the means of support of the said relators herein, if any, the jury may consider the personal character, mental and physical capacity, business and vocation, and habits of sobriety and economy of the said Joseph Nolting."—Approved: Berkemeier v. State ex rel. Nolting, 44 Ind. App. 1, 88 N. E. 634.

§ 3555. Habits and Income of Husband Prior to Sales—Basis of Estimate.

"In determining the amount of such damages you are at liberty to consider the habits, health, and estate of said Martin Kelley on and prior to April 15, 1893, the profits of his labor or occupation, the income from his property, if any, and the condition of his said family at such time so far as such facts may appear from the evidence given in the case."—Approved: Gorey v. Kelley, 64 Neb. 605, 90 N. W. 554.

I. Exemplary Damages.

§ 3556. The principle upon which Exemplary Damages are Given.
3557. Alienation of Affections—Wanton and Malicious Conduct.
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3565. Gross Negligence—Derailment of Car.
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3569. Reckless Driving on Street—Injury.
3570. Trespass—Breaking Fence and entry on Land.
3571. Trover—Fictitious Claim to Property.
3572. Vicious Animal—Permitting to Run at Large.

§ 3556. The Principle upon which Exemplary Damages are Given.

(a) "If the offense is committed willfully, the jury have a right to give damages as a punishment to the defendant for the purpose of making an example, and as a warning to him and others, in addition to the damages, which are as a compensation for the plaintiff's injuries."—Approved: McWilliams v. Bragg, 3 Wis. 424.

(b) "The damages to the son may be ordinary compensatory dam-

ages, or, if there be gross negligence, gross carelessness or recklessness or wanton disregard or malice, you may give him not only such damages as will compensate him, but give him smart money, punitive damages, to punish defendant."—Approved: Mack v. South Bound R. Co., 52 S. C. 323, 344, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913.

(c) "Exemplary damages mean damages given by way of punishment for the commission of a wrong or tort willfully. They are not the measure of the price of property or valuables, but are given as smart money in the way of pecuniary punishment, to make an example, not only for the private good of the person suing, but for the public good, by way of example, and to teach other persons not to do likewise."—Approved: Bates v. Davis, 76 Ill. 222, 223.

§ 3557. Alienation of Affections—Wanton and Malicious Conduct.

"If you believe that the defendant alienated from plaintiff her husband's affections in the manner set forth in instruction No. 1, and further believe that defendant's conduct in causing such alienation was wanton and malicious towards, and with the design to humiliate plaintiff, then, in addition to compensatory damages you may, in your discretion, award plaintiff punitive damages, not exceeding in all, however, the sum of $10,000."—Approved: Scott v. O'Brien, 129 Ky. 1, 110 S. W. 260.

§ 3558. Assault and Battery—Wantonly and Maliciously Assaulting and Beating—Mitigation.

"If you believe that defendant, not in his necessary, or to him apparent necessary, self-defense, assaulted, bruised, or injured plaintiff, and further believe that defendant wantonly and maliciously assaulted, bruised, or injured plaintiff, you may, in addition to compensatory damages, award plaintiff punitive damages, not exceeding in all the sum of $5,000. If, however, you believe from the evidence that plaintiff gave to the defendant such provocation to assault and bruise plantiff as would cause an ordinarily prudent man under like or similar circumstances so to assault and bruise the plaintiff, and that such provocation, if any, did prompt defendant to assault plaintiff, you may consider such provocation, if any, in mitigation of the punitive damages, if any, which you may find for plaintiff."—Approved: Renfro v. Barlow, 131 Ky. 312, 115 S. W. 225.

§ 3559. Same—Reckless Violence and Indignity.

"If the jury find for the plaintiffs, they should award such damages as will, under all the circumstances of the case, compensate for the injury to the person and feelings suffered by Mrs. Neal by reason of the unlawful act of the defendant, if they shall find that defendant assaulted and struck her; and if they further find that the female plaintiff was treated with reckless violence and indignity, then they may award such further damages as they may think proper, from all the evidence, to punish such conduct, and deter the defendant from like conduct in the future."—Approved: Thillman v. Neal, 88 Md. 525, 42 Atl. 242.

§ 3560. Attachment—Issuance without Probable Cause.

"The court charges the jury that the elements of actual damages, as claimed in this case, are damages to the goods, attorney's fees in the attachment suit and in contest of exemptions, and in loss of credit and business, and they must look to the evidence for the amount of these damages. The court charges the jury that if they believe from the evidence that the suing out of the attachment was wrongful, as has been defined by the court, and that the attachment was issued without probable cause, punitive as well as actual damages can be recovered, though the attachment is sued out by an agent, if the principal, with full knowledge, ratified the act of the agent. The court charges the jury that punitive or exemplary damages cannot be proven in dollars and cents, but when the proof shows acts of malice and vexation the jury alone can fix in dolars and cents the measure of damages for malicious and vexatious acts, and they, the jury, can fix such punitive damages as may seem right to them, not exceeding the amount of the attachment bond."—Approved: W. F. Vandiver & Co. v. Waller, 143 Ala. 411, 39 South. 136.

§ 3561. Ejection from Street Car—Assault, Malicious and without Provocation.

"The jury are instructed that if you believe, from the evidence, that defendant's conductor, while acting for the defendant in the scope of his employment, without provocation assaulted and injured the plaintiff, as charged in the declaration, and that such assault was a malicious, aggravated, and wanton one, and resulted in physical injury to the plaintiff, without fault on her part, and if the jury further believe, from the evidence, that justice and the public good require it, then the law is that the jury are not confined in their verdict to the actual damages proven, if any; but they may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant and to deter others from the commission of like offenses."—Approved: Chicago Consol. Traction Co. v. Mahoney, 230 Ill. 562, 82 N. E. 868.

§ 3562. Liquor Sold Contrary to Instructions—No Exemplary Damages.

"The court instructs the jury that if they believe from the evidence that the defendant in good faith instructed his employees not to sell or furnish liquor to ....., the husband of the plaintiff, and himself refused to furnish him liquor, but that the employees of the defendant, through mistake or caprice, did furnish it to ....., then the jury would have no right to give exemplary damages or smart money."—Brantigam v. While, 73 Ill. 561.

§ 3563. Intoxicating Liquors—Sale of—Peremptory Instruction to Award.

"If you find the plaintiff entitled to actual damages under the law, it is your duty to add thereto an amount as exemplary damages. Usually these exemplary damages are discretionary with a jury; that is, the jury may allow them or not, as they think best. In this case, if

actual damage is given, exemplary damages must be added; but of the amount to be given you are the judges, keeping in view the fact that they are given as a punishment for the wrong done, and as an example that may prevent others from doing a like wrong."—Approved: Thill v. Polman, 76 Iowa, 638, 41 N. W. 385. It is to be noted that the court tells the jury that "exemplary damages must be added," which instruction must be statutory, if correct.

§ 3564. Malice Authorizing Exemplary Damages Defined.

(a) "That in assessing plaintiff's damages, if they find for him, they are not limited to the physical injury inflicted, or shame, humiliation or disgrace caused plaintiff (if any), by said acts and conduct of said ———, but they may, in addition thereto, if they find the assault of plaintiff by said ——— was wanton and malicious (and, by the term malicious, is not meant spite or ill will, but the intentional doing of a wrongful act without just cause or excuse), they may allow such further damages, known in law as exemplary, as will be a punishment to defendant and a wholesome warning to others, in all not to exceed ——— dollars."—Approved: Canfield v. Chicago, R. I. & P. Ry. Co., 59 Mo. App. 354, 365.

§ 3565. Gross Negligence—Derailment of Car.

"If the jury shall find for plaintiff, they should award her such sum in damages as they shall believe from the evidence will fairly and reasonably compensate her in pain and suffering, mental or physical, directly resulting to her from her injury, for any loss of time or impairment of her power to earn money after she reached the age of twenty-one years caused thereby, and for any medical service, not exceeding the sum of $100, made necessary by her injury; and if the jury shall believe from the evidence that the derailment of the car was brought about by the gross negligence of the defendant's agents in the management thereof, then the jury may, in addition to compensatory damages as above, award the plaintiff such exemplary damages as they may think proper under all the circumstances of the case."—Approved: Louisville St. Ry. Co. v. Brownfield (Ky.), 96 S. W. 912 (not reported in state reports).

§ 3566. Malicious Prosecution—Defendant's Financial Ability.

(a) "If the jury find that the defendant, wantonly and maliciously, caused the arrest of the plaintiff, with intent to injure his feelings, and disgrace him in the estimation of the public, the jury not only may, but they ought to, go further, and give punitory damages in such a sum as will be a warning to the defendant and all other persons not to commit such wrongs and injuries. Punitory damages are given in law as an admonition to the defendant, and all other persons, not to perpetrate similar wrongs; and consequently such damages, to be effectual, must have some relation to the financial ability of the defendant. A sum in damages which would be a salutary warning to a man of limited means would hardly arrest the attention of a millionaire; and it is on

that theory alone that the testimony of the financial ability of the defendant was admitted."—Approved: Spear v. Hiles, 67 Wis. 350, 30 N. W. 506.

(b) "If you find that the defendant, without probable cause, and maliciously, caused the arrest of the plaintiff, you are authorized to go further, and award punitory damages in such sum as will be a warning to defendant and all other persons not to commit similar wrongs, and consequently such damages, to be effectual, must have some relation to the financial ability of the defendant. It is on this theory that evidence as to defendant's financial ability has been admitted."—Approved: Eggett v. Allen, 119 Wis. 625, 96 N. W. 803.

§ 3567. Oppressive Conduct in Seizure of Property.

"And the court further instructs the jury that in case you find a verdict in favor of the plaintiff, and the jury further believe from a preponderance of the evidence that the defendants in and about the taking of said piano were guilty of oppression or malice, actual or presumed—that is, with a wrongful intention to oppress, harass, vex, or annoy plaintiff—then, and under such circumstances, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendants; and damages of this character are called 'exemplary damages.' And, in case you find that plaintiff is entitled to exemplary damages, the jury should allow the plaintiff, in addition to actual damages, such further damages, by way of punishment to defendants, and to prevent others from like offenses, as the jury in the exercise of good judgment thinks defendants should pay, and plaintiff ought to receive, not exceeding the sum of $650, the amount claimed in the complaint."—Approved: Bailey v. Walton, 24 S. D. 118, 123 N. W. 701.

§ 3568. Public Service Company—Malicious Cutting off of Gas Supply.

"I further instruct you, gentlemen, that if you believe from the evidence that the agents or employes of the Kentucky Heating Company maliciously, or in wanton disregard of plaintiff's rights, disconnected the meter of the Louisville Gas Company, and cut off the supply pipe, whereby she was deprived of the use of the gas, you may or may not in your discretion award her punitive damages, or damages by way of punishment. I further instruct you by 'malicious' as used in this instruction is meant the intentional doing of a wrongful act without legal right." Approved—Kentucky Heating Co. v. Hood, 133 Ky. 383, 118 S. W. 337.

§ 3569. Reckless Driving on Street—Injury.

"If you believe from the evidence that at the time of the accident defendant was driving his horse in a wanton, reckless, or willful manner, with an entire want of care and an absolute indifference to the rights of others who might be using said street, and that such conduct on his part proximately caused or occasioned plaintiff's injuries, if any, and you find plaintiff entitled to recover actual damages under other charges submitted to you, then, and only in that event, you are instructed that you may in your discretion assess such further dam-

ages against defendant as you may deem proper by way of punishment."—Approved: Foley v. Northrup, 47 Tex. Civ. App. 277, 105 S. W. 229.

§ 3570. Trespass—Breaking Fence and Entry on Land.

"If the jury believe from the evidence, that the plaintiff was in possession of the land described in the declaration, and had the same fenced, and that the defendant willfully and forcefully broke the fence and entered upon the said land, the jury may allow, as damages, any sum not exceeding the amount sued for, even though the sum allowed may exceed the amount of damages actually proven, provided the entry was not for the purpose of building a railroad or its fixtures, if it had proper authority to build and operate such railroad."—Approved: Ill. & St. L. R. R. & C. Co. v. Cobb, 68 Ill. 53.

§ 3571. Trover—Fictitious Claim to Property.

"Now if you believe from the evidence that the claim of defendant mill company against the plaintiff, which said defendant has pleaded in offset of plaintiff's claim, is a fictitious and false claim, and that it was gotten up by said defendant for the purpose of trying to deceive the plaintiff and mulct funds from him falsely or fraudulently, and that it procured the possession of and converted to its own use said two cars of oats herein sued for, with the purpose and intent of not paying therefor unless the plaintiff would allow such claim, or with the purpose and intent of using the advantage thus gained by it in trying to force plaintiff to settle with it such claim, then, if you so find, you will find for the plaintiff against the defendant Werkheiser-Polk Mill Company such other and further amount as punitory or exemplary damages as in your sound judgment the circumstances in evidence would warrant, not to exceed the amount claimed by plaintiff in his petition as exemplary damages; or if you believe from the evidence that said defendant, with a wanton disregard of plaintiff's rights, obtained the possession of said two cars of oats with a fraudulent purpose and intent of withholding the value thereof from plaintiff until he should allow or pay the claim of defendant, then you may find for plaintiff such exemplary or punitive damages, although you may fail to find that defendant's said claim was false or fictitious; and, should you find any such damages, you will state the amount in your verdict as a finding for plaintiff against the defendant Werkheiser-Polk Mill Company as exemplary damages."—Approved: Werkheiser-Polk Mill Co. v. Langford, 51 Tex. Civ. App. 224, 115 S. W. 89.

§ 3572. Vicious Animals—Permitting to Run at Large.

"If you find any actual damages for the plaintiff, then if you find and believe, from the evidence, that the defendant, Clara Barklow, with full knowledge of the ferocious and vicious habits of the dog, if it did have such habits, permitted the dog to run at large on the public streets of the city of Dallas, being the owner, keeper, or harborer of the dog, or that with such knowledge she permitted her servant and

porter, Dan James, to keep the dog on her premises, and from said premises to allow the dog to run at large on the streets of the city, without being guarded or confined, and further find that she did so with reckless disregard for the safety of the lives and persons of the public, and that no effort was made to restrain said dog or to protect the public from his vicious attacks, if any, then you may in your discretion find for plaintiff as exemplary damages such an amount as you believe will be proper and right."—Approved: Barklow v. Avery, 40 Tex. Civ. App. 355, 89 S. W. 417.

CHAPTER C.

DEDICATION—MORTGAGES.

A. Dedication.
B. Deeds.
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D. Mortgages.

A. Dedication.

§ 3573. Highways—Dedication—Acquiescence by Owners—Evidence of.
3574. Acts by Adjoining Owners After Location of Highway.
3575. Highways—Dedication—Knowledge of User Creates by Prescription.
3576. Dedication by Adverse Possession and Continuous Use.
3577. Quantity Dedicated According to Purpose Intended.
3579. Acceptance of Dedication by the Public.

§ 3573. Highways—Dedication—Acquiescence by Owners Evidence of.

"If you find that for a series of years the way in question has been traveled and used by the public as a highway, and that it has been recognized by the proper authorities as a highway by the making of repairs and expenditure of the public road funds thereon, and that during such time the owner or owners of the land have resided in the immediate vicinity, having actual knowledge of the fact of such public use and such recognition by the public authorities, and have acquiesced therein without protest or objection, such acts and conduct on the part of the land-owners are competent evidence tending to show a dedication of the highway to the public use, and should be considered by you with all the other facts and circumstances in evidence in determining whether such dedication ever was or was not made. If you find that any such dedication was made by a former owner of the land, and accepted by the public, such dedication and acceptance would be binding on all subsequent purchasers."—Approved: State v. Birmingham, 74 Iowa, 407, 38 N. W. 121.

§ 3574. Acts by Adjoining Owners After Location of Highway.

"The jury are instructed that highways may be acquired by dedication. And in this case, if the jury believe, from the evidence, that, after the highway in controversy was located, defendants set their hedges back, leaving room for the highway, and removed their fence from said highway and permitted the public to use the same for a highway,—these facts, if proven, may be considered by the jury in determining whether the defendants had dedicated this land to the public for a highway."—Approved: Wragg v. Penn Township, 94 Ill. 11.

§ 3575. Highways—Dedication—Knowledge of User Creates by Prescription.

"If plaintiff had knowledge that the line of road in controversy was used and notoriously traveled by the public as a highway over and across his land, the fact that he supposed the travel to be continued under the claim that it was a highway by establishment under statute, instead of by prescription, will not prevent the statute from running in favor of the road. If he knew of its use as a highway, he is bound at his peril to inform himself as to the nature of the right by virtue of which the right to travel over the land is claimed."—Approved: Duncombe v. Powers, 75 Iowa, 185, 39 N. W. 261.

§ 3576. Dedication by Adverse Possession and Continuous Use.

"The actual adverse possession and continuous use and control of land for streets, roads, or alleys for a period of 30 years or more operates in law as a dedication of such land for that purpose."—Approved: Westerfield v. McDonald (Ky.), 100 S. W. 230 (not reported in state reports).

§ 3577. Quantity Dedicated According to Purpose Intended.

(a) "If you believe from the evidence, under the law as given you by the court in this case, that the city of Victoria is entitled to recover any portion or portions of the municipal square in controversy in this suit, and you do not find that the entire square was reasonably necessary and convenient for the purposes for which said buildings were erected, then you will determine what portion or portions of said square were dedicated by the town of Victoria to the county for said buildings, and were reasonable, necessary, and convenient grounds for said buildings, for the purposes for which they were erected, considering the condition of affairs when the act of the Congress of the Republic of Texas in 1840 was passed, and also the times of the erection of said three buildings, and you will designate such portion or portions, so that same may be identified, and find for the plaintiff for the balance of said square. If, however, you believe from the evidence, under the law as given in charge by the court in this case, that the entire square was reasonably necessary, and convenient grounds for said buildings, for the purposes for which the said three buildings were erected, considering the condition of affairs at the time of the passage of the act of Congress of the Republic of Texas in 1840 and the times of the erection of said three buildings, and that the city of Victoria is not entitled to recover any portion of said square, then you will find for the defendant, and so say by your verdict. Neither party has acquired title to any portion of said square by limitation. It is upon a preponderance of the testimony that you believe to be true that you are to find your verdict."—Approved: City of Victoria v. Victoria County (Tex. Civ. App.), 115 S. W. 67.

(b) "If you believe from the evidence, under the law as given you in the charge in this case, that the city of Victoria is entitled to recover any portion or portions of the municipal square in controversy in this suit, and you do not find that the entire square was reasonably necessary and convenient for the purposes for which said buildings were

erected, then you will determine what proportion or portions of said square were dedicated to the county for said buildings.

"If, however, you believe from the evidence under the law as given you in charge of the court in this case that the entire square was reasonably necessary and convenient grounds for said buildings for the purposes for which the said three buildings were erected, considering the condition of affairs at the time of the act of Congress of 1840 and at the time of the erection of said three buildings, and that the city of Victoria is not entitled to any portion of said square, then you will find for the defendant."—Approved: City of Victoria v. Victoria County (Tex. Civ. App.), 115 S. W. 67.

§ 3579. Acceptance of Dedication by the Public.

"The court instructs the jury that if they believe from the evidence, that the plaintiff, about the year ———, fenced out a strip of his land, intending that it should be taken by the public for a highway, of which strip the place in question is a part; that the public accepted said strip of land by working and improving the same under the direction of the public highway officers, and by using the same as a public highway, and that plaintiff, well knowing such improvement and use, acquiesced therein for about eighteen years without objection, then the place in question has been dedicated to the public and the jury must find the defendant not guilty. If, however, there was a laid out road sixty feet wide, with the section line as the center line of the road, and if the road was fenced by the plaintiff with intent to fence on the north line of said laid out road, and if by mistake the fence was placed between twenty and thirty feet too far north, then the dedication would be of the north thirty feet in width of the road along the section line of plaintiff's land,—if he only intended to dedicate the north half of the road as laid out on the south thirty feet only of his land north of the section line."—Approved: Manrose v. Parker, 90 Ill. 581.

B. Deeds.

§ 3580. Delivery a Question of Intent.
3581. Married Woman—Freedom from Coercion.
3582. Notary Explaining Acknowledgment to Married Woman.
3583. Marketable Title Defined.
3584. Offer of Vendor to Perfect Title—Right to Rescind.
3584a. Recovery upon Non-Performance of Condition Subsequent.

§ 3580. Delivery a Question of Intent.

"The main inquiry is as to the delivery of those deeds. Were those deeds delivered by the grantor, old man Moss? Now, the law cannot deal with an undisclosed intention. You may make a deed with all the formalities of a deed, properly witnessed, and otherwise executed; the grantee may be named therein; but unless there is some act indicating your intention to vest the property, the law cannot look into your mind and see what you intend to do with that deed. But where

a deed is signed, sealed, and delivered, and the grantee is named in the deed, the law seizes upon any act or word which expresses the intention of that party to vest the title in the grantee. It may not be a manual delivery, and that is a very strong evidence of delivery; but it is not necessary that one should take the deed and hand it into the hands of the other party. Any act or word, which at the time indicated his intentions—that that man's intentions were to part with the title, and to vest it absolutely and forever in the other party—is sufficient; and the title is therefore complete at that moment. It is completed at that moment. And if it is completed in the other party, it makes no difference what may subsequently become of the deed, the title is good in the grantee."—Approved: Moss v. Smith, 73 S. C. 231, 53 S. E. 284.

§ 3581. Married Woman—Freedom from Coercion.

"If you believe from the evidence that the plaintiff was induced by threats or acts of the husband to sign the said deed and that she signed the same unwillingly, but you believe from the evidence that she acknowledged before the notary, Flores, that she executed the same willingly as required by law, and further believe from the evidence that the said Storms and the said Look and London had notice of her unwillingness, if any, to execute said deed, then and in that event your verdict must be for the intervener, Look, as to all such property, if he is not owner of all, and, if not, as to such part as you believe he acquired and owns."—Approved: London v. Crow, 46 Tex. Civ. App. 190, 102 S. W. 177.

§ 3582. Notary Explaining Acknowledgment to Married Woman.

"On the other hand, if you believe from the evidence that said acknowledgment of Nina Evart to the said two deeds was taken as required by law, and as above explained, and that at the time it was so taken she understood the English language sufficiently well to fairly understand the explanation, the words and phrases used by the notary public to her of the contents of said deeds and of the acknowledgments, then you will find for all of the defendants, unless you find for the plaintiffs under some of the issues hereinafter submitted to you."—Approved: Evart v. Dalrymple (Tex. Civ. App.), 131 S, W. 223.

§ 3583. Marketable Title Defined.

"A marketable title is one of such character as should assure to the vendee a peaceable enjoyment of the property. If you find that the plaintiff and his father were in actual, visible, continuous, notorious, distinct, and adverse possession of the property sold to the defendants for a period of fifteen years and more prior to the time that the contract was made with the defendants, the plaintiff would be the absolute owner of the property. If you should find that these elements have been complied with, and that he has been in possession continuously by himself and his ancestors, he is the absolute owner of the property, as much as though he had record title, and could convey such title as the defendants had a right to receive under this contract."—Approved: Barnard v. Brown, 112 Mich. 452, 70 N. W. 1038.

§ 3584. Offer of Vendor to Perfect Title—Right to Rescind.

"I charge you that if the defendant offered to perfect the title to these premises, and you further find that the defendant could have perfected the title, then and in that case the plaintiff could not rescind the contract for such defect."—Approved: Cossett v. O'Riley, 160 Mich. 101, 125 N. W. 39.

§ 3584a. Recovery upon Non-Performance of Condition Subsequent.

"This action is brought to recover the farm in question by the plaintiffs, the heirs at law of S—, deceased. The defendant claims title under a deed executed by S— and wife, dated ———. This deed, if it was executed by the grantors and delivered to the grantee, showed upon its face a sufficient consideration to pass the title to defendant, if occupied by defendant and was binding upon the parties thereto at the time of its delivery and acceptance. If defendant had failed to perform the conditions of the deed, then and in that case the deed became void, and the plaintiff would be entitled to recover; but if the jury were satisfied from the evidence that the conditions of the deed had, in all respects, been substantially performed by the defendant, then the plaintiffs were not entitled to recover. That if defendant intended in good faith to perform all the conditions of the deed, and has substantially performed them, it will be sufficient, for the law under such circumstances leans against forfeitures; but it is your duty to see whether there has been a substantial or intentional neglect on the part of defendant to keep the conditions of the deed."—Approved: Spaulding v. Hollenbeck, 39 Barb. (N. Y.), 79, 82.

C. Gifts.

§ 3585. What Constitutes Parol Gift of Land.
3586. Taking Possession and Making Valuable Improvements.
3587. Donor Making Sale After Vesting of Equitable Title.
3588. Intent in Delivering Certificate of Deposit Series.
3588a. Gift and Delivery Investing Irrevocable Title.

§ 3585. What Constitutes Parol Gift of Land.

"The undisputed evidence further shows that defendants R. S. Pardue and T. B. Wilson own by regular conveyance whatever interest John K. Adams and his wife, Nancy Adams, had in said land, so if you believe from the evidence that the said W. L. Graves had an agreement with the said John K. and Nancy Adams, to the effect that if they would take care of him and give him a home during his lifetime that he would give to the said Nancy Adams this tract of land known as the 'Adams home place,' and described in the evidence as the 'W. L. Graves 130-acre tract', and also that tract of land described in the evidence as the 29-acre tract, which is the one that is in controversy in this suit, and if you further believe from the evidence that in pursuance with said agreement with the said W. L. Graves, if you find there was any such agreement, the said John K. and Nancy Adams during the lifetime of

said Graves moved on said land and made improvements thereon, and also improvements on the 29-acre tract and did take care of and furnish a home to said W. L. Graves during the remainder of his life, and did the same because of the said agreement they had made with the said Graves, then you will find for the defendants, and so state in your verdict."—Approved: Pardue v. Whitfield, 53 Tex. Civ. App. 63, 115 S. W. 306.

§ 3586. Taking Possession and Making Valuable Improvements.

"Now bearing in mind the above and foregoing general instructions, if you believe from the evidence that on or about the year 1892 or 1893 the defendant, J. W. Combest, told plaintiff Jemima Wall if she would move on the land in dispute and improve it that she (Jemima Wall) should have it for and during the period of her lifetime, and that at her death her children should have and own the land absolutely, and if you should further find and believe from the evidence that Jemima Wall and her husband made valuable and lasting improvements upon said land, with the mutual understanding and agreement, by and between Jemima Wall on the one part and J. W. Combest on the other, that said 200 acres of land, or 168 acres of land, as the case may be, was to be the property of the said Jemima Wall for and during the term of her natural life, and that at her death said land was to be the property of her children, and you further find and believe from the evidence that at the time the said J. W. Combest relinquished all claim and control for himself over said land, and you further believe from the evidence that, while said Jemima Wall and her husband and her three children lived on said land, the said Jemima Wall for herself, or through her husband, exercised and claimed the absolute ownership of the same for herself and her children, then you are instructed, under such a state of circumstances, if you so find such to have been the circumstances, the equitable title to said land would vest in said Jemima Wall for and during the period of her natural life, and at her death said equitable title would vest in her children absolutely, and this would be the case under the circumstances above enumerated, even though the defendant, J. W. Combest, had never executed a deed or other instrument in writing conveying the legal title to said land to plaintiffs, or either of them."—Approved: Combest v. Wall (Tex. Civ. App.), 115 S. W. 354.

§ 3587. Donor Making Sale After Vesting of Equitable Title.

"And you are further instructed, if under the above circumstances you find and believe from the evidence that the equitable title of the land in dispute had vested in Jemima Wall for and during the period of her natural life and in her children after her death, under a verbal gift from J. W. Combest, if you find from the evidence he made any such gift, and you further believe from the evidence that at or before the sale from J. W. Combest to M. W. Johnson the said J. W. Combest procured the consent of the said Jemima Wall and her husband, N. D. Wall, to the sale of said land by Combest to said Johnson, upon a promise by Combest that he (Combest) would invest the proceeds of

said sale, in other lands for the benefit of said Jemima Wall and her children, if you find from the evidence that J. W. Combest made such a promise, and you further find from the evidence that after the sale of the said land to M. W. Johnson the defendant, J. W. Combest, had collected the proceeds of said sale, that the defendant, J. W. Combest, failed or refused to invest the proceeds of said sale in other land for the benefit of Jemima Wall and her children, and you further believe from the evidence that J. W. Combest has refused to account to Jemima Wall and her husband and her children for the proceeds of the sale of whatever land you may find from the evidence, if any, the said J. W. Combest has given to said Jemima Wall and her children, then you will return a verdict in favor of the plaintiffs against J. W. Combest for whatever sum as would arise from a sale of said land at the rate of $75 per acre, that is, if you find from the evidence that Combest gave plaintiffs 200 acres of land, you will multiply said 200 by 75; or if you believe from the evidence he gave only 168 acres, if you find from the evidence he gave them any of the land, then you will multiply said 168 by 75, and return your verdict accordingly."—Approved: Combest v. Wall (Tex. Civ. App.), 115 S. W. 354.

§ 3588. Intent in Delivering Certificate of Deposit.

"Gentlemen of the jury: Mrs. Hart claims that Mr. Carroll gave her the certificate of deposit which was introduced in evidence. Mr. Carroll is dead, and his administrator now comes and denies that Mr. Carroll ever gave Mrs. Hart this certificate, and further denies that at the time of the alleged gift Mr. Carroll had sufficient capacity to make a valid gift. You are instructed that in order for you to find that Mr. Carroll made a valid gift of the certificate in question you must find, first, that Mr. Carroll was at the time of the alleged gift of sound mind—that is, that he knew and understood the effect of his act and intended that effect; second, that he actually delivered the certificate in question to Mrs. Hart; third, that by such act he intended to pass title to said certificate in question to Mrs. Hart to take effect immediately; and, fourth, that Mrs. Hart actually accepted said certificate as a gift. In determining whether, at the time of the alleged delivery of the certificate to Mrs. Hart, Mr. Carroll intended to make a gift of it to her you may take into consideration all the facts and circumstances surrounding the transaction; the acts and declarations of the deceased at the time and before and after the alleged gift; the relationship existing between Mr. Carroll and Mrs. Hart or her family, whether Carroll and Mrs. Hart or her family were friendly or otherwise, and his mental condition. Neither sickness nor infirmity will disqualify one for making a gift if sufficient mind remains; and if the jury believe from the evidence that Mr. Carroll delivered the certificate of deposit in controversy to Mrs. Hart with the intent of making it a gift to her, and that he made any declarations with reference thereto, the jury may consider these things in connection with all the other evidence in determining the mental capacity of Mr Carroll, and if they believe from all the evidence before them that he knew what he was doing at the time and intended by such delivery and declaration

to make a gift of the certificate to Mrs. Hart they will find a verdict sustaining the gift. The burden of the proof is upon the plaintiff to establish by a preponderance of the evidence a valid gift of the certificates in question by Mr. Carroll to her, so if, from a consideration of the entire case, you find the evidence equally balanced for and against the alleged gift it will be your duty to find for the interpleader and against the plaintiff."—Approved: Lowe v. Hart (Ark.), 125 S. W. 1030.

§ 3588a. Gift and Delivery Vesting Irrevocable Title.

"If the jury find from all the evidence in the case that D—, grandfather of the plaintiff, was owner of the horse in contest when a colt, and gave or sold the same to the plaintiff, and placed the same in the possession of the plaintiff, and if D— afterwards sold or transferred said horse to another without the consent of the plaintiff, then they will find for the plaintiff said horse, if to be had; if not to be had, then his value at the time, with reasonable value for the use of said horse from the bringing of this suit till the present time, which value and use will be fixed by the jury."—Approved: Dixon v. Labry, 16 Ky. L. Rep. 522, 523.

D. Mortgages.

§ 3589. Chattel Mortgage—Sufficiency of Description of Property
3590. Description Sufficient Where Third Person Put on Inquiry as to Identity of Property.
3591. Bona Fide Purchaser—Description Insufficient.
3592. Possession Taken Under Defective Mortgage Before Levy.
3594. Right of Possession where Clause Provides if Mortgagee Deems Himself Insecure.
3595. Delivery Evidenced by Mortgagor Filing for Record.

§ 3589. Chattel Mortgage—Sufficiency of Description of Property.

"It is not claimed that defendant, Stevens, had any actual knowledge of the existence of the plaintiffs' mortgage. He is therefore a 'subsequent purchaser without notice,' within the meaning of section 2906, which reads as follows: 'No mortgage of personal property where the mortgagor retains actual possession thereof is valid against subsequent purchasers without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate and filed for record with the recorder of the county where the holder of the property resides.' And unless he is charged with record or constructive notice of said mortgage his purchase would be superior to and free from lien of plaintiffs' mortgage. Constructive or record notice is such notice as is presumed to be imparted by recording with the proper county a properly drawn and properly acknowleged instrument. It is conceded that Tucker was a resident of Shelby County, Iowa, and therefore the chattel mortgage in question was recorded in the proper county. It was a properly acknowledged instrument. The remaining question to be determined is whether or not the chattel mortgage was properly drawn. To be properly drawn it must contain

a sufficient description of the property intended to be mortgaged. If the description of the property be not sufficient, the recording of the mortgage will not constitute notice. The description contained in the mortgage in question, on the face thereof, appears to be sufficient in law. It is for you to determine whether it is sufficient in fact, from the evidence in the case.

"The defendant claims that the description contained in the mortgage is not sufficient in fact. To be sufficient in fact, the description must be such that a third person may take said mortgage, and from the facts therein stated, and inquiries therein suggested, and such only, can identify the property covered by said mortgage with certainty. A description is sufficient which enables a third party, aided by the inquiries which the instrument itself suggests, to identify the property covered by it. If it directs the mind of the inquirer to facts or evidence from which he may ascertain the mortgaged property with certainty, it is sufficient. When a mortgage contains a description, part of which is true and part false and erroneous, that which is false or erroneous may be stricken out as redundant or superfluous, and the description will be sufficient if enough remains to lead a third party, by the inquiries it suggests, to the identification of the property covered by it. You are to take the mortgage in question, and, under the rules above announced, ascertain whether the property described in it, under the evidence before you, can be thus identified. If it can thus be identified, the description is sufficient, and the recording of the chattel mortgage in question constituted constructive notice to the defendant of the existence of said mortgage, and his purchase of the cattle in controversy was subject to the lien thereof. If you find that the description in said mortgage is sufficient under the rules set forth, you will find for the plaintiffs as to such property in controversy as you find covered by said mortgage, unless you should further find the plaintiffs have waived the lien of their mortgage as above indicated. If you find that the property described in the mortgage cannot be identified with certainty under the rules above given, and you find that the description is insufficient, then the recording of the mortgage in question would not constitute notice to defendant of the existence of said mortgage, and his purchase of the cattle in controversy was free from and superior to the claims of the plaintiffs under their mortgage, and you will find for the defendant."—Approved: Livingston v. Stevens, 122 Iowa, 62, 94 N. W. 925.

§ 3590. Description Sufficient Where Third Person Put on Inquiry as to Identity of Property.

"The note and mortgage sued on are valid instruments upon their face, and, as between the mortgagee and a third party, are valid, and impart sufficient notice of the lien on the property therein named, if there is such property in fact, as described therein, corresponding with such description, or, if not fully and truly described, yet if the description is sufficient to furnish such suggestions that one examining the mortgage itself by the suggestions therein given can know and identify the property as the property mortgaged, as more fully explained in instruction No. 7 herein.

"The jury are instructed that, in order for the description contained in the chattel mortgage to be sufficient to impart notice to purchasers without actual knowledge of the existence of the mortgage or the identity of the property, it should describe the property with reasonable particularity, and must be such that third persons, aided by the inquiries which the mortgage itself suggests, would be able to identify the property as the property described in the mortgage."—Approved: Drumm-Flato Commission Co. v. Barnard, 66 Kan. 568, 72 Pac. 257.

§ 3591. Bona Fide Purchaser—Description Insufficient.

"If you find that the description in the mortgage is sufficient to put the defendants on inquiry, and put them in the way of learning the truth about plaintiff's mortgage, you will have to find for the plaintiff. If you do not so find, and if you further find that defendants are purchasers in good faith, as explained hereafter, you will find for the defendants. If you find that the description of the steers in the mortgage is not sufficient to put a purchaser upon his guard, and to lead him to a knowledge of the rights of the plaintiff, as already explained, and that the defendants bought and paid for the said steers in good faith, without any knowledge or information that they had been mortgaged to Wheeler, then you are charged that they would acquire a complete title to said steers, and should recover in this action."—Approved: Iowa Sav. Bank v. Dunning, 37 Neb. 322, 55 N. W. 1079.

§ 3592. Possession Taken under Defective Mortgage before Levy.

"The court instructs the jury that under a mortgage like the one in evidence before the jury in this case, the mortgagee is entitled to the immediate possession of the property mortgaged, and may take the same, and reduce the same into possession, at any time before the rights of creditors, or third persons, attach by purchase, or by lien under execution."—Approved: Whisler v. Roberts, 19 Ill. 274.

§ 3594. Right of Possession where Clause Provides if Mortgagee Deems Himself Insecure.

"The jury are instructed that the mere fact that the plaintiff deemed himself insecure or that he deemed the payment of the note by defendants as insecure, is not conclusive upon the jury. And it is for the jury to consider all the facts and circumstances shown in evidence and from them to determine whether plaintiff had reasonable grounds for deeming himself insecure or for deeming the payment of the note by the defendants as insecure; and by 'reasonable grounds' is meant such facts and circumstances as would lead a reasonably prudent man, acting in good faith, to believe himself insecure in the respects above mentioned."—Approved: Feller v. McKillip, 109 Mo. App. 61.

§ 3595. Delivery Evidenced by Mortgagor Filing for Record.

"If, at the time the debt was contracted, which is evidenced by the note dated November 23, 1875, it was agreed between plaintiff and Elijah Everett that the debt should be secured by a chattel mortgage

or bill of sale of personal property, and it was left with Elijah Everett to determine the particular property which should be included in the instrument, and it was agreed between them that Elijah should execute the instrument and have it recorded, and in pursuance of that agreement he did execute it and leave it with the recorder to be recorded; that act was in effect a delivery of the instrument, and it became effective as a mortgage from the date of such delivery."—Approved: Everett v. Whitney, 55 Iowa, 146, 7 N. W. 487.

CHAPTER CI.

EJECTMENT—ACCRETIONS.

A. EJECTMENT.
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D. ACCRETIONS.

A. EJECTMENT.

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3598. Plaintiff to Prove Identity of Land with that Sued for.
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3607. Tacking Successive Possessions through Color of Title.
3608. Presumption that Occupier Holds in Subordination to Legal Title Rebuttable.

§ 3596. Plaintiff Must Recover on Own Title.

"The court instructs the jury that the plaintiffs must recover, if at all, on the strength of his own title, and not upon the weakness of the defendants'. Therefore, if you find from the evidence that plaintiffs, Paul F. Beardsley and Catherine A. Beardsley, on the 3d day of October, 1893, conveyed by deed, duly acknowledged and filed for record, the lands in controversy, to George F. Richters, and it does not appear that said George F. Richters has conveyed said lands to the plaintiffs or some one through whom they claim title, you will find for the defendants."—Approved: Beardsley v. Hill, 77 Ark. 244, 91 S. W. 757.

§ 3597. Title Need not go Back of Common Source.

"The court instructs the jury that if they believe from the evidence that A was in possession of the premises in controversy, claiming them as his own on the ——— day of ———, 18—, and that A executed to B the mortgage offered in evidence, and that B sold said property under said mortgage, and that C purchased the same and conveyed it to plaintiff, and that defendant entered into possession of the same under said A, subsequent to said mortgage, under a contract of pur-

chase or otherwise, they will find for plaintiff."—Approved: Miller v. Hardin, 64 Mo. 545, 546.

§ 3598. Plaintiff to Prove Identity of Land with that Sued for.

(a) "The burden is upon the plaintiff, under the law, to establish by a preponderance of the evidence that the land described in his petition, or some of it, is a part of said Hugh Morgan league; and if such fact is not shown by a preponderance of the evidence, then the plaintiff has failed to sustain the burden upon him, and cannot recover."—Approved: Wilkins v. Clawson, 50 Tex. Civ. App. 82, 110 S. W. 103.

(b) "The plaintiff sues to recover a tract of land which he claims is a part of a league of land granted by the Mexican government in 1835 to Hugh Morgan; and to that tract of land he has shown title, if it is a part of said Hugh Morgan league, but otherwise he has not."—Approved: Wilkins v. Clawson, 50 Tex. Civ. App. 82, 110 S. W. 103.

§ 3600. Title of Plaintiff Subject to Defeasance on Performance of Condition Subsequent.

"The sheriff's deed (in evidence) to the plaintiff of the property therein described, conveys to the plaintiff the legal title to said property, and said title is conclusive as to the ownership of said property, unless there is proof satisfactory to you that said title and said property were acquired upon some condition or agreement with the defendant. In such a contingency you will inquire further into the case as presented, in order to ascertain if the plaintiff and the defendant had any agreement or understanding regarding the purchase of said abstract of titles, etc., at said sheriff's sale; and if you believe, from all the facts and circumstances in evidence in this case, that the plaintiff bought the property sued for, and was to hold and retain the same for the use and benefit of defendant, and until said defendant was to make certain payments to plaintiff, and if you believe further, from the evidence, that the defendant has complied with all of said conditions, then in such case you will find for the defendant."—Approved: Smith v. Eckford, (Tex.), 18 S. W. 210 (not reported in state reports).

§ 3601. Title Acquired by Actual Settler on Public Land.

"In determining whether or not the defendant, Miss Lizzie Jones, was an actual settler in good faith upon the survey designated as her home section for the purpose of making it her home, you are charged that you may look to all the facts and circumstances in evidence concerning the defendant's acts and conduct in relation to such settlement, if you find any such settlement, for a reasonable time before and after the date of her application."—Approved: Jones v. Wright (Tex. Civ. App.), 92 S. W. 1010 (not reported in state reports).

§ 3602. Temporary Abandonment does not Defeat Title.

"If you do not find that A was an actual bona fide settler on said land on the — day of ————, and that his abandonment, if any, was temporary, and caused by a well-grounded fear of death or serious bodily injury, you will return a verdict for defendant upon the whole case."—

Approved: Jones v. Wright (Tex. Civ. App.), 81 S. W. 569 (not reported in state reports).

§ 3603. Reasonable Diligence to Protect Public Land against Relocation.

"The court instructs the jury that the withdrawal of the certificate would not affect the rights of the defendant, if the jury should further believe that said owners, upon being informed of such withdrawal, used reasonable and proper diligence to secure the return of said certificate to the general land-office. If, however, the heirs of Cartwright failed to exercise reasonable diligence to return said certificate to the general land-office, and to assert claim to the land located and surveyed by virtue of said certificate, that then, and in that event, said land became subject to location; and, if you so find, you are instructed that the title exhibited by plaintiffs entitles them to recover the land in controversy, and you should so find, unless, under the instructions before given, you should find that said Musselmans had assented to or acquiesced in the cancellation of said patent."—Approved: Musselman v. Strohl, 83 Tex. 473, 18 S. W. 857.

§ 3604. Presumption of Rightful Possession—Burden of Proof.

"The court instructs the jury that the law assumes that those in possession of land are rightfully in possession, and he who claims that the persons in possession are unlawfully in possession must satisfy the jury by a preponderance of the evidence that he has a good title and a better title than the defendant. The plaintiff must recover upon the strength of his own title."—Approved: Sutton v. Clark, 59 S. C. 446, 38 S. E. 150.

§ 3605. Adverse Possession for Requisite Time Defeats Paper Title.

"The court instructs the jury that, although they may believe from the evidence that the land in controversy is covered by the deeds under which the plaintiff claims, yet if they further believe from the evidence that the defendants and those under whom they claim have been in the honest, peaceable, continuous, open, notorious and adverse possession of said land, paying taxes on the same, under color of title, for ——— years prior to the institution of this suit, they must find for the defendants."—Approved: Reusens v. Lawson, 91 Va. 226, 21 S. E. 347.

§ 3606. One Holding Without Legal Title has Burden to Show Adverse Possession for Requisite Time.

"If a plaintiff, in an action to recover real property, or the possession thereof, establishes a legal title to the land in dispute, then he is presumed to have been in possession thereof, within the time required by law, and when such is the case, the occupation of the land by any other person is deemed to have been under and in subordination to the legal title, and before such legal title can be defeated the person in possession must show that he has held and possessed the land adversely against such legal title for ten consecutive years, before the commencement of the action."—Approved: Lewis v. Pope, 86 S. C. 285, 68 S. E. 680.

§ 3607. Tacking Successive Possessions Through Color of Title.

"Where there has been for a period of twenty years or more a continuous, adverse possession of land, either by a single person, or by a number of persons successively, such successive possession being connected in law with each other by instruments of writing amounting to color of title, the law will presume that such possession originated in a grant from the state."—Approved: Bryan v, Donnelly, 87 S. C. 388, 69 S. E. 840.

§ 3608. Presumption that Occupier Holds in Subordination to Legal Title, Rebuttable.

"I charge you, as I have already done in sum and substance, whenever a person comes into court, and shows that he has the legal title, or has had it, the law presumes that he is in possession, or that if any one else is in possession, the law presumes that he is there by permission of the owner, the person who owns the legal title to the land. The person in possession claims as a subordinate, but that presumption may be rebutted by evidence. That is the case here, and it is for you to say whether that presumption has been rebutted by the evidence."—Approved: Lewis v. Pope, 86 S. C. 285, 68 S. E. 680.

B. Adverse Possession.

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3610. Tenant of Part Claiming Ownership of Whole under Contract for Purchase.
3611. "Open and Notorious" Defined and how Evidenced.
3612. Nature of Possession and Honesty of Claim of Ownership.
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3614. Continuousness and Exclusiveness in Occupancy.
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3619. Using Land for Fire Wood, Rails, etc.
3620. Possession of Water Front Attached to Possessio Pedis of Land.
3621. Tacking Possessions.
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3627. Hostile Possession of Surface does not Carry Coal Beneath.
3628. Maintaining a Water Power and Dam as Acquiring an Easement.
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3631. Peaceable Possession Interrupted by Claim of Title.
3632. Burden of Proof on Party Claiming by Adverse Possession.
3633. Personal Property Adverse Possession under Claim of Ownership.

§ 3609. Must be Hostile in Inception and Under Claim of Right.

(a) "The jury are instructed that to constitute a valid and effectual adverse possession, the possession must have been hostile in its inception, that is, from the time the defendant claims he purchased the property; that no possession could be adverse except where the person in possession held for himself to the exclusion of all others, and under a claim of title entirely antagonistic to that of the true owner."—Approved: Fox v. Spears, 78 Ark. 603, 93 S. W. 560.

(b) "You are instructed that adverse possession sufficient to defeat a legal title must be hostile in its inception and continue uninterruptedly for ten years. It must also be open, notorious, adverse, and exclusive, and must be held during all such time under a claim of ownership by the occupant; and all of these facts must be proved by a preponderance of the evidence."—Approved: Hoffine v. Ewing, 60 Neb. 729, 84 N. W. 93.

(c) "If you believe from the evidence that, prior to the marriage of plaintiff, the defendant was in the actual possession of the land in controversy, or any part of the same, claiming the same as his own, and that such possession continued for ten years, then you should find for the defendant so much of the land as he may have so held; but such possession, in order to entitle him to recover by reason thereof, must have been actual, continued, visible, and hostile to the true owner, and the recovery by reason of such possession would be restricted to the land so held and occupied by him, if any."—Approved: Evans v. Foster, 79 Tex. 48, 15 S. W. 170.

§ 3610. Tenant of Part Claiming Ownership of Whole under Contract for Purchase.

"If you find from the evidence that the defendant was in possession of part of the property in controversy as a tenant of plaintiff's ancestor, of whom she is the heir, and while in such possession purchased the property, then, to constitute possession under such purchase, it is not necessary to actually change the possession; it is sufficient if the defendant at once asserted and claimed ownership and continued to do so. Such acts constitute a holding adverse to the former owner and landlord, having knowledge thereof, and the statute of limitations begins to run from the time of such adverse acts."—Approved: Fox v. Spears, 78 Ark. 603, 93 S. W. 560.

§ 3611. Open and Notorious Defined and how Evidenced.

"By 'open and notorious possession' is meant such an occupancy as would indicate to a stranger or passer-by that someone was claiming the premises. It would be evidenced by acts of ownership or control, such as making improvements thereon, cultivating the ground, leasing it to others. If you find and believe from a preponderance of the tes-

timony in this case that the plaintiff, either by himself, or in connection with his grantors from whom he procured deeds giving color of title as heretofore explained, was in the actual, open, notorious, exclusive, continuous possession of any of the lots in controversy for the period of ten years, claiming to own them, and to hold them as against all others, then, as to such lots, you are instructed, the plaintiff acquired perfect title by adverse possession, and as to such lots he is entitled to recover in this action."—Approved: Ballard v. Hansen, 33 Neb. 861, 51 N. W. 295.

§ 3612. Nature of Possession and Honesty of Claim of Ownership.

"The person who has been in the adverse possession of a tract of land, and in person and by his grantors, continuously for more than ten years before the commencement of an action to eject him therefrom, becomes the owner thereof, regardless whether he had originally any title thereto or not. To constitute adverse possession such as to invest a party claiming it with title to and right of possession of the land in dispute, the possession must have been open, visible, notorious, exclusive, and adverse for more than ten years before the commencement of this action. The possession must have been such as was consistent with the nature of the property, and is indicative of an honest claim of ownership thereof; and if you find from the evidence in this case that Anna M. Elrod, by herself and her grantors, John Horsham, James Elrod, and Celia Elrod, was for more than ten years continuously before the commencement of this case, to wit, the 17th day of January, 1900, in the open, visible, notorious, exclusive, adverse possession of the premises in dispute, claiming to own the same, your verdict must be for the defendant."—Approved: Baty v. Elrod, 66 Neb. 735, 92 N. W. 1032.

§ 3613. Nature of Possession of Wild Land Constituting Defense.

"Gentlemen of the jury, I charge you that if Mr. Armstrong was in the adverse possession of the land sued for, for more than 10 years prior to 1893, claiming to own the same as his own, or as a partner in the firm of Johnston & Co., and remained in possession until the time that Wallace bought from him, and that after Wallace's purchase he, the said Wallace, remained in possession until the delivery of the possession to Maxom by him under his deed, and the said Maxom, acting through his tenants, remained in possession of the same until Owen ousted him in the fall of 1908, then your verdict must be for the plaintiff. (2) Gentlemen of the jury, if you are reasonably satisfied from the evidence that the plaintiff and those under whom he claims had such an adverse possession of the land as, from its wild nature, it was susceptible of, for 10 years prior to the time that Owen entered into possession, then your verdict must be for the plaintiff. (3) Gentlemen of the jury, to constitute an ouster or adverse possession of wild or unimproved land, it is not necessary that the person claiming the possession should remain on the land, or that he should have any improvements thereon. If such person, claiming the possession, exercises acts of ownership over the land, and has such possession of the land as,

from its wild character, it is susceptible of, like cutting timber therefrom, keeping off intruders, paying taxes, offering to sell it, cutting trees off the land, selling trees off the land, cutting board timber off of it, and giving persons permission to get wood and light wood off the land, then such acts may constitute an actual adverse possession of such wild or unimproved land."—Approved: Owen v. Maxom (Ala.), 52 South. 527.

§ 3614. Continuousness and Exclusiveness in Occupancy.

"If you believe from the evidence that the defendant, Solomon Hoffine, not less than ten years prior to the commencement of this suit, entered into possession of the lands in controversy, and cultivated said lands or fenced the same, or erected improvements of any kind thereon, or did other acts of such a character as to clearly show that he was occupying said lands and claiming the same as his own, and during all of said ten years continued to so occupy said lands, claiming during all of said time to be the owner of the same, and never during any of said period of ten years abandoning said lands, but during all of said time continued openly, notoriously, adversely, and exclusively to occupy and claim the same as his lands, then you are instructed that said acts on the part of said defendant, Hoffine, would constitute adverse possession, within the meaning of the law, and would entitle the defendant to a verdict at your hands. But if the defendant, Hoffine, has failed to establish any of said acts, by a preponderance of the evidence, your verdict should be for the plaintiff."—Approved: Hoffine v. Ewing, 60 Neb. 729, 84 N. W. 93.

§ 3615. Fact of Possession and Intent of Commencement and Holding.

(a) "Such possession must be under a claim of title or right to the land occupied; or, in other words, the fact of possession, and the intention with which it was commenced and held, are the only tests. If, therefore, the intention is wanting of claiming the title to the land against the true owner the possession will not be adverse, and, however long and continued, will not bar the owner's right to recover.

"If defendants, during the time they have held this land in dispute, only claimed to own the improvements made on said land, then no length of possession will give them title to the land in dispute; and in considering this case you will take into consideration the acts and declarations of the defendants, and their statements of the claim made by them, and if the evidence offered upon the trial of this cause satisfies you that the claim of defendants was a claim for improvements only, then you must find for the plaintiffs."—Approved: Davenport v. Sebring, 52 Iowa, 364, 3 N. W. 403.

(b) "If, as before seen, the evidence satisfies you that the true and original section corner and line is as claimed by Skinner, then, in law, Skinner will be entitled to a verdict, unless the defendant should satisfy you that he held open and notorious and adverse possession of the disputed tract for ten years, under a color of title or claim of right. An essential element of adverse possession is a claim of right

adversely to the true owner or his grantors; and, as we have stated, such possession must be open, notorious and continuous for the statutory period before it will ripen into a title. Hence, if you believe that Crawford did enter upon said land without any color of title, or without claiming any right thereto, then a possession under such circumstances is not adverse; and a possession without such color of title, or claim of right, will not ripen into a title, will not become adverse possession, however long it may continue."—Approved: Skinner v. Crawford, 54 Iowa, 119, 6 N. W. 110.

(c) "If the jury believes from the evidence that the plaintiffs and their predecessors in interest occupied the premises in dispute, claiming to be the owners thereof, and having the same inclosed by a fence for a period of ten years prior to the date that defendants took possession and disputed the ownership of the plaintiffs, I instruct you that your verdict should be for plaintiffs."—Approved: Sommer v. Compton, (Or.), 96 Pac. 124.

§ 3617. Actual Possession Indicated by Inclosure.

(a) "The jury are instructed that in the instructions in reference to the defendants acquiring title to the property in dispute by the statute of limitations, it is not meant that every foot of said land must have been continuously occupied for ten years at all times, but that the occupation must have been for such a kind, evidenced by an inclosure, or by visible token of possession, clearly defining the limits of possession, and calculated to give notice to the owner, and such that in itself excluded and was inconsistent with the possibility of any person at the same time occupying and using the land, or any part thereof, adversely to the defendants; and if the occupation was of such a nature, it did not cease to be continuous because, by reason of changing piles of lumber, or otherwise, any particular spot thereof became temporarily vacant and unused, and that such adverse possession must be made out by clear and positive proof."—Approved: Pim v. City of St. Louis, 122 Mo. 654, 27 S. W. 525.

(b) "The court instructs the jury that if they should believe from the evidence that the plaintiff Mary Rayl had the actual adverse possession of the tract of land sued for continuously and uninterruptedly for 15 years or more before April 20, 1906, claiming the same openly and notoriously as her own, adversely to all others, then and in that event the jury should find for the plaintiff the lot of ground sued for. And the court instructs the jury that if they should believe from the evidence that the plaintiff had said lot under inclosure, and claimed said land as her own, then she was in the actual adverse possession of said lot in the meaning of the instructions."—Approved: Louisville & N. R. Co. v. Rayl, 32 Ky. Law Rep. 870, 107 S. W. 298.

§ 3618. Visible Occupancy Shown by Cultivation and Use.

(a) "If you believe from a preponderance of the evidence that the defendants, and those under whom they claim, have had peaceable and adverse possession (as those terms have been defined) of the land

described in the defendants' answer, claiming, cultivating, using, or enjoying the same, by defined metes and bounds, continuously for ten years before the filing of this suit on the 4th day of May, 1903, you will find for defendants."—Approved: Texas & N. O. Ry. Co. v. Broom, 53 Tex. Civ. App. 78, 114 S. W. 655.

(b) "The defense is that this title of the plaintiff has been wholly divested by the adverse possession, continued for the statutory period. All adverse possession must be open, notorious, continuous, exclusive, visible, and distinct, as well as adverse. Now, what is meant by this is that there must be an actual occupancy, as distinguished from a constructive possession, of the property; that is, some one must be in actual possession of the property,—not necessarily living upon the property. If the property is inclosed and cultivated, this would be a sufficient actual occupancy; and, if crops were continually growing upon the premises, this would be a visible occupancy; and even though in the interim between the harvesting of a crop and the recropping of the land the succeeding spring no person was actually upon the premises, and nothing done with them, yet, if year after year the land was thus cropped and cultivated, this would be a sufficiently continuous possession, within the meaning of the term as I have given it to you. So, a possession is sufficiently notorious if it is open and visible, and the premises are actually so that the people passing to and fro past the premises may see these visible evidences of occupation. This would make it notorious, among those familiar with the premises. It is distinct, when it is clearly defined. And in this case I instruct you that if the defendant in this case went into possession of these premises, described in the deed of conveyance under which he claims, that deed would define the extent of his occupancy. It would not be necessary for him to occupy each acre of the premises. If he occupied some portion of it, that would be distinct occupancy of the whole, as defined by the deed under which he entered into possession. The claim must be hostile to the plaintiff."—Approved: Cook v. Clinton, 64 Mich. 309, 31 N. W. 317.

(c) "You are further instructed, as a matter of law, that adverse possession of real estate, in order to vest the title thereof in adverse claimants, must be an actual, continued, and notorious adverse possession with claim of the same as his own against all persons, for the full extent of ten years; and that, if you find from the evidence in this case that the defendant entered upon the land in controversy, planting forest and fruit trees thereon, claiming as his homestead, and erecting buildings thereon, and remaining in possession of said real estate for ten years prior to the commencement of this action by the plaintiff, that such occupancy would constitute that adverse possession, under our statute, which would vest the right of possession and the title to said real estate in defendant; and your verdict, should you so find, should be in favor of the defendant."—Approved: Obernalte v, Edgar, 28 Neb. 70, 44 N. W. 82.

§ 3619. Using Land for Fire Wood, Rails, Etc.

"The court declares the law to be that if the title to the land in controversy emanated from the government more than ten years, and that the defendant and those under whom he claims has been in the lawful possession for one year before the institution of this suit and that the plaintiff and those under whom he claims have not paid any taxes on the said land for thirty years prior to February 12, 1903, then the plaintiff cannot recover.

"The court declares the law to be that in order to show actual possession it is not necessary to show that there was any building or enclosure upon the land but such possession may consist of the use of the same for fire wood, rail timber or other purposes in connection with a farm and improvements belonging to the claimant and adjoining said land, and if the court believes the defendant and those under whom he claims did use the land in this suit for the use of his farm hands and for getting fire wood, rails, and other purposes in connection with said farm and improvements belonging to the said party claiming said land, then such acts of ownership show actual possession."—Approved: Campbell v. Greer, 209 Mo. 199, 108 S. W. 54.

§ 3620. Possession of Water Front Attached to Possessio Pedis of Land.

"If you find that the defendant—and his grantors—have been for a period of more than fifteen years next before the commencement of this suit, ————, in actual, continued, visible, notorious, distinct and hostile possession of the land in dispute, then your verdict should be for the defendants, because such long-continued adverse possession gives just as good a title as a deed. You are instructed that when possession is by actual occupation of the land in question or by tenants under claim of title in the landlord, the possession is visible, open, notorious, and distinct, and will be presumed to be hostile. The actual, continued, visible, notorious, and hostile possession of land is tantamount to a claim of ownership. If you find that the defendant and his predecessors successively have maintained adverse possession for more than fifteen years up to the east line of the disputed tract, or up to the fence in question, then it is entirely immaterial whether the fence or the east line of the disputed tract is on the surveyed line run originally by the United States government surveyor as a dividing line between private land claims 105 and 106. A part of this strip of land in question is land covered by water, or what is called 'water frontage.' You are instructed that it is not necessary that ———— and his successive grantors should have held this water front actually in possession, or have of the water front what the law calls 'possessio pedis,' or possession of the foot. Such possession is only required in the case of the solid land, or the upland; and, accordingly, if you find that the defendant has had adverse possession, as hereinbefore explained to you, of the upland for the statutory period of fifteen years, this adverse possession of the upland would carry with it the enjoyment of the riparian rights as to the land under the water, so far out as the ownership goes for

anybody, without any proof further whatever of adverse possession of the water front, or land under the water. You are instructed that it is the law that in retracing the lines of a former survey that course and distance shown by the field notes of the former survey must yield to the original artificial or natural monuments. The undisputed testimony shows that ———— and his wife, ————, occupied the land north of Portage avenue as a homestead at the time of the alleged conversation stated to have occurred between ———— and ————. You are instructed that ———— could not incumber, bind, or convey any portion of his homestead without the consent in writing of his wife and you are instructed that there is no evidence of such written consent in this case."—Approved: Dawson v. Falls City Boat Club, 125 Mich. 434, 84 N. W. 618.

§ 3621. Tacking Possessions.

(a) "Although you may find from the evidence that the survey made by Roark is correct, still if you further find from the evidence that prior to said survey the said line was surveyed by one Paulding and the line in question was located and designated by said Paulding and if the witness Meador was at said time owner of the said land at said time, north of said line, and after such survey took possession of the said land to the line designated by Paulding, and claimed to own the land up to such line designated by Paulding, and if under such claim of title he held the open, notorious and adverse possession of the said land for a period of ten years prior to the 14th day of April, 1905, then you will find the issues for the defendant; and in such case if the defendant bought Meador's land believing that the same extended to the said line, so marked or designated by Paulding, and was put by Meador in possession thereof, and has since the purchase held the adverse, open and notorious possession of the same, claiming title thereto, then the period of his possession prior to April 14, 1905, may be considered and included with that of Meador in estimating such period of ten years' possession prior to April 14, 1905."—Approved: Foard v. McAnnelly, 215 Mo. 371, 114 S. W. 990.

(b) "If, as to any of the lots in controversy, the jury shall find that Hansen took actual possession, and either in person, or by another person or persons, as his agents or lessees, held such possession for a time, and then sold his right to another, who continued in actual possession, and from whom he has since purchased it back, Hansen may avail himself of their several occupancies in this action, provided that, taken together, they continued uninterruptedly for ten years. If the jury find that Hansen, by himself or his employes, lessees, or privies, has had exclusive control and actual occupancy of said lots, or any of them, under a claim of ownership, for the full period of ten years next before the commencement of this suit, the fact that he may have occupied or had inclosed with them other grounds, or even portions of the public streets, would not of itself be sufficient to prevent a recovery of the defendant as to such lots, provided the defendant exercised such acts of ownership and control over such lots as to indicate clearly his intention

to claim the same as if his fence had inclosed only said lots, and, as to lots so occupied and controlled, the jury should find in favor of the defendant."—Approved: Omaha & Florence Land & Trust Co. v. Hansen, 32 Neb. 449, 49 N. W. 456.

§ 3622. Abandonment after Full Period Does not Defeat Title by Adverse Possession.

"If the jury find from the evidence that W. A., in ———— or ————, abandoned his claim to land in dispute, but that before such abandonment he had acquired title to the land by adverse possession, such abandonment would not defeat his title. They must find a verdict for him unless such abandonment continued for ten years."—Approved: Pittman v. Pittman, 124 Ala. 306, 27 South. 242.

§ 3623. Color of Title and Claim of Title Distinguished.

"Color of title and claim of title are not in their strict sense synonymous terms. To constitute color of title, a paper title—that is, a deed or other instrument purporting to convey title—is requisite; but claim of title may exist wholly in parol, and may be manifested by acts as well as by words; and if you find from the evidence that the defendant, Secor, built a house or houses, a barn, and other out-buildings, dug a well or wells, planted an orchard, and otherwise improved and cultivated the premises in controversy, this is competent evidence tending to show claim of title on part of defendant upon which an adverse possession may be predicated, and which if continued for 20 years or more would bar the plaintiffs from maintaining this action."—Approved: Bartlett v. Secor, 56 Wis, 520, 14 N. W. 714.

§ 3624. Taking Possession under Color and Claim of Title.

(a) "If you believe from the evidence that any or all the defendants, and those under whom they claim, took possession of the respective tract or tracts claimed by them respectively under the decree of partition offered in evidence, and had prior to January 22, 1908, had and held peaceable, adverse, and continuous possession of such tract or tracts so claimed by them respectively, cultivating, using, and enjoying same for a period of ten years, then plaintiff is barred from recovery by the 10 years' statute of limitation, and, if you should so find, you will return a verdict for defendants, or such of them as you find had such possession."—Approved: Honea v. Arledge (Tex. Civ. App.), 120 S. W. 508.

(b) "That if the tenants, under their respective leases from Kittredge, occupied and cultivated to the Tyler line, in such a manner as the owners of such land would ordinarily occupy and cultivate, and such an occupation had continued for the period of thirty years, it would constitute such an adverse possession as would bar the demandant's right to recover. That the possession of the premises by said lessees, under the lease, was the possession of Kittredge, the lessor, and his heirs, he claiming to have a deed which included them, and having turned Melvin out of possession; if it was of such a character as amounted to a disseisin, it would in law, inure to the benefit of Kittredge and his heirs, and would be the disseisin and adverse possession of the lessor."—Approved: Reed v. Proprietor, etc., 8 How. 274.

§ 3626. Use by Public of Road or Street.

"The public may acquire the right to a road or street over the private property of a citizen by use only when such use is under a claim of right adverse to the owner, and such claim of right must be shown to have been known during the time to the owner; and such use must be continuously for a period of ten years, excluding the time during which, on account of infancy, the statute of limitations does not run. Now unless you find that the possession and use of the property for a street began before the death of Robert Cockrell, then you will find for defendant."—Approved: Cockrell v. City of Dallas (Tex. Civ. App.), 111 S. W. 977 (not reported in state reports).

§ 3627. Hostile Possession of Surface does not Carry Coal Beneath.

"The court instructs the jury that the actual, exclusive, continued, peaceable, and hostile possession of the surface of the land by the defendants, or either of them, described in the foregoing instructions, will not carry with it the possession of the coal under the surface of said land, and you should not find for the defendants, or either of them, on that account."—Approved: Gordon v. Park, 219 Mo. 600, 117 S. W. 1163.

§ 3628. Maintaining Water Power and Dam as Acquiring an Easement.

"If the jury find from the evidence in this case that at the time of the commencement of this suit, and for fifteen years and more prior thereto, there had been kept up and maintained a water power and a dam at a certain height on the property described in the declaration, by the plaintiff or the parties from whom he claims, then the plaintiff would have the right at this time to keep up and maintain the said dam at said height, and would be the owner thereof, the same as though he had a deed or deeds of the same."—Approved: Neeley v. Detroit Sugar Co., 138 Mich. 469, 101 N. W. 664.

§ 3629. Accretions following Line—Boundary in Adverse Possession.

(a) "But if you find, gentlemen of the jury, that as far as the island is concerned the defendant has been in possession of the same adversely, but that the channel is narrower now than it was, and you should find that the narrowing of the same was not made by natural accretions to the land, and that the defendant had not been in adverse possession of the strip of land between what was then the west bank and the bank as it is now for a period of fifteen years, then it will be for you to say how far from the east bank of the channel the plaintiffs are entitled to recover. * * *

"Should you find under the rules that I have given you that the plaintiffs are entitled to recover for any portion of the land which lies between what is known as the trees and the west bank of the channel, you will state in your verdict, 'We find for the plaintiffs, and fix the boundary line at ———' whatever number of feet you should happen to find it to be west of the west line of Market street, regardless of whether it takes in the land or whether it does not take in the land on the west side of the channel,

"If you should find, as I say, that the defendant has not been in adverse possession of that strip for fifteen years, and that it was not made by the natural accretions that I have spoken about, then it would be for you to fix the line where the center of the channel was, and render your verdict accordingly."—Approved: McKee v. City of Grand Rapids, 133 Mich. 272, 95 N. W. 85.

(b) "The jury are instructed that the deeds read in evidence in behalf of plaintiff constitute color of title to the land lying on the north bank of the Missouri river immediately north of the lands described in plaintiff's petition, and if the jury believe from the evidence that plaintiff and his grantors have been in the open, notorious, peaceable and adverse possession of said land, situate on the said north bank of said Missouri river, for a period of ten years or more next before the institution of this suit, then such possession vested in plaintiff the legal title to said premises, and also vested in him the title to all accretions made thereto; and if the jury so believe, and shall further believe that the land sued for was made to and against the said north bank by the gradual and imperceptible deposit of earth, sand and sediment against said bank by the action of the water, and by the gradual receding of the water of said river from said north bank, then the jury must find the issues for plaintiff."—Approved: Chinn v. Naylor, 182 Mo. 583, 81 S. W. 1109.

§ 3630. No Private Enjoyment of Public Right is Adverse Possession.

"I instruct you that the mere use of tide lands for fishing purposes by a single person, no matter how long the use may have continued as an exclusive use, is only the exercise of a public right, and can confer no exclusive right by any principle of prescription or otherwise; but the lands still remain open to the public, as before."—Approved: Pacific Steam Whaling Co. v. Alaska Packers' Ass'n, 138 Cal. 632, 72 Pac. 161.

§ 3631. Peaceable Possession Interrupted by Claim of Title.

"If you find from the evidence that the possession and occupancy of the land in dispute by the plaintiff, while held by her, was broken or interrupted by the defendant claiming title thereto, with plaintiff's knowledge of such breach of possession or interruption, then the ten years would not begin to run until the time of such interruption, and you must determine from the evidence whether any such entry and breach of possession took place. This applies only to the question of title by adverse possession."—Approved: Clark v. Thornburg, 66 Neb. 717, 92 N. W. 1056.

§ 3632. Burden of Proof on Party Claiming by Adverse Possession.

"That under the pleadings, the law, and the evidence in this case, the only question for your consideration is the question of adverse possession of the property in controversy set up by the defendant, Solomon Hoffine, in his answer herein, wherein he alleges that he has been in the actual, open, notorious, and exclusive possession of the land in controversy, claiming the same adversely to the plaintiff and all the world, for more than ten years next before the commencement of this

action; and the burden is upon the defendant to establish such defense by a preponderance of the evidence."—Approved: Hoffine v. Ewing, 60 Neb. 729, 84 N. W. 93.

§ 3633. Personal Property Adverse Possession Under Claim of Ownership.

"You are instructed, if you find from the evidence that the plaintiff purchased the property in suit or any thereof for herself, and became and was the owner of it, and that subsequently plaintiff loaned the same or any thereof to the defendant for his temporary use, and defendant was in possession of said property by reason of such loaning, and not otherwise, the mere fact, if it is a fact, that he was in possession of the same, for a period of more than two years prior to the commencement of this action, does not entitle him to the continuous possession of the same after demand made for it by the plaintiff, unless you further find that for more than two years prior to the commencement of the action he claimed to be the owner of the property, and such claim for more than two years was known to the plaintiff."—Approved: Woods v. Latta, 35 Mont. 9, 88 Pac. 402.

C. Boundaries.

§ 3634. Natural Objects Preferred to Courses and Distances.
3635. Distance Yields to Marked Lines and Corners in Patents.
3636. Natural and Artificial Objects preferred to Courses and Distances.
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3646. Recognition for Ten Years of Fence as Division Line.
3647. High Water Mark, how Ascertained as a Boundary.
3648. Land Lying between a Meander Line and a Stream.

§ 3634. Natural Objects Preferred to Courses and Distances.

"The court instructs the jury that in questions of boundary natural objects called for, marked lines, and reputed boundaries, well established, should be preferred, in ascertaining the identity of a tract of land, to the courses and distances of the calls of the grant."—Approved: Brooks v. Stanley, 74 Neb. 858, 105 N. W. 551.

§ 3635. Distance Yields to Marked Lines and Corners in Patents.

(a) "In locating a patent course and distance must yield to marked lines or corners of the patent found on the ground."—Approved: Burt & Brabb Lumber Co. v. Hurst, 33 Ky. Law Rep. 270, 110 S. W. 242.

(b) "If it has been shown to you by a preponderance of the evidence that the mounds and pits claimed by the plaintiff as a government corner, and known in this case as the 'Smith Corner,' was the place where the United States surveyors originally located the section corner, then you must recognize this corner as the true corner between said sections, regardless as to whether it might agree or disagree with any subsequent surveys. In other words, if the government corners can be found and you find from the evidence that they were so found, and established they settle the question of the boundary line between these lands in dispute, no matter what effect it might have on the case, or on the land in dispute, and no matter whether this corner agrees with the government field notes or not."—Approved: Smith v. Curtice, 73 Neb. 167, 106 N. W. 460.

§ 3636. Natural and Artificial Objects Preferred to Courses and Distances.

"In your deliberation to determine the location of the league of land described in the grant to Hugh Morgan, and whether or not it includes the land in controversy, you will search for the footsteps of the surveyor in locating the Hugh Morgan league, and in this search you will be guided first, by natural objects, such as streams and timber; second, by artificial objects, such as the fixed and established line of an adjoining survey, about which there is no dispute, and then by course and distance; yet in this case you will consider all the evidence and follow the actual survey of said Hugh Morgan league as it was made, if in fact made by the surveyor, to decide the location of said league, and whether or not it included, in whole or in part, the land described in plaintiff's petition."—Approved: Wilkins v. Clawson, 50 Tex. Civ. App. 82, 110 S. W. 103.

§ 3637. But These Rules Yield to Intention as Ascertainable from the Description.

(a) "The court instructs you that in locating land covered by a deed, in order to find out what land the grantor conveyed, the jury are not bound by any particular rule of location. The rules of location which usually govern must yield to the intention of the grantor as ascertained from the description of the land contained in the deed, and not from any parol evidence which might tend to contradict or vary its terms.

(b) "Even if it has been shown that C. P. B. did at one time have title to the land in dispute, still the jury cannot locate the deed from B. to defendant so as to cover this land, if they find that the line as actually run when the deed was made did not cover this identical land."—Approved: Connor v. Johnson, 59 S. C. 115, 37 S. E. 240.

§ 3638. Stakes and Monuments of Original Survey.

"If you find from the evidence that stakes or monuments have been found which are claimed by plaintiff to indicate and fix the location of the boundaries of the land in question, or of sectional or quarter corners of the original official government survey of said land, or of land in the vicinity, or surrounding territory, then you are instructed that the burden is upon the plaintiff to show by a preponderance of evidence,

that such stakes or monuments are those of the original, official government survey, and, also, that such original stakes or monuments establish and locate particular and designated boundaries, section, or quarter corner of such original survey; and unless such stakes or monuments are of such official and designated character as above specified, and shown to be such by a preponderance of evidence, then they should be disregarded by you as evidence of the boundaries of the land in question, or of section or quarter corners of said official government survey."—Approved: Pauley v. Brodnax, 157 Cal. 386, 108 Pac. 271.

§ 3639. Surveys—Lost Monuments—Fences—Fixed Starting Point.

"Unless you find by the preponderance of evidence that the line located by Mr. Williams is on the line located by the original government survey, then the plaintiff cannot recover in any event. It will not do to permit boundaries to be disturbed and moved upon a survey made from an assumed starting point, without some proof of its being a true line, located and fixed by the original government survey. The only practical way of ascertaining the true line is by a survey made from some fixed starting point,—some monument placed under the original government survey; and, if such monuments are no longer discoverable, the question is, where were they located? And fences of long standing, erected upon what parties have called the true line, and up to which they have improved and cultivated, are better evidence of the true line than surveys made after the monuments have disappeared."—Approved: Pugh v. Schlindler, 127 Mich. 191, 86 N. W. 515.

§ 3640. Discrepancy in Calls May be Settled by the Field Notes.

(a) "The court instructs you that should you find a discrepancy in the calls for artificial objects, then you are to be governed by the call or calls that most thoroughly indicate to your minds the intention borne upon the face of the field notes."—Approved: Matkins v. State (Tex. Cr. R.), 62 S. W. 911 (not reported in state reports).

(b) "Therefore, when a government surveyor, in the field notes returned by him to the government, shows that such section and quarter section corners are established on such straight lines between the township corners, and fixes their locations by courses and distances, these field notes are to be accepted as presumptively correct, and can only be overcome by a preponderance of evidence that such surveyor actually established such corner monuments at points other than those indicated by the government field notes. The rule that fixed monuments shall control courses and distances only prevails when the boundaries are fixed and known, and monuments exist. And where the boundaries are not fixed and known, and the location of the monuments themselves is uncertain, or left in doubt by the evidence, then courses and distances as shown by field notes and maps of the original survey will be considered in fixing the boundaries."—Approved: Pauley v. Brodnax, 157 Cal. 386, 108 Pac. 271.

§ 3641. General Rules to Ascertain Boundary.

"The general rules which are to be observed in ascertaining the locality, identity, or boundary of a particular tract of land described in

a deed or grant, are well settled. Recourse must be had, first, to natural objects; second, to artificial marks, and third to course and distance.—The acquiescence of the proprietors of adjoining lands, in a particular line, is a circumstance to which the jury may look in determining the true boundary.—If the jury believe from the evidence that the boundary line between plaintiffs and defendants would give the disputed premises to plaintiffs, then they will find for plaintiffs.—If, on the other hand, the jury believe from the evidence that said true boundary line would leave said disputed premises in defendants' tract of land, they will find for defendants.—If the jury believe from the evidence that the dividing line between the lands of plaintiffs and defendants has been run, and that the parties, or those under whom they claim, have acquiesced in the same and recognized the said dividing line they will find for defendants."—Approved: McArthur v. Henry, 35 Tex. 804, 805.

§ 3642. Deed Referring to Plat for Fuller Description Adopts It.

"When a grantor adopts a plat attached to a deed as the true description of the land sold and conveyed, he thereby only warrants the land sold as described therein, and as run and delineated by the surveyor who surveyed the land at the time the deed and plat was made.

"Where a deed refers to a plat for a fuller description, the plat forms a part of the deed; and, if the plat calls for adjacent land as a boundary, such boundary is as much a part of the plat as the courses laid down on the plat. If such a plat calls for adjacent lands as a boundary, the new plat cannot cross the lines of the older grant, but the lines of the older grant must first be located; and the lines of the plat must be made to conform to the lines of the older grant, even if the courses and distances on the new plat must be corrected so as to conform to the courses and distances called for by the older grant. This is not remodeling the deed or plat, but is making it conform to the true boundary called for by the plat. For adjacent boundaries called for on the plat control the courses and distances, also called for on the plat, and where they conflict there is an error on the plat, and the adjacent boundary is the true line.

"The court instructs you that in locating land covered by a deed, where it describes the land as containing a certain definite number of acres, without the addition of the words 'more or less,' and gives as boundaries some of the adjacent lands, and refers to a plat attached to the deed for a fuller description of the land conveyed, then, as a rule, the land conveyed is the land marked and delineated by the surveyor who ran the lines when the deed was made, and such deed only covers the land so run, marked, and described."—Approved: Connor v. Johnson, 59 S. C. 115, 37 S. E. 240.

§ 3643. Example in Applying Rules to Ascertain Boundary.

"Before plaintiffs can recover, they must satisfy you by the greater weight of the evidence of the following facts: (1) That they have located the Jacob Anthony grant, and that it is included in the lands described in the complaint. (2) That they and those under whom they

claim have been in the open, notorious, adverse possession of the land embraced in the Jacob Anthony grant for more than seven years next preceding the commencement of this action under the deed from Margaret Erwin to H. C. Tate. The possession of a part of the land embraced in the Margaret Erwin deed would extend to the whole, in the absence of evidence tending to show that some one else possessed any part of said land adversely to the plaintiffs or their ancestor H. C. Tate. It is admitted that the Anthony grant and the Margaret Erwin deed cover the same land. In locating the land described in said grant and deed, the natural boundaries called for must, when they can be ascertained and located to your satisfaction, control course and distance. If plaintiffs have failed to satisfy you of the location of any of the natural boundaries called for in said grant or deed, then you should answer the first issue, 'No.' If you are satisfied by the greater weight of the evidence that at figure 15 on the map a white oak was marked for a corner, and, further, that said white oak is the white oak in the Perkins' line called for in the grant and Margaret Erwin deed, said grant and said deed being silent as to the distance between the white oak called for and the beginning point, you can consider the distance between these two points as shown by the plat made at the time of the grant. If you find by the greater weight of the evidence that the beginning corner of the Jacob Anthony grant is at W O, on the map, and that the calls of the grant go from there west to block 2, thence south to block 3, and to 10, thence west to 11, thence south to 12, thence east to 13, thence north to 14, thence west to 15, thence north to W O, you will answer the first issue, 'Yes,' the lands covered by the Anthony grant beginning at W O, provided you further find that the plaintiffs were, or their ancestor H. C. Tate was, in the actual, open, and notorious possession for more than seven years next before this action was commenced of any part of said land. It is true, as claimed by defendants, that the calls, courses, and distances laid down on a plat at the same time a grant is made cannot control or vary the calls, courses, and distances given in the grant; but where the grant is silent as to the distance between any two natural boundaries called for in the grant, and the distance is laid down on the plat, and you have located one of said natural boundaries, you can consider the distance given on the plat in locating the other natural boundary called for, if it aids you in locating the other natural boundary. The effect of the burnt or lost record proceeding is to estop plaintiffs from saying that the deeds or records established in the proceeding are not true copies of the lost or burnt deeds and records mentioned therein. These copies have the same force and effect as the lost or destroyed deeds and records would have were they not lost or destroyed. They do not estop or prevent the plaintiffs from showing, if they can, that they have a better title to any of the lands embraced in said lost deeds than Mrs. Michaux and those claiming under her. If you locate the beginning of the Anthony grant at 18, you will answer the first issue, 'Yes,' the lands embraced in the Jacob Anthony grant beginning at 18 on the map. If you locate the beginning corner of the Jacob Anthony grant at W O, and you further find that plaintiffs are the owners of the lands covered by the Jacob An-

thony grant, then you should answer, 'Yes,' to the issue, 'Did Chas. Laxton enter upon said land and commit a trespass thereon?' Said Laxton on cross-examination said that he had cut and carried away timber trees from said land. If you locate the beginning point of the Jacob Anthony grant at 18, then you should answer this issue, 'No,' because the land Laxton said he cut timber trees on is not included in the Jacob Anthony grant, if its beginning corner is at 18,"—Approved: McNeeley v. Laxton (N. C.), 63 S. E. 278.

§ 3644. Actual Location Making Certain Uncertain Calls in Deed.

"If the land in dispute between the plaintiff and defendants, Walton and Davis, is found to be on the Morrow survey, the plaintiff cannot recover unless the same is owned by plaintiff. Plaintiff claimed some of it to be part of the 50 acres conveyed by H. L. Molloy to J. M. Elliott. The defendants contend that the said 50 acres is not on the Morrow survey, even if they are wrong as to the position of the east line, and that the 50 acres should be located by lines beginning at the Bowles corner and running in a southeasterly direction to the northeast corner of the Webb tract, thence S. 60° W. and N. 30° W. and N. 60° E., to make the 50 acres. It is uncertain what particular land was embraced in the deed; that is, the lines of the said 50 acres, judged by the calls in the deed, are uncertain. If you believe from the evidence that at the time Molloy sold Elliott the 50 acres was run out, lines and corners established, then actual location of the land by its lines and corners may be considered as making certain the uncertain calls in the deed, and if you conclude that the land actually conveyed by Molloy to Elliott was that now claimed by plaintiff, and that Molloy owned the land claimed by plaintiff as the 50 acres, then plaintiff should recover provided the same is on the Morrow survey, and you do not find for defendants under their plea of limitation. Of course, if the Bowles southeast corner is on the Morrow east line, plaintiff cannot recover against Davis or Walton any part of the 50 acres, even if the deed of Molloy to Elliott in its true intent and meaning cover the land in dispute."—Approved: Davis v. Mills (Tex. Civ. App.), 133 S. W. 1064.

§ 3645. Misrepresentation by Grantor—Estoppel.

"If you believe from the evidence that at the time and before the making of the deed by J. H. Mars to defendant there was a bois d'arc stake at what was supposed to be the northwest corner of the Gregg 500 acres and at the northeast corner of the strip of land in controversy, and that what was supposed to be the Gregg west boundary line was marked by a fence, and if you further believe that at the time and before the making of said deed the said Mars and defendant knew where the said Gregg fence and line were located, and if you further believe that the said Mars represented to defendant that the said Gregg line was his east boundary line, and agreed with defendant that for the consideration named in the said deed he would convey to defendant all the land owned by him in the Joshua B. Hill survey

lying west of said Gregg line, and if you further believe that the defendant relied on said representations and agreements, and was thereby induced to buy the said land of the said Mars, and believed from the representations made to him by the said Mars that the said Mars was conveying to him by said deed all the land owned by him in said Hill survey lying west of the said Gregg line, and if you further believe that but for said representations defendant would not have bought the land of the said Mars, then the said Mars and the plaintiff, who claims under him, would be estopped from denying that the said Gregg line was the true east boundary line of the land conveyed to defendant by the said deed, and in such case you should find for the defendant."—Approved: Mars v. Morris, 48 Tex. Civ. App. 216, 106 S. W. 430.

§ 3646. Recognition for Ten Years of Fence as Division Line.

"The court instructs you that the question for your determination in this case is the true location of the division line between the land owned by the plaintiff and the defendant. If you believe and find from the evidence that the old fence now referred to and described by the witnesses is the true location of the division line between the plaintiff's and defendant's land, or was accepted and recognized by those under whom plaintiff and defendant claim, as such division line, or if you find from the evidence that the line run and surveyed by M. is another and different line from the said old fence row, and is the true division line between plaintiff's and defendant's land, but you further find that the plaintiff and those under whom he claims, had and held peaceable and adverse possession of the land claimed by him in this suit, extending to said old fence row, cultivating, using, or enjoying the same, for more than ten years next before the date of the entry and trespass, if any, of the defendant on said land, then in either such case you will find for the plaintiff, although you may believe the distance from the S. W. corner of the K——— survey, running east with its south boundary line to said old fence row, is more than 950 yards, unless you find for the defendant under the instructions hereinafter given you. If, on the other hand, you believe and find from the evidence that the said line run and surveyed by the said M. is another and different line from said old fence row, and is the true location of the division line between plaintiff's and defendant's land, or if you find from the evidence that W. C. H., in his lifetime, and the defendant agreed or accepted and recognized the said line run and surveyed by said M. as such division line, and you do not find that the plaintiff and those under whom he claims had and held peaceable and adverse possession of the land in dispute, extending to said old fence row, cultivating, using, or enjoying the same, for more than ten years next before the entry and trespass, if any, of defendant on said land, then in either such case you will find for the defendant."—Approved: Rountree v. Haynes (Tex. Civ. App.), 73 S. W. 435 (not reported in state reports).

§ 3647. High-Water Mark—How Ascertained as a Boundary.

"The court instructs the jury that the line, then, which fixes the high-water mark is that which separates what properly belongs to the river bed from that which belongs to the riparian owner,—that is, the owner of adjoining land,—and is not the line reached by unusual floods, but that which is shown by the character and condition of the soil and vegetation to be the limit to which high water ordinarily reaches. Soil which is submerged so long or so frequently, in ordinary seasons, that vegetation will not grow upon it, may be regarded as part of the bed of the river which overflows it, and consequently soil to the use of which the public have the same right that they have to waters of the river."—Approved: Welch v. Browning, 115 Iowa, 690, 87 N. W. 430.

§ 3648. Land Lying Between Original Meander Line and a Stream.

"The court instructs the jury that if you find from the evidence offered in this case that there existed at the time of the government survey and plat of the meander line of the reservation a quantity of upland between the meander line and the channel of ——— Creek, covered with a natural growth of vegetation, and such tract of land was equal to or greater in area than the adjacent lots lying north of the meander line and claimed by plaintiff, then you may consider this fact as a circumstance tending to show that the meander line was intended as the south boundary of the lots claimed by plaintiff, regardless of the location of the creek. I instruct you that a meander line is a line run by the surveyor for the purpose of determining the sinuosity of the stream and the area of the lots, and where such line in fact meanders the stream, under the laws of this state the boundary of the lots described would be the center of the channel of the stream, and not the meander line as run on the shore. If, however, you find from the evidence in this case that there is a wide and material divergence between the meander line as run by the surveyor and the north bank of the stream, as it existed at the time of the survey, then I instruct you, as a matter of law, that the meander line as run by the surveyor upon the ground, and not the stream, should be taken as the southern boundary of the lots described in plaintiff's complaint."—Approved: Barnhart v. Ehrhart, 33 Or. 274.

D. Accretions.

§ 3649. Accretion Defined.
3650. Accretion by Recession of River.
3651. Question of Fact whether there was an Island or an Accretion to the Shore.
3652. A Bar to form an Accretion must be annexed to the Shore.
3653. New Accretions Covering Land lost by former Accretions.
3654. Title to Accretion may Rest on Adverse Possession as well as in Deed.
3655. Government Survey Excluding River Accretion Attaches to Meander Lines.
3656. Boundary Line between Island and Main Land where Slough Filled up.

§ 3649. Accretion Defined.

"The court instructs the jury that the term 'accretion,' as used in the instructions in this case, means portions of soil added to that already in possession of the owner by gradual deposit caused by a change in the bed of the river, and that accretion belongs to the owner of the land, and it makes no difference whether the accretions were formed before or after the ownership has accrued, and that ownership may be acquired by adverse possession as well as by deed."—Approved: Benne v. Miller, 149 Mo. 228, 50 S. W. 824.

§ 3650. Accretion by Recession of River.

"Although the jury may believe from the evidence that the land in question first appeared above the water as a large bar, made to and against the north shore or bank of the Missouri river, after an overflow and rise of the waters of said river, still, if this bar was so made by the gradual deposit of earth, sand, and sediment by the action of the water, and by the gradual receding of the water of said river to the south, it is an accretion, and your verdict will be for plaintiff."—Approved: Chinn v. Naylor, 182 Mo. 583, 81 S. W. 1109.

§ 3651. Question of fact whether there was an Island or an Accretion to the Shore.

"The jury are instructed that it is for them to determine, as a question of fact, from the evidence whether the tract of land sued for was formed as an island in the Missouri river, or as an accretion to the north bank of said river; and if the jury find from the evidence that said land was formed against the north shore by the gradual receding of the waters of the river from said shore, and the deposit of earth and other substances against said bank, then your verdict must be for the plaintiff."—Approved: Chinn v. Naylor, 182 Mo. 583, 81 S. W. 1109.

§ 3652. A Bar to Form an Accretion to be Annexed to the Shore.

"Although the jury may believe from the evidence that after an original bar was formed in the river, if you find the bar was formed

therein, and willows had begun to grow thereon, there was deposited upon said bar by the waters in one season earth, sand, and other substances, so as to raise the sand bar four or five feet higher than where it was first formed or made, still this will not prevent the same from being an accretion to the north shore of the river, provided the jury shall find from the evidence that the land or bar as originally made was formed against and annexed to the said north shore by the action of the waters in receding from said shore and running further south."—Approved: Chinn v. Naylor, 182 Mo. 583, 81 S. W. 1109.

§ 3653. New Accretions Covering Land Lost by Former Accretions.

"The court instructs the jury that if you believe from the evidence that the defendants, John M. Little, James W. Little, and Mary E. Brown, are the same persons described in the deed from Elizabeth Little and introduced in evidence, then they became owners of the land described in the patent from the United States to Eiler, also introduced in evidence in this case; and if you further believe from the evidence that such land was in the form of an island in the Missouri river, then the boundaries of said land extended in each direction to the water's edge, and all new land or soil, which you believe from the evidence may have been added to such island by gradual accretion to its shores, or by the gradual recession of the waters of the river from its shores, became a part of such island and also became the property of said defendants, even though such accretions and new land so formed and added to said island extended over and included portions of that territory where land owned by Nicholson had formerly been located, provided you also believe from the evidence that said land of said Nicholson located in said territory as above described had been washed away by the river to the level of the river's bed, and to such extent that the channel of said river flowed over the same locality occupied by said portions of land of said Nicholson prior to the formation of said accretions and new land.

"And if you further believe from the evidence that the land in dispute in this suit is made up of land described in said patent from the United States government, or any part of same, and new land gradually added thereto by accretion or recession, as above described, then the plaintiff acquired no title or right of possession to the land in dispute by reason of the patents to same made by the county of St. Charles or its officials, and your verdict should be for defendants."—Approved: Bradshaw v. Edelen, 194 Mo. 646, 92 S. W. 691.

§ 3654. Title to Accretion May Rest on Adverse Possession as Well as in Deed.

"The court instructs the jury that if they believe, from the evidence, that S. cleared and cultivated the land east of the old levee, beginning at an old stone in the southeast corner of the lot No. 7 of the D. tract, and running eastwardly at right angles to said old levee toward the Mississippi river, and that he and those under whom he

claims title have been in the open, public, notorious and adverse possession thereof, claiming title thereto, for more than (time prescribed by statute) prior to the institution of this suit, plaintiff is not entitled to recover any part of the land so occupied, nor any part of the accretion thereto."—Approved: Benne v. Miller, 149 Mo. 228, 50 S. W. 824.

§ 3655. Government Survey Excluding River—Accretion to Meander Lines.

"The court instructs the jury that when the United States surveyed the land through which the Des Moines river flowed, and abutting thereon on either side of said river, the same was treated as a navigable river, and the land along its shores was meandered on both sides of said river, and the space between the meander lines on each shore was excluded in calculating the number of acres in any section or part thereof through which said river flowed; and the purchasers of the tracts of land abutting upon said river acquired title to the meander line of said river, but at the same time became what is known in law as 'riparian owners,' so that the encroachment by the river upon their land, and washing away, would be their loss, and at the same time any accretions made by the river to their land abutting upon said river would inure to their benefit and become their property; and hence, if you find from the evidence in the case that on the south side of the river, and east of the line 60 rods west of the east line of said sections there have been accretions to the land in said section 16, abutting upon said river, by reason of which the quantity of land abutting thereon has been increased, then such increase would inure to the benefit of the abutting owner thereof, and if the plaintiff was such abutting owner thereof, on the south side of said river, it would inure to her benefit, but only to the extent to which the same was added to her land abutting thereon, and included in said southeast quarter section, east of the 60-rod line."—Approved: Dashiel v. Harshman, 113 Iowa, 283, 85 N. W. 85.

§ 3656. Boundary Line Between Island and Main Land Where Slough Filled Up.

"The court instructs the jury that if they believe from the evidence that a slough, or arm of the Missouri river ran between Island 73 and survey 1922, at the time of making the United States survey, and that since that time the same has been filled up so as to connect the Island with the main land, and make the Island and survey one continuous tract of land, then the adjacent owners of Island 73 and survey 1922 are entitled to the accretions to their respective lands, but if the slough simply filled up from the bottom, or by deposits within the bed of said slough, and said accretions did not form on the one side or the other, then the center of the slough as it was before the water deserted it, is the boundary between said survey and said island."—Approved: Buse v. Russell, 86 Mo. 209.

CHAPTER CII.

EMINENT DOMAIN

§ 3657. Right of Way—Fee in owner who may Use for Purpose not Inconsistent.
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3685. Opening Street—Difference between Damage and Benefits Allowed Owner.

§ 3657. Right of Way—Fee in Owner Who May Use Same for Purpose not Inconsistent.

"The court instructs the jury that the defendant corporation does not, by its proceedings appropriating the plaintiff's land, or by the award in this case, acquire the fee or the absolute title to the lands appropriated. What it does acquire is the right to use and occupy the land for the purposes for which it was appropriated, and the owner of the land has at all times the right to possess and use the land for any purpose not inconsistent with the purpose for which it was appropriated, and, in case of the abandonment of the use of the land by the defendant for the purpose for which it was appropriated, the entire possession and title to said land reverts to the plaintiff."—Approved: Dethample v. Lake Koen Navigation, Reservoir and Irrigation Co., 73 Kan. 54, 84 Pac. 544.

§ 3658. Same—Railroad May Fence Off—Construct and Operate Railway and Use Earth, Stone, Etc.

"The land which the defendant has taken for its right of way is a strip of ground one hundred feet in width, and lying fifty feet on either side of the center line of the track of defendant's railroad, as the same is laid upon the surface of the ground. The right which the defendant acquires to this strip of ground is a right to fence it off from the adjoining lands on either side, and construct and operate its railroad thereon. It may also take, remove, and use, for the construction and repair of said railway and its appurtenances, any earth, stone, gravel, timber, or other materials on or from the land so taken. The right is a perpetual one, at the option of the defendant; that is, it will continue so long as the defendant, or any person or corporation claiming under it, sees fit to and does use said land for railway purposes. If, at any time, the railway built upon this right of way should cease to be used or operated for a period of eight consecutive years, the land embraced in said right of way, and the title thereto, would revert to the person who then owned the adjoining land."—Approved: Winklemans v. Des Moines N. W. R. Co., 62 Iowa 11, 17 N. W. 82.

§ 3659. Railroad Taking Quarry—Blasting not Element of Damage as Law Protects Others.

"You are instructed that, if you find from the evidence that Castle Rock can only be profitably worked by blasting it in such a manner that portions of it would fall upon land now owned by the railroad company, then you may disregard all the evidence of value as a quarry. The owners of Castle Rock are by law required, if they desire to quarry the same, to so quarry their rock as not to interfere with the rights of others. If you find from the evidence that petitioner herein owns a right of way across the Snooks donation land claim and up to the land of defendants, then it is the duty of the defendants or claimants to quarry the rocks so as not to interfere or trespass upon this right of way, and you are not to consider the inability of defendants or claimants to use this right of way on the Snooks donation land claim as an element of defendants' damages whereby the property not taken by the

action is damaged. The damage you are to consider is confined to that which arises and naturally flows from the appropriation of the land for a right of way across defendants' land, which is sought by this suit."—Approved: Portland & Seattle Ry. Co. v. Ladd, 47 Wash. 88, 91 Pac. 573.

§ 3660. Railroad May Construct Track Usual and Ordinary Way—May Divert Flow of Water.

"A railway company, by virtue of acquiring right of way across a tract of land, acquires the right to construct its tracks in the usual and ordinary way. It may construct it upon an embankment, if such is the better method, considering the character and lay of the ground in the immediate locality. It is not obliged to so construct its road as to avoid entirely the obstructing or interfering with the natural flow of surfact water which does not flow in well-defined channels. On the contrary, it may divert and obstruct the flow of such water to the extent that the same may be reasonably necessary to accommodate the same to the customary and usual mode of constructing a railroad in such places, and to the extent reasonably necessary to enable the railway company to so construct and maintain its road as to promote the reasonable and safe operation of trains thereover."—Approved: Blunck v. Chicago & N. W. Ry. Co., 142 Iowa, 146, 120 N. W. 737.

§ 3661. Railroad Must Provide Crossing to Public Road.

"If the jury believe from the evidence that the defendant, the Louisville & Eastern Railroad Company, while in and about the construction of said railroad, through the farm occupied by the plaintiff, destroyed his passway or crossing out to the public road, it was their duty to provide a crossing in reasonably good order and condition, and within a reasonable time after the original crossing was destroyed, and if the jury believe from the evidence that said crossing was not provided in a reasonable time, after the destruction of the then existing crossing, they should find for the plaintiff. If the jury believe from the evidence that the defendant negligently tore down plaintiff's fences, or if they believe from the evidence that it was necessary to tear down said fences in the prosecution of the construction of said road, and defendants tore down said fences and failed for an unreasonable length of time to provide fences so as not to expose his farm and premises to the depredations of stock, they should find for the plaintiff."—Approved: Louisville & E. R. Co. v. Hardin (Ky.), 117 S. W. 381.

§ 3662. Drainage Ditch Crossing Railroad Right of Way must Pay Cost of Bridge.

(a) "You have also been told that you may consider the cost of keeping and maintaining the bridge you find reasonably necessary, adequate, and sufficient in a reasonable, safe, and adequate condition for use as a passageway over the ditch as compared with the expense of keeping the earth embankment at the place where the ditch crosses the right of way in such condition. You may consider this matter in determining the kind of bridge or other structure reasonably necessary, adequate, or sufficient, and may also consider and

allow for it as damages otherwise, except in so far as you allow for and consider it in determining the kind of bridge reasonably necessary and adequate; that is to say, to the extent to which you give it place or consideration in determining the kind of bridge reasonably necessary, adequate, and sufficient. You are not otherwise to allow for or consider it."—Approved: Mason City & Ft. D. R. Co. v. Board of Sup'rs of Wright County (Iowa), 116 N. W. 805 (not reported in state reports.)

(b) "In determining the kind of bridge or other structure reasonably adequate, necessary, and sufficient for a passageway over said ditch, you are not to take into account or allow for a structure to be made by putting piles or other material permanently in said ditch. The plaintiffs in constructing said bridge or other structure must not place in the limits of the ditch as defined by the plans and specifications therefor any such piling or other material permanently, but the bridge for which you are to allow is one which is to be made in such manner or form as not to require the placing of any material permanently within the limits of the ditch as indicated and provided for by said plans and specifications."—Approved: Mason City & Ft. D. R. Co. v. Board of Sup'rs of Wright County (Iowa), 116 N. W. 805 (not reported in state reports.)

§ 3663. Damages Actual Cash Market Value at Time of Taking.

"The jury are instructed that in determining the value of the one hundred and sixty acre tract of land involved in this case they are to fix the actual cash market value of said land on August 1, 1891; and you are further instructed that you are not to consider the price which the land would sell for under special or extraordinary circumstances not existing at the time, but its fair cash value if sold in the market under ordinary circumstances, or under the circumstances then existing, for cash, and not on time, and assuming that the owner is willing to sell and the purchaser is willing to buy."—Approved: Dady v. Condit, 209 Ill. 488, 70 N. E. 1088.

(b) "You are not to consider what the land was worth to the defendant, the owner, for speculation, or merely possible uses, nor what she claims it was worth to her, nor what it may be worth to plaintiff for railroad or other purposes, nor what the land would bring at a forced sale. You are not to consider the price the land would sell for under special or extraordinary circumstances, but its fair, market value, if offered in the market under ordinary circumstances for cash, a reasonable time being given to make the sale. Market value is the amount the strip would sell for if put upon the open market, and sold in the manner in which property is ordinarily sold for cash in the community where it is situated, with a reasonable time being given to find a purchaser and make the sale."—Approved: Sacramento Southern R. Co. v. Heilbron, 56 Cal. 408, 104 Pac. 979.

(c) "In ascertaining the market value you may consider the purposes for which the land is adapted, and the price for cash it would bring for any purpose, allowing a reasonable time in which to find

a purchaser on February 14, 1906."—Approved: Sacramento Southern R. Co. v. Heilbron, 156 Cal. 408, 104 Pac. 979.

§ 3664. Speculative Value Not to be Considered.

"The location of the property, its surroundings, and all other things are to be considered, but you are not to indulge in speculation or conjecture. The law does not require that the plaintiff, in order to take the land, should pay a value based upon speculation, or what might happen if certain things would occur."—Approved: Sacramento Southern R. Co. v. Heilbron, 156 Cal. 408, 104 Pac. 979.

§ 3665. Actual Value Independent of Purpose it is to be Used For.

"The market value of the property means its actual value independent of the purposes for which it is to be used by the railroad company; that is, the fair value of the property as between one who wants to purchase, and one who wants to sell it. Not what could be obtained for it in peculiar circumstances when greater than its fair price could be obtained; nor its speculative value; nor the value obtained through the necessities of another; nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer. The question is: If the defendant wanted to sell his property, what could be obtained for it upon the market from the parties who wanted to buy and would give its full value? The market value is not to be determined by the value of the railroad company or the railroad's necessity for acquiring it. This consideration must, in no way, be allowed to affect the determination by the jury of the value of the property sought to be appropriated by the railroad company."—Approved: Metropolitan Street Railway Company v. Walsh, 197 Mo. 392, 94 S. W. 860.

(b) "Assuming that the railroad company wishes to buy the land, but is not compelled to do so, and the defendants wish to sell the land, but are not compelled to do so, you are to ascertain and find from the proof, under these circumstances, what was the actual reasonable cash value of the land sought to be appropriated and set apart for this right of way—that is, in the form, in the amount, and at the place taken; and in assessing the damages to that portion of the land actually taken and set apart for the use of the railroad company for its right of way you are to give the owners the reasonable market value in cash, at the time of the appropriation, to wit, October 17, 1902, without any deduction."—Approved: Vaulx v. Tennessee Cent. R. Co., 120 Tenn. 316, 108 S. W. 1142.

§ 3666. Location, Present and Probable Adaptability and bona fide Sales in the Vicinity to be Considered.

"In determining the value of the land in controversy, taken by plaintiff, the jury may take into consideration its location, the uses and purposes for which the property is suitable or adaptable considering such location, and having regard, not alone to the existing business wants of the community in which the same is located, but also to such uses as may be reasonably expected in the near future, together with all the surroundings and conditions as shown in evidence in this case; and

you may also take into consideration other bona fide sales of property in the immediate vicinity and similarly located, made at or about the time the commissioners made their report in this case, to wit: July 18, 1902."—Approved: Metropolitan Street Railway Company v. Walsh, 197 Mo. 392, 94 S. W. 860.

§ 3667. Fair Market Value at the Time—Not Speculative Value.

(a) "The petitioner is not entitled, as I have just said, to swell the damages beyond the fair market value of the land by any consideration of the chance or probability that the petitioners might acquire authority by legislation to carry the water in pipes for the purpose of supplying the town of Merrimac or any other town. You cannot go beyond the fair market value of the property at the time that it was taken."—Approved: Sargent v. Town of Merrimac, 196 Mass. 171, 81 N. E. 970.

(b) "In estimating such value and the damages, the rule of law is that the owner is only entitled to the difference between the fair market value of the land before it was taken, and the fair market value of what remained after the taking of the part by the railway. In determining the value of the land actually taken you are to be governed by the fair market value in December, 1880,—what was the fair market value of the land at that time for any purposes for which it might reasonably be used in the immediate future,—not what would lots sell for in the distant future if a street were opened and lots offered for sale. Nor, indeed, is the price per lot a measure of value either in the near or the distant future."—Approved: Watson v. Milwaukee & M. R. Co., 57 Wis. 332, 15 N. W. 468.

§ 3668. Value of Land for Platting Into Lots.

(a) "If the land possesses a value for residence purposes when platted into building lots, in view of its situation with reference to the town of Petersburg, the defendant is entitled to the fair value of the land for such purpose, although at the time of the commencement of these proceedings the land had not been platted for such purpose."—Approved: Petersburg School Dist. of Nelson County v. Peterson, 14 N. D. 344, 103 N. W. 756.

(b) "If the jury believe from the evidence that there was a demand for acreage property in and about Waukegan on August 1, 1891, for purposes of subdivision and sale in lots, and that the land in controversy was at that time supposed to be adapted to subdivision and sale in lots, and in consequence of its supposed adaptability to such subdivision and sale in lots had a market value above the price which the plaintiff, Condit, agreed to pay for it, the jury must take into consideration such increased value above such contract price, whether such demand for acreage property, if any, was permanent or temporary, and whether, if the land in controversy had been subdivided, there would have been at that time any demand for the lots thereof or not."—Approved: Dady v. Condit, 209 Ill. 488, 70 N. E. 1088.

§ 3669. Not use of Land, but Adaptability is Test.

(a) "In determining the uses and purposes for which defendant's lot was suitable or adaptable, the jury are not confined solely to the

use, if any, made of said lot at the time it was taken by plaintiff, but may also consider such uses, if any, for which it was reasonably adaptable at that time, considering its location and surroundings."—Approved: Metropolitan Street Railway Company v. Walsh, 197 Mo. 392, 94 S. W. 860.

(b) "You must take into consideration the purposes for which the property was adapted, and determine the market value from what a person would then have paid for the property, in cash, not buying, however, for any particular purpose, but having regard to the market value of the property, as it then stood for all purposes."—Approved: Sacramento Southern R. Co. v. Heilbron, 156 Cal. 408, 104 Pac. 979.

(c) "In estimating its value, all the capability of the property and all uses to which it may be applied are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner. It is not a question of the value of the property to the owner, nor can the value be enhanced by his unwillingness to sell. On the other hand, the damages cannot be measured by the value of the property to the party condemning it, nor by its need of the particular property. You cannot single out from the elements of general value the value for a special purpose, but you are to consider all the constituent elements that make up the market value. Its availability, adaptability, and capability for different uses and purposes, and everything which enhances or depreciates its worth, should be taken into consideration."—Approved: Vaulx v. Tennessee Cent. R. Co., 120 Tenn. 316, 108 S. W. 1142.

§ 3670. Disadvantages to Remainder of Land —Direct and Peculiar.

(a) "The jury will consider the benefits, if any, and the disadvantages, if any, resulting to the remainder of defendants' said property from the appropriation by plaintiff bridge company, of the strip of land in question for the purpose of its bridge and approaches. The benefits to be considered and allowed by the jury are the direct and peculiar benefits, if any, which result to the remainder of defendants' said property, and not the general benefits which defendants derive in common with the other land-owners in the vicinity from the building of the bridge and its approaches."—Approved: Southern Illinois & M. Bridge Co. v. Stone, 194 Mo. 175, 92 S. W. 475.

(b) "If the value of the land was equally as great, or greater, immediately after the taking than it was before, then you will find against the defendants upon the plea for resulting damages. If the value of the land was less immediately after the taking and the construction and operation of the railway than it was immediately before, and you further find that said decrease in value was the result and necessary consequence of the construction and operation of the railway across the land, then you will ascertain the amount of such decrease in value, and find for defendant the amount of the same, in addition to the value of the land actually taken."—Approved: Dallas & G. Ry. Co. v. Chenault (Tex. App.), 16 S. W. 173 (not reported in state reports).

(c) "If the jury believe, from the evidence, that plaintiff is the owner in fee-simple of the land described in the declaration, and that the defendant railroad company, in constructing its roadbed and track, entered upon any portion of plaintiff's said land, and dug up and carried away the soil, and that such acts were a physical injury to such lands, or any part thereof; and if the jury further believe, from the evidence, the construction of defendant's road-bed and track along, near, and adjacent to plaintiff's land, and its contemplated maintenance and operation (if the jury believe, from the evidence, they are so constructed, and that defendant intends to maintain and operate the same) are an actual damage to his lands, and do in fact render the same less valuable in the market if offered for sale,—then the law is for plaintiff, and the jury should find for him; and the jury are instructed, as a matter of law, plaintiff is entitled to recover for any depreciation, if the jury believe, from the evidence, there has been any depreciation, in the market value of plaintiff's lands not actually entered upon by reason of the construction, maintenance, and operation by defendant of its railroad as constructed, and also for any physical injuries done to that portion of plaintiff's land upon which defendant did actually enter, if the jury believe, from the evidence, defendant did enter upon any portion of plaintiff's lands described in the declaration, and did cause any physical injuries to the same. The jury are further instructed, on behalf of the plaintiff, that, in determining whether plaintiff's lands are lessened in value by reason of the construction and the proposed operation of the railroad, then the jury may consider the injury to plaintiff's lands, if any is proved, arising from the inconveniences actually brought about and occasioned by the construction of defendant's railroad, although such damage might not be susceptible of definite ascertainment; and may also consider such incidental injury as the proof may show might or would result from the perpetual use of the track for moving trains, or from the inconveniences in using said lands for farming purposes and in handling stock upon it, if the proof shows such railroad would occasion any such inconveniences; and they may consider generally such damages as the evidence may show, if any are reasonably probable to ensue from the construction and operation of the defendant's said railroad."—Approved: Lake Erie & Western R. Co. v. Scott, 132 Ill. 429, 24 N. E. 78.

(d) "In the next place, you are to consider whether there are any incidental damages to the property and to the owners, independent of that portion of the land actually appropriated. Incidental damages may be of the following character: They may result from the necessity of new fences or walls to be constructed, or the removal of outbuildings, or the inconvenience of going through it, or the general inconvenience suffered by the owner on account of the land being cut in some particular shape, and are to be estimated also as though the land taken was occupied by as many railroad tracks as is practicable, and any form of incidental damages shown by the proof that effects the value of the tract of land in question. But you will not consider as an element of damage any depreciation resulting from apprehension of

danger or negligence in the operation of plaintiff's railroad."—Approved: Vaulx v. Tennessee Cent. R. Co., 120 Tenn. 316, 108 S. W. 1142.

(e) "So, in seeking the value of this farm immediately after the right of way was taken, you will consider not only the opinion of witnesses, but the facts upon which a just opinion ought to be based. You will consider not only the loss of the land actually taken, but the condition in which the farm was left after the appropriation, and every inconvenience naturally resulting from such appropriation by which the market value of the farm was then unfavorably affected. I need not enumerate these inconveniences in detail. You are not to allow damages for these inconveniences as such, but you are to consider them for their bearing, and only for their bearing, on the market value of the farm to which such inconveniences are attached. To illustrate: If you find among these inconveniences the necessity of opening gates, and crossing the railroad often, in conducting the operations of the farm, you will not attempt to estimate the damages resulting from this inconvenience, and make this estimate a part of your assessment; but in estimating the fair value of the farm you will look at the farm with this inconvenience attached, and give it due weight in making this estimate."—Approved: Dudley v. Minnesota & N. W. R. Co., 77 Iowa, 408, 42 N. W. 359.

§ 3671. Incidental Benefits and Damages Offset Each Other.

(a) "Should you find that there are such incidental damages, then you can offset the same from the enhancing of the value of this remaining tract of land to the owners, if any such be proven, on account of the enhanced facilities of travel, or by the erection of a depot or a village or town upon the lands; and if such incidental benefits, under the proof, equal the incidental damages, then you would so report, but if the incidental damages exceed the incidental benefits, then you should report what amount you allow for such incidental damages. Your verdict should first show the amount you find for the defendants for the reasonable cash value of the land, 9.12 acres, actually appropriated for the right of way; then the amount, if any, which you may allow for incidental damages; and upon these two amounts you should allow interests from the 17th day of October, 1902, to this date, at 6 per cent. interest per annum."—Approved: Vaulx v. Tennessee Cent. R. Co., 120 Tenn. 316, 108 S. W. 1142.

(b) "The court instructs the jury that, if they believe from the evidence that the right of way of the defendant company is over or upon any portion of any lands belonging to the plaintiff, then they ought to find for the plaintiff, the value of such portion of said land at the time the same was appropriated by defendant, or its predecessors, if any such portion was appropriated, and such damages, if any, resulting to the adjacent lands in the condition they were at said time, considering the purpose for which said land was taken, if any was taken, less the value, if any, of the advantages and benefits that would or have accrued, if any, to such adjacent lands from the prudent and careful construction

and operation of the railroad owned by the defendant and its predecessors over the same, if any portion thereof was constructed or operated thereover, with interest on such amount, if any, from the time the same was appropriated, if it was appropriated, to this date, not however exceeding the sum of $8,000, the sum claimed in the petition."—Approved: Pryse v. Louisville & A. R. Co. (Ky.), 104 S. W. 698 (not reported in state reports.)

§ 3672. Damage in Excess of Special Benefits.

"If you think that the conditions that exist in that locality without the improvement projected by this ordinance are unsettled with respect to permanency of grade, with respect to the location of the bridge over the canal, with respect to the time that the government might permit the canal to be used at the present grade, if you think that the present conditions are unsettled so as to affect the market value of the property, then you will inquire from the evidence whether, by virtue of this proposed public improvement, these conditions will be settled, whether permanency will be brought about affecting the market value of the property, and if, from consideration of the whole case you are satisfied that the property is damaged in excess of the special benefits that will accrue to it over and above the general benefit flowing to the public from this public improvement, why, then, your verdict would be for damages with respect to the realty alone at that amount."—Approved: In re Westlake Ave. (Wash.), 111 Pac. 780.

§ 3673. The Part Taken Independently Valued, and if Damages Exceed Benefits the Difference is to be Added.

"This is an appeal from the award of damages sustained by plaintiff by reason of the location and construction of defendant's railroad over and across the east half of the south-west quarter, and the south-west quarter of the south-west quarter, of section 31, in township 13, of range 10, of this county. If you find from the evidence that the plaintiff was, at the date of the location and construction of defendant's said railroad, the owner of the whole of said quarter section, then you are instructed that plaintiff would be entitled to recover in this action whatever damages you may find from the evidence she sustained upon the whole quarter section, if any, notwithstanding only part thereof was described in the condemnation proceedings. (2) You are instructed that, in estimating plaintiff's damages, you will take into consideration all such injuries to the property as necessarily result from the legal and proper construction of defendant's road in the manner shown by the evidence, and also that resulting from its lawful and proper and perpetual use in the future. (3) You will first estimate the value of the strip of land, actually taken and occupied by the defendant, and to this sum you will add the damages, if any, which you find from the evidence was sustained by the remainder of the plaintiff's said farm. (4) If you find from the evidence that, upon the strip of land as occupied and taken by the defendant, there was at the time it was taken a stone-quarry which by the construction and maintenance of defendant's road over it has been rendered less valuable or im-

practicable to work, then you will take such facts into consideration in estimating the amount plaintiff should recover for the strip of land actually taken and occupied by defendant. (5) You are instructed that if you find from the evidence that the house on these premises stands within the right of way of defendant's road, then plaintiff should recover for the value of such right of way, including the value of the house as shown by the evidence."—Approved: Burlington & M. R. R. Co. v. White, 28 Neb. 166, 44 N. W. 95.

§ 3674. Actual Depreciation in Market Value of Remaining Land.

"The interruption of plaintiff in the use and cultivation of his land, or any inconvenience he may have been put to in its cultivation and use as a livestock farm, or otherwise, according to his peculiar taste in farming, since the appropriation of the right of way, if any, cannot be considered by the jury as forming an element of damages in his favor, and your inquiry must be confined to the marketable value of plaintiff's land before and after the right of way was appropriated, taking into the account, in this connection, the number of acres taken for right of way, the manner of its location, the way his land is cut by the railroad, and the like, so as to be able to estimate the true market value of his land affected by the location of the railroad before and after such location. The difference in the market value of the land affected by the appropriation of the strip for right of way before, and then again after, the right of way is asserted, will form or constitute his true measure of damages.

"Nevertheless, if you find, from the evidence, that plaintiff's farm consisted of near 500 acres of improved lands, and the right of way of defendant cut the same in such a manner as to injure the value of the same by throwing it open and dividing it into pieces, you are at liberty to consider all the circumstances and effects upon the lands and lots, if any, by reason of the location upon the lands of the railroad, and all the inconveniences directly caused by the railway, in determining the effect the same would have upon the market value of the lands; and it is the depreciation in market value of the premises which is the true measure of damages, and which you are to allow for, and not the matters which would cause such depreciation."—Approved: Hartshorn v. Burlington, Cedar Rapids & Northern Railroad Company, 52 Iowa, 613, 3 N. W. 648.

§ 3675. Strip Taken by Telephone Company—Depreciation to Remaining Land.

"In determining the value to the balance of the several tracts not included in the 8-foot strip, you should determine from the evidence how much said land will be depreciated in value by reason of the taking for the particular use of the 8-foot strip or the portion thereof necessary to be taken. What is the difference, if any, between the cash market value of the entire tract of land excepting the 8-foot strip before the erection of the said telephone and telegraph lines thereon and its present cash market value after said line has been erected. Such difference will be the damage occasioned to the defendant arising un-

der the second element of damage."—Approved: Tri-State Tel. & Tel. Co. v. Cosgriff (N. D.), 124 N. W. 75.

§ 3676. Market Value with Regard to Existing Business and that Reasonably to be Expected.

"In this case, if you should find that land taken contains building stone, you are instructed that the measure of compensation is the fair market value of the land taken with the building stone in it, and the profits or the price or value of such building stone, if the same or any part thereof will be taken by the proposed right of way, should not be considered by you as building stone in arriving at your verdict. The number of tons of building stone that could be gotten from the land, and the value per ton thereof, or the royalties thereon, are not to be considered except as they may guide you in fixing the value of the lands taken or injury to quarry lands; and as a special rule for your guidance in arriving at the value of any portion of the quarry which you may find from the evidence will be taken, and of the amount of damages to any portion of the quarry not taken, I instruct you that the compensation to be awarded by you to the owners is to be estimated by a reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the near future."—Approved: Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.

§ 3677. Part Appropriated Injuring Business Adaptability of Remainder.

"As you have been before instructed, where property is taken for public purposes the owner is entitled to its fair market cash value for the uses to which it may be most advantageously applied, for which it would sell for the highest price in the market; and if you should find from the evidence in this case that portions of the land taken border on the shores of Chuckanut Bay, and that the lands immediately in front thereof are available for manufacturing purposes of any kind, and that, in order to utilize, lease, or sell them for such purposes, it would be necessary to have fresh water; that on other portions of the land not taken there is fresh water sufficient for the purpose; and that the construction of this road will interfere with the bringing of the water over the right of way,—this is an element that you would have a right to consider in estimating the damages sustained. In this connection you should also take into consideration the fact that the railway company has stipulated in this case and agreed to construct culverts upon its right of way, under its track, for the transmission of water from all springs now upon the uplands not taken, and that the railway company would be bound by such stipulation to construct its roads in such manner as to permit the flow of the water from such springs across its right of way."—Approved: Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.

§ 3678. Possibility of Railroad's Negligence as to Fire May be Considered.

"You cannot assume that the owner of this farm will some time be injured by fire in consequence of defendant's negligence, and you cannot assess damages on this account; but if you believe the necessary danger from fire in operating the defendant's trains over this farm is a fact which would tend to depreciate the value of such farm, then this danger from fire may be considered with other things in seeking the value of this farm immediately after the appropriation. The same method of investigation will guide you in considering every inconvenience that can be properly considered by you."—Approved: Dudley v. Minnesota & N. W. R. Co., 77 Iowa, 408, 42 N. W. 359.

§ 3679. Common Benefits not Taken Into Consideration.

(a) "The plaintiff in this petition is entitled to recover all damages sustained by it to the property in question occasioned by the construction of the tunnel and its station, and in estimating such damages you are not to take into account the benefit, if any, received by said property from said tunnel and station."—Approved: Fifty Associates v. City of Boston, 201 Mass. 585, 88 N. E. 427.

(b) "In estimating the amount of the damage, if you find in favor of plaintiff, you will not take in consideration either the benefits or the injuries to plaintiff's said property which he may receive or sustain in common with the community generally where said property is situated, which results from the construction and operation of the defendant's railroad, and which are not peculiar to him, and connected with his ownership, use, and enjoyment of the said property."—Approved: Morrow v. St. Louis, A. & T. Ry. Co., 81 Tex. 405, 17 S. W. 44.

(c) "The court instructs the jury that although they may find from the evidence in this case that all property in the vicinity of plaintiff's premises, through which defendant's road runs, experienced a general increase in value, by reason of the construction of defendant's road, and that plaintiff's premises shared in such general increase, still they must not deduct such increase in the value of plaintiff's premises from the damages done to the said premises by the construction of defendant's road through them, nor are they permitted to consider said increased value of said premises for the purpose of reducing plaintiff's damages."—Approved: Chicago, K. & N. Ry. Co. v. Wiebe, 25 Neb. 542, 41 N. W. 297.

§ 3680. Servitude for Telegraph Poles—Difference in Value Before and After Appropriation.

"That the measure of damages which the plaintiff is entitled to recover, if anything, is the difference in market value of his tract of land immediately before and immediately after its appropriation to the uses of the defendant, and, in arriving at the amount of such damage, the jury should take into consideration any benefits accruing to the plaintiff, and any enhancement of the value of his land, if any, by reason of the erection of, and maintenance of, defendant's telephone line upon his land.

"In estimating what damage, if any, the plaintiff is entitled to recover, the jury will take into consideration that the lines and poles will remain upon plaintiff's land for all time to come; that he cannot build a building or fence upon the land which will in any way interfere with the defendant's use of its line; that he cannot complain of any damages which the defendant may do to crops or fences upon the land, in so far as such damages may be necessary in the operation or repair of its line. You will also take into consideration the value of said franchise to the company, and place upon it such reasonable value as you shall find."—Approved: Wade v. Carolina Telephone & Telegraph Co. (N. C.), 60 S. E. 987.

§ 3681. Highway Across Railroad Track—No Recovery.

"I instruct you that a railroad acquires its right of way subject to the right of the state to extend public highways and streets across the same, and subject to the condition that it must place, keep, and maintain all highway crossings, regardless of whether the highway was established before or after the railroad was constructed, and in such condition as not unnecessarily to impair the usefulness of the highway, and in such manner as to afford security for life and property. I therefore instruct you that should you find by a preponderance of the evidence in this case that the proposed highway will necessitate the crossing of the right of way at right angles of the New York, Chicago & St. Louis Railroad Company, and will not interfere with the operation of said railroad, said company cannot recover damages in this case, and your verdict on that issue, so far as said railroad company is concerned, may be for the petitioners."—Approved: New York, C. & St. L. R. Co. v. Rhodes, (No. 20,994.) (Ind.), 86 N. E. 840.

§ 3682. Change of Grade in Street—Damage Offset by Benefit.

"The court instructs you that if you believe from the evidence that the city raised the level of Washington Street, or caused it to be raised, for the laying of a pavement thereon, that such raising of said street above its former level damaged the property of the plaintiff described in the declaration, and reduced its market value, then the plaintiff is entitled to recover the amount that his said property was so damaged, less the benefit, if any, which the evidence shows the property received from the making of the street improvement.

"The court instructs the jury that in case they should believe from the evidence the plaintiff had been in any way benefited by the improvement of the street in front of plaintiff's property in question, then in such estimate the jury should deduct from such benefit what they believe from the evidence plaintiff has paid, and is liable to pay, toward making the pavement in front of said premises, and in any event it is only the difference between the benefits proved by the evidence and such payment, and liability to pay which can be set off against the damage to plaintiff's property if plaintiff has proven any damage.

"The court instructs you that the measure of damages in this case, if any, have been proven, is the difference in the market value of plaintiff's property before the level of the street was raised and its market

value after the street was so raised."—Approved: City of Bloomington v. Pollock, 38 Ill. App. 133.

§ 3683. Grading Street—Special Benefits—Deducting from Damages.

"By 'special benefits' are meant such benefits, if any, as accrued to the lots by the grading of the street, by reason of their fronting upon a street better graded than before, or by being rendered more accessible, if previously inaccessible, or any other benefits conferred specially by the grading of the streets upon plaintiff's lots which are not shared by the property in general upon the street or in the vicinity of the improvements.

"Such benefits, if any, as were conferred by the grading of the street upon plaintiff's lots which were shared in common by all other lots upon the street, or in the vicinity thereof, cannot be considered in estimating the amount of 'special benefits' to be deducted from the damages sustained by plaintiff by reason of the grading of the streets." —Approved: City of Omaha v. Schaller, 26 Neb. 522, 42 N. W. 721.

§ 3684. Same—Special Distinguished from Common Benefits.

"If you find from the evidence that, by reason of the grading of the streets, the lots of plaintiff were so specially benefited in the particulars above specified as that the market value of the lots after the grading was as great as or greater than it was before the grading, the plaintiff is not entitled to recover in this action; but in considering the question of the benefits derived by plaintiff's lots from the grading, and the effect produced thereby upon the market value of the lots, you will be careful to distinguish between such benefits as are common to all the property on the street or in the vicinity of the street and such as arose from the peculiar location of these lots, and their situation with reference to the street and the previous condition of the street immediately in front of these lots. The first are called 'general benefits,' and any addition to market value by reason thereof are not to be considered, nor is any general advance in market values, owing to the growth of the city or any other causes, to be considered, but the benefits arising from the peculiar location of the lots, and their situation with reference to the street, and the previous condition of the street in front of the lots, and the betterment of the lots by reason of the changed condition of the street in front of them, are called 'special benefits,' and any increase in value of the lots by reason thereof may be considered."—Approved: City of Omaha v, Schaller, 26 Neb. 522, 42 N. W. 721.

§ 3685. Opening Street—Difference Between Damage and Benefits Allowed Owner.

"In determining whether any such adjacent property is damaged, you will determine whether or not the remaining property is benefited, and, if the damage is in excess of the benefits arising from the opening of the proposed street, then you will assess the damages to the amount of such excess; but, if you find the benefit to the adjacent property is equal to the damage the adjacent property will sustain by reason of the opening of the street, then you will find the property is not damaged." —Approved: City of Tacoma v. Wetherby (Wash.), 106 Pac. 903.

CHAPTER CIII.

FALSE IMPRISONMENT.

A. False Imprisonment.
B. Libel and Slander.
C. Malicious Prosecution.

A. False Imprisonment.

§ 3686. False Imprisonment—Acts Constituting.
3687. Absence of Reasonable Grounds for Belief in Guilt.
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3695a. Imprisonment by Corporation's Servant in the Scope of his Employment.
3695b. Owner Causing Arrest of One Unlawfully withholding his Property.
3696. Right to Arrest Trespasser—Excessive Force.

§ 3686. False Imprisonment—Acts Constituting.

"Now a man may be imprisoned without being taken hold of by persons that imprison him. Suppose, for instance, an officer comes to one with a warrant and says, 'I want you to go along with me,' and you go along without his taking hold of you,—that would be an arrest. It is not necessary that he should lay his hands upon you. And if a man comes to you in any other way and uses words, or accompanies them with such an appearance that would lead you to be in fear of him, or make you comply with his demand, that would be an imprisonment. So, in this case, if the defendants came to this plaintiff and told him that they wanted to take him to the station house, and he complied, seeing the two together with clubs in their hands, and went with them through fear, that would be imprisonment."—Approved: Brushaber v. Stegemann, 22 Mich. 266, 268.

(b) "If the defendant caused the plaintiff to be arrested and imprisoned, without process of law, and against plaintiff's will and so

held for a period of ———, the jury should find for the plaintiff, and assess his damages in such sum as they believe from the evidence is sufficient to compensate him for the injury sustained."—Approved: Pandjiris v. Hartman, 196 Mo. 539, 94 S. W. 270.

§ 3687. Absence of Reasonable Grounds for Belief in Guilt.

"If you shall believe from the evidence in this case that at the time complained of by plaintiff the defendants James Collins, Henry Singery, and Tom Evitts, or either of them, unlawfully, wrongfully, or without having any reasonable grounds to believe plaintiff had committed a felony, arrested plaintiff and placed her in the jail house of the city of Paducah, and deprived her of her liberty for any time, then the law is for the plaintiff."—Approved: Johnson v. Collins (Ky.), 89 S. W. 253 (not reported in state reports).

§ 3688. Party Acting under Commitment by Court Justified.

"Although you may believe from the evidence in this case that the plaintiff was arrested by defendants Collins and Singery unlawfully and wrongfully, or without having any reasonable grounds for believing that plaintiff had committed a felony before she was arrested, yet if you shall further believe from the evidence that the plaintiff was ordered into defendant Evitt's custody, and to be confined in the jail of the city of Paducah, and that defendant Evitts received and confined the plaintiff in jail under an order from said judge, D. L. Sanders, then the law is for the defendant Evitts, and you will so find."—Approved: Johnson v. Collins (Ky.), 89 S. W. 253 (not reported in state reports).

§ 3689. Officer Arresting for Offense Committed in his Presence.

"In the case it is admitted by the defendant that he had no warrant for the arrest of the plaintiff. The laws of the state permit an arrest without a warrant, or 'on view,' as it is sometimes termed either (1) when a public offense is committed or attempted in the presence of the officer; or (2) when a public offense has been in fact committed, and he has reasonable ground for believing that the person to be arrested has committed it. It is claimed by the defendant in his answer that he arrested plaintiff for the first cause,—that is, for a public offense committed or attempted in his presence; and, unless this fact has been proven by him by a fair preponderance of the evidence, his plea of justification has failed, and justification at your hands cannot be made out upon any other ground than that set up by the defendant in his plea of justification."—Approved: Stewart v. Feeley, 118 Iowa, 524, 92 N. W. 670.

§ 3690. Officer Arresting Without Warrant Where No Offense in his Presence.

"The court instructs the jury that if defendant, being then the sheriff of ——— county, without having in his hand any capias for the arrest of plaintiff, arrested him and put him in the custody of his jailor, with instructions to take him to jail, and if afterwards, and

after said jailor had released the prisoner, under a suggestion that if there was no capias, nor offense committed in the sheriff's presence, defendant, in an insulting and unlawful manner, again, without any capias, arrested plaintiff and maltreated him, then find for plaintiff, and assess such a sum, by way of and for damages, as you deem adequate and proper, considering the nature of the facts proved."—Approved: Hall v. O'Malley, 49 Tex. 70.

§ 3691. Private Person Arresting Until Warrant may be Obtained.

"The jury are instructed that section 284 of the Criminal Code of this state provides as follows: 'Any person not an officer may without warrant arrest any person if a petit larceny or a felony has been committed, and there has been reasonable ground to believe the person arrested guilty of such offense, and may detain him until a legal warrant can be obtained.' And in this case if you believe, from the evidence, that the plaintiff assaulted one Barney Sullivan, with a knife, with intent to kill him, and if you further believe from the evidence that the defendants had reasonable grounds to believe the plaintiff guilty, then they had the right to arrest him, and detain him until a legal warrant could be obtained. And if you find from the evidence that the defendants so arrested plaintiff, and had reasonable ground to believe the plaintiff guilty, then you will find for the defendants."—Approved: Kyner v. Laubner, 3 Neb. Unoff. 370, 91 N. W. 491.

§ 3692. Arrest for Contempt by Sergeant-at-Arms.

"The plaintiff in this case sues the defendants for damages for false imprisonment. The testimony shows that he was imprisoned by J. C. Carr, one of the defendants, and confined in the jail of Travis county. The testimony further shows that in so imprisoning the plaintiff the said Carr was acting under the authority of a writ of commitment issued by the speaker and clerk of the house of representatives of the twentieth legislature of the state of Texas for contempt of that body. There are no facts in evidence which show the act of the said house to have been void; and the defendants, who are members of said body, cannot be held to respond in damages for their votes in adjudging the plaintiff guilty of contempt and ordering him committed therefor. The writ was a legal justification of defendant Carr in imprisoning the plaintiff. You will return your verdict in favor of all the defendants."—Approved: Canfield v. Gresham, 82 Tex. 10, 17 S. W. 390.

§ 3693. Detaining to Prevent Disturbance of Religious Worship.

"The jury are further instructed that the officers of the church at Beach Grove had the right to adopt reasonable precaution to have and preserve order on the church grounds while the congregation was assembled for worship, and had the right to engage the service of the defendants to assist them for that purpose, and defendants had the right, acting in said service in good faith, and using no more force than was necessary, to temporarily restrain any person creating a disturbance or doing an act calculated to lead to disturbance on the

grounds; and a temporary restraint under such conditions would not be unlawful."—Approved: Rich v. Bailey, 123 Ky. 827, 97 S. W. 747.

§ 3694. Chief of Police Arresting on Reasonable Grounds to Believe Plaintiff Guilty of Felony.

"If you shall believe from the evidence that previous to said arrest plaintiff's child had been shot, or killed, and that defendant James Collins, as chief of police of the city of Paducah, had received such information as would induce a person of ordinary prudence and discretion to believe that plaintiff had committed a felony by shooting, or aiding or abetting in the shooting, of said child, and that said Collins, relying on said information, had reasonable grounds to believe, and did believe, that a felony had been committed by plaintiff in the shooting of said child, and, acting upon said information and upon reasonable grounds he ordered defendant Singery to arrest plaintiff, although you may believe from the evidence that in fact no public offense had been committed by the plaintiff, and that said defendants Collins and Singery, or either of them, carried plaintiff, after she was arrested, before D. L. Sanders, judge of the Paducah police court, for an examination of said charge, and that said Sanders, after evidence was heard on said charge, ordered plaintiff into the custody of defendant Evitts, and plaintiff was then and thereafter confined in said jail under said order from said judge, then the law is for each of defendants, and you will so find."—Approved: Johnson v. Collins (Ky.), 89 S. W. 253 (not reported in state reports).

§ 3695. Conductor of Street Car Causing Arrest Without Reasonable Grounds.

"I further instruct you, gentlemen of the jury, that if you believe from the evidence that the plaintiff, Kupper, was arrested by the police officer for disorderly conduct, and such arrest was made by the police officer by reason or as a result of the representations and at the demand of the conductor of the car, and would not have been made by him but for such representations and demand by the conductor, and was not made by the police officer in the line of his duty and upon the information which he had other than the information and the demand of the conductor, and if you further believe from the evidence that there was no reasonable ground for the officer to believe at the time that the plaintiff was guilty of disorderly conduct or violation of the law, then the law of the case is for the plaintiff as to the false arrest, and you should so find."—Approved: Louisville Ry. Co. v. Kupper (Ky.), 118 S. W. 266.

§ 3695a. Imprisonment by Corporation's Servant in the Scope of his Employment.

"If the jury believe from the evidence that the plaintiff on the ——— day of ———, 19—, was a passenger of the defendant and on one of the approaches to its station at ———, and that said approach was in the occupancy and control of said defendant, with the intention of

taking passage on one of its trains to A, then he was entitled to protection by the defendant from insult, injury and abuse; and if the jury find that the plaintiff, while a passenger as aforesaid, without any reasonable provocation, was assaulted and imprisoned by one of defendant's employees, in charge of its said station and approaches as aforesaid, while acting in the scope of his employment, then the plaintiff is entitled to recover."—Approved: Philadelphia B. & W. R. Co. v. Crawford, 112 Md. 508, 512, 77 Atl. 278.

§ 3695b. Owner Causing Arrest of one Unlawfully withholding his Property.

"If the jury find that the plaintiff knew that defendant's automobile had been taken from the public highway and placed in the garage of which plaintiff was manager by some person other than the owner or his agent, or some person who had not a lawful right to do so, and without the consent of the owner, and when the possession and delivery of the automobile was demanded from the plaintiff and he thereafter refused to deliver possession thereof to the true owner, he was guilty of a felony, and the verdict must be for the defendant, who, under the circumstances, was justified in causing plaintiff's arrest, if the jury find he did cause plaintiff's arrest."—Approved: Greene v. Fankhauser, 121 N. Y. Supp. 1004, 137 App. Div. 124, 131.

§ 3696. Right to Arrest Trespasser—Excessive Force.

"We have a statute in this state which provides that: 'Whoever unlawfully enters upon the lands of another and severs from the soil any product or fruit growing thereon, the property of another, of the value of ten cents or upward, upon conviction thereof shall be fined in any sum not exceeding one hundred dollars, to which may be added imprisonment in the county jail for not more than six months.' Burns' Rev. St. 1901, 2017. As you will observe, the penalty provided by such statute is by way of fine not exceeding one hundred dollars, to which may be added imprisonment in the county jail for not more than six months; and I instruct you that, if the plaintiff were guilty of taking cherries from the defendant or defendants without their consent and against their will, such offense would not be a felony. It would be what is known in law as 'criminal trespass.' If the value of the cherries so taken amounted to ten cents or upwards, and would constitute a misdemeanor or if it were committed by the plaintiff, the defendant Mary P. Golibart would have no right to seize and tie plaintiff, and, without any warrant or process, confine him in the house of defendants against his will, unless it was reasonably necessary to do so for the purpose of preventing such act of trespass on his part. If you find from the evidence that the plaintiff at the time alleged was engaged in taking cherries from the tree of the defendants, without their consent, of the value of ten cents, or less, such an act would be trespass on the part of the plaintiff; and if, while he was taking such cherries, the defendant Mary P. Golibart discovered him, she would have the right to prevent such an act of trespass on the plain-

tiff's part, using such force as was reasonably necessary for that purpose. But if she used an excessive force to prevent such trespass, then she would be liable in damages for such excessive use of force, and if such act of trespass could have been prevented, or (if, when she discovered the plaintiff committing such an act of trespass, he discontinued the same, and attempted to flee from the premises of the defendants, and it was not necessary for her to use any force to prevent the continuance of such trespass, then I instruct you that said defendant Mary P. Golibart would have no right to seize the plaintiff, and bind him with rope, and confine him in the house of defendants against his will, and, if she did so, she would be liable to the plaintiff)."—Approved: Golibart v. Sullivan, 30 Ind. App. 426, 66 N. E. 188.

B. Libel and Slander.

§ 3697 Definition of Libel—Statutory.
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3736. Statement Imputing Crime Known to be False—Conclusive Evidence of Malice.
3737. Proper Elements in Assessing Damages.
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§ 3697. Definition of Libel—Statutory.

(a) "Libel is defined by our statute, so far as applicable to this case, as the malicious defamation of a person made public by any printing or writing tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse."—Approved: Dever v. Clark, 44 Kan. 745, 25 Pac. 205.

(b) "To maliciously print and publish of and concerning a man that he has been guilty of a crime is a libel, if the charge is false. It is also a libel to maliciously print and publish false statements concerning a man, which tend to degrade or disgrace him, or subject him to degradation, contempt, or ridicule."—Approved: Pfister v. Milwaukee Free Press Co., 139 Wis. 627, 121 N. W. 938.

§ 3698. Libelous Per se—Publication Charging a Penal Offense.

"You are instructed that any publication in a newspaper, charging one with an offense punishable under the law, or tending to bring him

into contempt among his fellow men, is a libel per se, or of itself, and in such case it is not required that the plaintiff should prove express malice or ill-will towards plaintiff on the part of the defendant. The law, in such a case, presumes malice."—Approved: Pokrok Zakadu Pub. Co. v. Ziskovsky, 42 Neb. 64, 60 N. W. 358.

§ 3699. Same—Imputation Upon Professional Capacity.

"Although the plaintiff alleges in his petition that he has, on account of the publications complained of, sustained a damage of one thousand dollars on account of each of said publications, it is not necessary for him to prove any specific damage; for the law presumes the reputation of the plaintiff to be good, as also it presumes that his official duties as a public officer were honestly performed, and his professional obligations properly discharged, and an article which tends to hold him up to the public view as an unskilled lawyer and an incompetent officer is libelous per se, ('per se' meaning 'of itself'), and entitles the plaintiff to damages, unless the defendant establishes the truth of said publication by a preponderance of the evidence."—Approved: Dever v. Clark, 44 Kan. 745, 25 Pac. 205.

§ 3700. Words Not Libelous per se Libelous in their Connection.

"If the defendant said of the plaintiff 'you will steal,' or 'I believe you will steal,' or 'you are religiously and politically dishonest,' or 'D. H. Bays is dishonest,' these sentences, or any of them, if spoken ordinarily, or without aid from the attendant circumstances, would import simply an expression of the defendant's opinion concerning the plaintiff. They do not of themselves, nor does any one of them, purport to charge any specific act as having been committed by the plaintiff which would make larceny. For this reason these sentences, or any of them if spoken, and without more, will not of themselves make a cause of action, or make the defendant liable. They will not, in the absence of proof by circumstances giving to them some other than their ordinary meaning, be regarded as actionable. But if defendant said of plaintiff, 'I believe you will steal,' or 'you will steal,' and if the surroundings and circumstances then known to the speaker and hearers gave the words reference to any specific transaction or occurrence, so that the hearers would naturally understand the speaker to impute to the plaintiff the actual commission of some act of larceny, instead of merely expressing the defendant's opinion or belief as to plaintiff's moral character, then the words should be considered as actionable and will give a right of recovery to the plaintiff, unless this right is defeated by the establishment of some one of the defenses pleaded."—Approved: Bays v. Hunt, 60 Iowa, 251, 14 N. W. 785.

§ 3701. Where Words are Ambiguous, Jury to Determine How they were Understood.

"Now gentlemen, about the first question you will be called upon to solve is this: What impression would this first article complained of ordinarily convey to the mind of the reader? The rule is that, where an article alleged to be libelous is susceptible of two meanings, it is for

the jury to say, after an inspection of the article, what would naturally be understood therefrom by the ordinary reader. The plaintiff contends that the only inference to be drawn therefrom is that he was being prosecuted criminally for the crime of embezzlement, while the defendant claims that no such inference could reasonably be drawn, but that it would be generally understood by ordinary readers to mean simply that he was said to be short in his account as treasurer, and that the proceedings were simply proceedings to ascertain and enforce the rights of the city."—Approved: Myers v. Longstaff, 14 S. D. 98, 84 N. W. 233.

§ 3701a. Intent with which such Words are Uttered.

"If you believe from the evidence that the defendant in the presence and hearing of any person other than the plaintiff falsely and maliciously spoke to her the following words, to-wit: 'Bet, you stole my money. I know damned well you did. You were at the head of my bed last night and took it,' or in substance the same as the above words [meaning thereby to charge that the plaintiff had committed the crime of larceny], then you will find for the plaintiff."—Approved: Beams v. Beams (Ky.), 129 S. W. 298.

NOTE: The court held the bracketed words should have been added because defendant, plaintiff's father, testified he had no thought of charging her with a crime. Other instructions should also have been given about what would be naturally understood by the person or persons who heard the words.

§ 3702. Jury to find Whether Words are Libelous and Plaintiff the Person Referred to.

"If you find from a preponderance of the evidence that the article complained of by plaintiff in her petition and set forth therein, and as published by the defendant, is libelous, as above defined; or if you believe from the evidence that certain parts of said article are susceptible of the meaning or innuendoes placed thereon by the plaintiff and as set out in her petition, and that such innuendoes are legitimate inferences from the words composing such parts of said article, and that such parts of said article with the innuendoes set out by the plaintiff in her petition are libelous; and if you believe from the evidence that the plaintiff is the person referred to in said article, or in the innuendoes placed thereon to certain parts of said article by plaintiff—then you are instructed to return a verdict for the plaintiff, unless you find for the defendant under instructions hereafter given you."—Approved: San Antonio Light Pub. Co. v. Lewy, 52 Tex. Civ. App. 22, 113 S. W. 574.

§ 3703. Malice Implied from Charge Libelous per se.

(a) "The jury are instructed that words charging a woman with being a whore are actionable in themselves, and the law presumes that a party uttering them intended maliciously to injure the person concerning whom they are spoken, unless the contrary appear from the circumstances, occasion, or manner of the speaking of the words; but all the plaintiffs are bound to prove in the case, to entitle them to re-

cover, is the speaking, by the defendant Hannah Boldt, of enough of the slanderous words charged in the petition to amount to a charge that the plaintiff Caroline Budwig was whore, and express malice or ill will need not be proved; but, if the jury believe from the evidence that the plaintiffs have failed to prove enough of the words to amount to a charge that the plaintiff was a whore, then the plaintiffs cannot recover, and your verdict should be for the defendant."—Approved: Boldt v. Budwig, 19 Neb. 739, 28 N. W. 280.

(b) "Every publication, by writing or printing, which falsely charges upon or imputes to any one a crime which renders him liable to punishment, or which alleges against him that which is calculated to make him infamous or odious in the estimation of the public, is libelous per se, and in such a case malice is implied from the publication, against the publishers thereof."—Approved: Pokrok Zakadu Pub. Co. v. Ziskovsky, 42 Neb. 64, 60 N. W. 358.

§ 3704. Willful Publication of Matter Libelous per se Involves Design to Cause Injury.

"In considering the question of damages, gentlemen, it is necessary, to enable you to make an intelligent disposition of it, to understand what is meant by the term 'malice,' which you have heard used so frequently in the course of the trial. The word 'malice', when used in relation to the action of libel, means no more than 'willfulness.' A willful injury without just reason is properly called 'malicious.' Malice is said to be express or implied. So far as any explanation of that distinction is necessary for our purposes here, I instruct you that implied malice is the kind of malice which the law presumes actuated the defendant, Dr. Hyndman, in publishing the libel in question; it is what the law assumes influenced him in making the publication; while express malice is such further or additional or actual malevolent design or purpose as may have been entertained by the doctor in making the publication in question. I instruct you, gentlemen, without any further evidence, that the mere fact of the publication itself—those parts of the publication which have not been justified, and which I have instructed you are libelous—should be considered by you as a voluntary act by the doctor, and to have proceeded from a malicious motive. The willful publication by Dr. Hyndman of this libelous statement necessarily involved a design on his part to produce such injury upon the plaintiff as is a necessary consequence of the libel, and the doctor would be liable, without other proof than the publication itself, for all the necessary damages which resulted to the plaintiff from the publication of all those parts of the publication which have not been proven to be true."—Approved: Austin v. Hyndman, 119 Mich. 615, 78 N. W. 663.

§ 3705. Newspaper Proprietor Responsible Though Ignorant of Publication.

"I charge you that the proprietor of a newspaper in which a libel is published, though he has no knowledge of the publication at the time, is as responsible for it as he would have been if it had been done by

him personally or under his direct supervision, and it is no defense to a libel that it was published, in the absence of the proprietor, by an employe, however competent said employe may be."—Approved: Dunn v. Hearst, 139 Cal. 239, 73 Pac. 138.

§ 3706. Publishing Libelous Statement Along with Plaintiff's Denial of its Truth.

"Now I think this is a good case to submit to twelve men in S. county, to say what damages a plaintiff shall have who has been treated as X. has. Has he been injured, or has the defendant pursued a proper and justifiable course in which to treat a citizen, who is a man of good character, and where the defendant does not set up the truth? Or has the defendant, while the plaintiff is away, tried to find out what the truth is, and then published the libel with the truth, with the allegation of the wife? Now, you will have this article before you. It is put in the declaration exactly, I understand, as it was printed, and the first question is: Do you find that to be, as I have suggested,—that paragraph with the whole article,—to be practically a charge of adultery? If it is, and it is not true,—and it is not claimed to be true,—then the plaintiff is entitled to whatever damages you think a man is entitled to, who has a good character, and who is above reproach, who is accused in a public journal like the B. Journal of that crime, and sent out under the circumstances which this was; because you are to take in mitigation, if there is anything in mitigation of it,—you are to take into consideration that the defendant had published what was published in N. Y., that the article was not true, so that, when the defendant published this article, it had not only the fact that Mrs. ———— but that ———— also denies that there was any truth in that accusation. But still the defendant published it with their denial. Now, it is for you to say whether the defendant is justified in doing that, or whether, when the defendant found out both from the plaintiff and his wife, acting separately and from different sources, that there was not a word of truth in the article, that it was a gross libel, whether the defendant can go on and publish it, and then set up as an excuse that the defendant consulted both the plaintiff and his wife, and that they both said that it was not true. And, if you say it is a libel under the rules I have given you, you are to say what the damages are."—Approved: Bishop v. Journal N. Co., 168 Mass. 327, 47 N. E. 119.

§ 3707. Publishing Libelous Statement in Court Pleading Without Malice not Actionable.

(a) "A publication in a newspaper of the contents of a bill filed in a judicial proceeding upon which a fiat for injunction has been granted, when the contents published are pertinent and material to the relief sought, cannot be made the basis of a recovery in a libel suit, even though the contents of said bill so published are false and untrue, unless it appears that the paper making said publication was actuated by malice, and in such case malice is not presumed, but it is incumbent on plaintiff to prove its existence before he is entitled to recover."—Approved: American Pub. Co. v. Gamble, 115 Tenn. 663, 90 S. W. 1005.

(b) "In undertaking to publish the contents of a court pleading, in order to be entitled to the conditional privilege which the law extends to newspapers in making said publication, the paper is not required to publish the whole of said pleading. It is sufficient if the substance of all that relates to the alleged libelous matter, or that in any way reflects on it, is fairly and impartially stated."—Approved: American Pub. Co. v. Gamble, 115 Tenn. 663, 90 S. W. 1005.

(c) "If you find from the evidence that the publication made by the defendant was a fair and substantially true and accurate account of a bill filed in a court of record upon which an injunction was issued, and that the said publication was made in good faith, and not with a malicious motive, then I charge you that you should find for the defendant."—Approved: American Pub. Co. v. Gamble, 115 Tenn. 663, 90 S. W. 1005.

§ 3708. Libelous Under Statute to Publish What will Provoke to Wrath or Expose to Public Contempt or Ridicule.

"The court instructs the jury that the petition of the plaintiff in this case charges, and the answer of the defendant admits, that the defendant published of and concerning the plaintiff the following language: 'Stone himself failed to appear last night, and this morning his interests were in the hands of Kimbrough Stone, his son, and Henry S. Julian. Julian is remembered here as a member of the legislature who did well in a legislative way, but also as Stone's chief of police, of whom a Democratic Senate committee said, 'he is not a proper man for the position.' A Democratic Senate removed him and the commissioners who appointed him. And the court instructs the jury that our Statute defines a libel to be the malicious defamation of a person made public by any printing or writing tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; and if, therefore, you believe and find from the evidence that the article admitted to have been published by the defendant of and concerning the plaintiff had a tendency to provoke him to wrath, or to expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, then the article in question is libelous under the Statute."—Approved: Julian v. Kansas City Star Co., 209 Mo. 35, 107 S. W. 496.

§ 3709. Words Imputing Crime Privileged Where Honestly Believed to be True and Uttered in Discharge of Duty.

(a) "I charge you, gentlemen of the jury, that if you believe the evidence of W. S. Prince that defendant, on November 30, 1907, an occasion previous to that alleged in the complaint in this charge, stated to the said Prince that the plaintiff had stolen 15 bales of cotton belonging to Birmingham Industrial Company, or had converted it to his own use, or words to that effect, as testified by W. S. Prince, and you further believe from the evidence that the defendant had the right to believe at that time that W. S. Prince was the superintendent of the farm, and that the words were spoken by the defendant in what he

honestly conceived to be in the discharge of his duties to the interest of the Birmingham Industrial Company, that the utterances of the defendant on that occasion to the said W. S. Prince were privileged communications, from which the law withdraws an inference of malice, and the same are not malicious, nor can you consider them as evidence of malice in the utterances charged in the complaint in this cause."—Approved: Phillips v. Bradshaw, 167 Ala. 199, 52 South. 662.

§ 3710. Privileged Statement—Averment of Insanity in Judicial Proceeding Instituted in Good Faith.

"The real question for you to determine first in this case is: Was the information made by the defendant and filed by him honestly and in good faith, upon probable cause, he believing at the time that the plaintiff was insane, or laboring under an insane delusion, and done for a laudable purpose, to protect himself, his property, or society? And if you find, from the preponderance of the credible evidence in the case, that it was so done, then your verdict should be for the defendant. But if you find that the same was made and filed without probable cause, or without honestly believing that the statements therein were true, but was done to injure the plaintiff in his good name and reputation, or for some advantage over him, then the law would imply malice, and you should find for the plaintiff."—Approved: Comfort v. Young, 100 Iowa, 627, 69 N. W. 1032.

§ 3711. Same—Testimony Unless it is Perjury.

"The communications alleged to have been made by Mr. Bradford are shown by the evidence to be what are known as 'privileged communications,'—communications which the defendant had a right to make if true; and, unless you find that the defendant and Mr. Clark have testified falsely about the coins, your verdict should be for the defendant."—Approved: Livingston v. Bradford, 115 Mich. 140, 73 N. W. 135.

§ 3712. Same—Unfavorable Comment on Defamatory Matter in a Court Proceeding is not Privileged.

"The court instructs the jurors that while the publication of an abridged or condensed report of a public trial or judicial proceeding, if prepared impartially, truthfully, and fairly, will be deemed privileged, and protect the publisher against an action therefor, yet the addition by the publisher of any unfavorable insinuations or comments of his own as to the person assailed, or the ommission or suppression of parts of the proceedings which would tend to qualify or explain the defamatory matter and place it in a more favorable light for the person defamed, is evidence of malice and destroys the privilege, and, therefore, unless the jurors believe and find from the evidence that the report published by defendant of the proceedings of the William Ziegler extradition matter before the governor of New York was a fair, truthful and impartial report or abridged report of said proceedings, as above explained (so far as it related to the plaintiff herein and the accusations there made against his character), the jury will disregard the de-

fense of privilege made by the defendant and find against it on said defense.

"And the jurors are further instructed that, even though said defense of privilege, as above indicated, is sustained by the evidence, yet it is not available to the defendant, if the jury find and believe, taking into consideration the character of the publication and all other facts and matters in evidence, that the defendant was actuated by actual malice or ill will towards the plaintiff when it made said publication."—Approved: Brown v. Globe Printing Co., 213 Mo. 611, 112 S. W. 462.

§ 3713. Privileged Publication—Strictures on Chairman and Committees of Political Parties.

"The jury are instructed that it is the privilege of the defendant, as of every other citizen, to comment in its paper upon all public matters that affect the public welfare and are at the time agitating the public mind; and the defendant, as every other citizen, may characterize the action of the public officials or quasi public officials, such as chairmen of state political committees, and can denounce such action in the severest terms, and illustrate the pernicious effects and results of such actions, and in such terms as may seem just, and reasonable to it under the circumstances, and so long as the comment relate to the acts, conduct, and policy of such officials and committees, in their official capacities, such publication, if fairly made, in good faith, and for an honest purpose, is privileged, and the defendant is in no wise liable therefor, without the party alleging the injury shall charge and prove malice and special damages resulting to him therefrom. Wherefore, if upon a consideration of the publication offered in evidence, the jury believe that the same is a comment and characterization of and upon the conduct of the plaintiff as chairman of the Democratic State Committee, and upon the policy and action of that committee, if fairly made, in good faith, and for an honest purpose, then it is not libel, and plaintiff cannot recover in this action."—Approved: Cook v. Globe Printing Co., 227 Mo. 471, 127 S. W. 332.

§ 3714. Candidate—False Imputation of Crime is not Privileged.

"The law provides that a privileged communication, so far as it relates to this case, is one made in a communication, without malice, to a person or persons interested therein, by one who is also interested, or by one who stands in such relations to the persons interested as to afford a reasonable ground for supposing the motive for the communication innocent. The defendant claims that, the plaintiff being at the time a candidate for office at the hands of the voters of this community and he (the defendant) being a resident of the city of Huron, he was interested in the result, and that the residents of the city, to whom the publications were addressed, and who read the paper published by him, were also interested in like manner; that he was not actuated or inspired by malice in publishing the articles referred to; and that they are, therefore, privileged, under the rules which I have given you, and were, therefore, not libelous. And, generally, upon the question of privileged communications, I charge you that the law is that the fitness

and qualifications of a candidate for an elective office may be a subject for the freest scrutiny and investigation, either by the proprietor of a newspaper, or by a voter or person having an interest in the matter, and that much latitude must be allowed in the publication, for the information of voters of charges affecting the fitness of a candidate for the place he seeks, so long as it is done honestly and without malice; nor will such a publication be actionable, without proof of express malice, although it may be harsh, unjust, and unnecessarily severe, for these are matters of opinion, of which the party making the publication has a right to judge for himself. In the case of such a publication the occasion rebuts the inference of malice which the law would otherwise raise from the falsity, and no right of action exists, even though the character of the party has suffered, unless he is able to show the existence of actual malice. You will, however, understand that this privilege accorded to a newspaper publisher or any other person cannot avail any one as a defense, who may seek under cover of it to maliciously attack or traduce the character of any person by publishing of such person false and libelous articles concerning himself. If a publication attacks the private character of a candidate for office by falsely imputing to him a crime in some respect not specially going to the question of his fitness for the office to which he aspires, it is not privileged by the occasion, either absolutely or qualifiedly, is actionable per se, and the law implies malice; and it is no justification that the publication was made with honest belief in its truth, in good faith, and for the purpose of influencing voters. Such publications can only be justified by proof of their truth."—Approved: Myers v. Longstaff, 14 S. D. 98, 84 N. W. 233.

§ 3715. Same—If Merely Derogatory to Character Publication in Good Faith is not Actionable.

"As you have already observed from the statement of the case, defendant claims, as his first defense, that the publication is what is known in law as 'privileged.' A communication made in good faith, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged. And, where an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office, and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith, and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff, and in such a case the burden is on the plaintiff to show actual malice in the publication of the article. If you believe from the evidence in this case that on August 20, 1904, plaintiff was a candidate for re-election to the office of Attorney General, and that defendant published said article for the sole purpose of giving to the voters of Kansas what he believed to be truthful information concerning the acts of the Attorney General, and only for the pur-

pose of enabling such voters to cast their ballots more intelligently, and that the defendant made all reasonable effort to ascertain the facts before publishing the same, and that the whole thing was done in good faith, and without malice toward plaintiff, and if you believe that the bulk of the circulation of the said paper was within the state of Kansas, and that its circulation outside of the state of Kansas was only incidental, then I instruct you that your verdict must be for the defendant, although you may believe that the principal matters contained in said article are untrue in fact and derogatory to the character of the plaintiff; but, on the contrary, if you should find from the evidence that said article was published with a malicious intent to wilfully wrong and injure plaintiff, then the fact that the article is a privileged one would constitute no defense to this action, and the plaintiff would be entitled to recover such damages as the evidence shows him to have sustained by reason of said publication."—Approved: Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281.

§ 3716. Truth a Defense Whatever Defendant's Motive.

"The defendant, as already stated, pleads as a defense that the matters published by him and complained of by the plaintiff are true, and it devolves upon him to prove, by a preponderance of the evidence, the truth of said matter; and if he has succeeded in establishing the truth of the matter charged as defamatory in the plaintiff's petition, by a preponderance of the testimony, then your verdict must be for the defendant. And this is true, no matter what the motives of the defendant may have been in the publication thereof. It is no concern of yours. It is no concern of the plaintiff, or of anybody else, what the defendant's motives in such publication may have been. It is a complete defense to this action, if he has succeeded in establishing the truth of the matters published by him concerning the plaintiff."—Approved: Dever v. Clark, 44 Kan. 745, 25 Pac. 205.

§ 3717. To be Complete Must Show that Every Material Statement is True.

"To complete this defense of justification, and make it cover the whole case, defendants must have shown by a preponderance of the evidence that all the libelous charges contained in the publication are true. If only a part are shown to be true, and a portion of them are not proved to be true, the defense would not be complete,—it would not cover all of the alleged libel. To justify the entire publication on the ground of its truthfulness, the evidence must show that the libel was true as published,—that every material and substantial libelous statement contained in it was true. If, therefore, you find that some of the libelous statements were true, but that any material part of the libel has not been shown to be true, you should treat and dispose of the case, from that point forward, as involving only such statements in the alleged libel as have not been proven to be true by the testimony in the case."—Approved: Hanaw v. Jackson Patriot Co., 98 Mich. 506, 57 N. W. 734.

§ 3718. Slander—Anger is Matter in Mitigation Only.

"You are further instructed that anger is no justification for the use of slanderous words; and it ought not to be considered even in mitigation of damages, unless the anger is provoked by the person against whom the slanderous words were used; and, in this case, if the jury believe from the evidence that the defendant Hannah Boldt spoke of the plaintiff any of the slanderous words charged in the petition, then it matters not who commenced the conversation, and that the defendant was angry at the time, unless her anger was wrongfully provoked, in whole or in part, by the acts or language of the plaintiff herself."—Approved: Boldt v. Budwig, 19 Neb. 739, 28 N. W. 280.

§ 3719. Per Contra.

"You are instructed that anger is no justification for the use of slanderous words, and if you should find that the defendant was provoked to speak the slanderous words by any act of conduct of the husband, Chas. O. Childs, that would be no justification or excuse for speaking the slanderous words of and concerning the wife, Bessie Childs, and should not be considered by you in mitigation of the damages, if any, suffered by her. Of course, that is based on the assumption that you find these words were uttered."—Approved: Childs v. Childs, 49 Wash. 27, 94 Pac. 660.

§ 3720. Slander—Not every Word Must be Proved, but the Fair Import of What is Charged.

(a) "The plaintiffs are not bound to prove the speaking of all the words charged in the petition. If the jury believe from the evidence that the defendant Hannah Boldt spoke of and concerning the plaintiff Caroline Budwig, in the presence and hearing of others, any of the slanderous words charged in the petition, the fair import of which would be to charge the plaintiff Caroline Budwig with being a whore, then she is entitled to a verdict."—Approved: Boldt v. Budwig, 19 Neb. 739, 28 N. W. 280.

(b) "The court instructs the jury that while it is necessary, to entitle the plaintiff to recover in an action of slander, that she should prove the slanderous words alleged in the declaration, or some count thereof, still it is not necessary to prove all the words that are charged to have been spoken. It is sufficient to prove substantially any set of words in some one or more of the statements of slanderous words contained in the declaration and the different counts thereof."—Approved: Iles v. Swank, 202 Ill. 453, 66 N. E. 1042.

§ 3721. Presumption in favor of Plaintiff's Character.

"You are instructed that the law presumes, in the absence of evidence to the contrary, that plaintiff possesses a good character and reputation, and that she is innocent of the crimes charged; and you are instructed that she is entitled to recover in this case, unless the defendant has proven by preponderance of the evidence all the elements necessary to convict plaintiff of prostitution and abortion. The burden of proof is upon defendant to show the plaintiff guilty of the commis-

sion of these crimes."—Approved: Whiting v. Carpenter, 4 Neb. Unoff. 342, 93 N. W. 926.

§ 3722. Imputation of Unchastity.

"The law of this state makes it slander for one, in conversation with a third person, in the hearing of a third person, to use language falsely imputing to a female want of chastity, and from such false charge, without justification, malice is inferred and damages presumed. So, in this case, if the plaintiff has established by a preponderance of the evidence that the defendant, at the time charged in plaintiff's petition, in a conversation with Mrs. J. O. Anderson, used some or all of the language charged in plaintiff's petition, or language substantially as charged, and that by the use of such language he intended to impute to plaintiff a want of chastity, and in using said language he was understood by the said Mrs. J. O. Anderson as imputing to the plaintiff a want of chastity, then the plaintiff will be entitled to recover such damages as she has sustained. If, however, the defendant did not use any of the language charged in plaintiff's petition, or language substantially as charged, or if he did use said language, but did not intend by such language to impute the want of chastity to the plaintiff, and was not so understood, then the plaintiff cannot recover, and your verdict should be for the defendant."—Approved: Charleson v. Russell, 144 Iowa, 38, 121 N. W. 531.

§ 3723. Malicious False Statement as to Business.

"Now, if you believe from the evidence that the defendant company, acting through one or more of its controlling officers and one or more of its agents and employes, working in concert and with a common purpose, committed the acts, or some of them, or made the statements, or some of them, alleged in the petition, and did such acts maliciously, or made such statements falsely, and committed such acts or made such statements in furtherance of a design and intention to break up Brown Bros. in business, and drive them out of business, and that Brown Bros. were financially injured in their business as loan agents thereby, then you will find for the plaintiffs, and the burden of proof rests upon the plaintiffs to establish such facts by the preponderance of the evidence; and, if you do not find for the plaintiffs under this paragraph, you will return a verdict for the defendant."—Approved: American Freehold Land Mtg. Co. v. Brown (Tex. Civ. App.), 118 S. W. 1106.

§ 3724. Charging False Testimony.

"If the jury find from the evidence, or the admissions of the defendant in his answer, that the defendant, on or about the day named in the plaintiff's complaint, did, in the presence of divers persons, or even one person, say, of and concerning the plaintiff, such words as are set forth in the complaint, that the plaintiff had sworn to a lie, or used such words as amount to charging the plaintiff with swearing falsely, or with having sworn falsely, or did utter or publish words of or to or concerning the plaintiff which, in their common acceptation, would amount to such a charge, the words are actionable of themselves, and

no special damage need be proven, and you will find for the plaintiff; and the words spoken by the defendant of and concerning the plaintiff are to be taken to mean what it is apparent the defendant intended them to mean, according to the common understanding of language, in its common acceptation and use."—Approved: Stallings v. Whittaker, 55 Ark. 494, 18 S. W. 829.

§ 3725. If it Takes All the Words to Constitute a Slander All Must be Proven.

"The jury are further instructed, that all the words laid in the declaration need not be proven to maintain the action, unless it takes them all to constitute the slander, and if they believe from the evidence that a sufficient number of the words laid in the declaration to amount, in their common acceptation, to a charge of fornication against the plaintiff, have been proved to have been spoken by the defendant Caroline Baker, then they must find for the plaintiff."—Approved: Baker v. Young, 44 Ill. 42, 44.

§ 3726. Unsuccessful Attempt at Justification in Aggravation of Damages.

"The jury are instructed that, if a material part of a plea of justification fails, the plea fails altogether; and if a defendant in an action of libel interposes a plea of justification, and abandons or fails to prove his plea, such failure to prove, or abandonment of the plea, may be taken into consideration by the jury in estimating damages. It is evidence tending to show malice and continued malice."—Approved: Downing v. Brown, 3 Colo. 571, 596.

§ 3727. Repeating Slanderous Rumor not Justification, but Mitigation.

"If defendant, at the time he spoke the words complained of, stated that he had heard such a report from others, and gave it as a matter of rumor, and he has proved that he heard it, then while it would not amount to a justification, for no one has a right, even through idle wantonness, to keep a slanderous report afloat against another, yet it may be considered as tending to show that he did not originate the story in malice, and given its due weight in mitigation of damages."—Approved: Hinkle v. Davenport, 38 Iowa, 355, 364.

§ 3728. What Constitutes a Newspaper Publication.

"In regard to what will constitute a publishing, the law of libel is that the publication is made wherever the matter is made known and communicated; and if you find that the paper called the Galveston Daily News was edited, printed and sent out to their subscribers through the mails, to be delivered through the post-office at Austin to subscribers here by due course of mail; and that the said paper was so sent by defendants, or by their procurement, to this county, to be read and circulated by the people of this county; and that the paper containing said article was so by them sent to this county to be read by its subscribers generally and for general circulation here, and it was so and by that means read and circulated in Travis county; then, for the pur-

poses of this trial, the said matter, statements, etc., was as to this plaintiff published in Travis county."—Approved: Belo v. Wren, 63 Tex. 686, 713.

§ 3729. Dictation to Stenographer and Signing Typewritten Copy as Publication.

"The court instructs the jury that if they find from the evidence that on the ..... day of ....., 19.., the witness ..... was in the employ of the defendant as a stenographer and typewriter in the office and business of the defendant, and on said day said defendant dictated to the witness ..... the typewritten words and figures appearing in the letter of date of ....., and set out in the first count of the declaration and offered in evidence, and that said witness ..... took down said dictation in shorthand characters upon paper, and thereafter and on the same day copied the same upon a typewriting machine upon the business paper of the said defendant, and in the form and manner appearing in said letter offered in evidence, and after said letter was thus typewritten the defendant subscribed his name thereto in his proper handwriting, and thereafter said letter was copied by a letter-press machine into the letter book of the defendant by the witness ..... in the course of her said employment in the business of the defendant, then such action in law constitutes a writing and publication by said defendant of the matters and things appearing in said letter, and if the jury further find that the person therein mentioned and referred to is the plaintiff, then the plaintiff is entitled to recover under the first count of the declaration."—Approved: Gambrill v. Schooley, 93 Md. 48.

§ 3730. Exemplary Damages—When not Recoverable.

"If the jury find from the evidence that the defendant published the article complained of in good faith believing the same to be a proper item of news and a part of the report of occurrences in the matter of the Ziegler extradition, and without malice or ill-will towards the plaintiff, and not negligently, or in wanton disregard of plaintiff's rights, then the plaintiff is not entitled to recover any exemplary damages herein."—Approved: Brown v. Publishers: George Knapp & Co., 213 Mo. 655, 112 S. W. 474.

§ 3731. Where Crime is Imputed. Plea of Justification to be Proved as in Criminal Case.

"In order to make good his defense set up by his plea of justification, the defendant is required to prove the plaintiff guilty of the crimes imputed to him by the slanderous words, by testimony sufficient to convict the plaintiff of those charges on a criminal trial; and if the defendant has failed to do this, the jury must find for the plaintiff."—Approved: Merk v. Gelzhaenser, 50 Cal. 631, 633.

§ 3731a. Plea of Justification to be Proven Like Charge in Criminal Trial.

"The court instructs the jury that, in order to make good his defense, the defendant is required to prove the plaintiff guilty of the crimes im-

puted to him by the slanderous words, by testimony sufficient to convict the plaintiff of those charges on a criminal trial; and, if the defendant has failed to do this, the jury must find for the plaintiff."—Approved: Merk v. Gelzhaenser, 50 Cal. 631, 633.

§ 3732. Per Contra.

"The jury are instructed that if a sufficient number of words laid in the declaration were proven to have been spoken by defendant to others which would amount to a charge of larceny, the jury should find defendant guilty, unless the plea of justification has been proven by a preponderance of the evidence."—Approved: Moore v. Maxey, 152 Ill. App. 647, 651.

§ 3732a. To whom Libelous Publication Refers Question of Fact.

"The court instructs the jury that if they believe from the evidence, that the article complained of, as published by the defendant company, did not refer to the plaintiff, but to a person who was sometimes known as Annie Oakley, and used this title, stage or fanciful name in order to attract the notice of the public, and was not, in its description or identification, such as to lead those who knew or know of the plaintiff to believe that the article was intended to refer to the plaintiff, then they must find for the defendant."—Approved: Butter v. News Leader Co., 104 Va. 1, 4, 51 S. E. 213.

§ 3733. Nor that Damages are Aggravated.

"The filing of the plea of justification does not necessarily aggravate the damages, if the jury, from the testimony, believe that the defendant insisted upon such plea, believing in good faith that he could prove it."—Approved: Thomas v. Dunaway, 30 Ill. 373.

§ 3734. Damage Implied from Actionable Words and that Injury was Intended.

(a) "You are instructed that, in an action for slander, the law implies some damage from the uttering of actionable words; and the law further implies that the person using the actionable words intended the injury the slander is calculated to effect, and in this case, if you find for the plaintiff on that part of the complaint alleging slander, you will determine from all the facts and circumstances proved what damages ought to be given her, and in assessing the damages you are not confined to any mere pecuniary loss sustained; physical pain, mental suffering, humiliation, and injury to reputation or character, if proved, are proper elements of damages."—Approved: Townsley v. Yentsch (Ark.), 135 S. W. 882.

(b) "The jury are instructed that damage is to be implied from falsely speaking words imputing a crime, and if the jury believe defendant guilty of such false speaking, it is their duty to determine under all the evidence what damages ought to be given."—Approved: Moore v Maxey, 152 Ill. App. 647, 651.

§ 3735. Slander by Agent of Corporation—What is Necessary to Constitute Liability Series.

"a. The court instructs the jury that the burden of proof is on the plaintiff in this case to prove by a clear preponderance of the evidence

that the language complained of as set out in the complaint was used and published by the agent or agents of the defendant as alleged, and that such agent was acting under the authority of the defendant and acting within the scope of his employment in using such language, or that the defendant had afterwards ratified the same, and to prove that, as a result of such slanderous publication by the agent of defendants, the plaintiff has been damaged in his character and reputation, and it must further appear that the slander was uttered with the malicious intent on the part of the defendant company to injure the plaintiff in his business or social standing.

"b. The court instructs the jury that unless it appears to your satisfaction by a fair preponderance of the weight of the testimony after careful comparison of all the evidence in the case that the language set out in the complaint was uttered or published toward or about the plaintiff by the agent or agents of the defendant, acting within the scope of their authority, you will not be warranted in presuming that any language was used which was detrimental to plaintiff's character or reputation, nor was intended to be used in a slanderous way, but the presumption is that no language was used or intended to be used to injure plaintiff's reputation in his business or social standing, and this presumption must be overcome by proof.

"c. The court instructs the jury that the liability of a corporation for oral slander uttered by its agents stands upon a different footing than written or published slander, the law ascribing them to the personal malice of the agent rather than to the act performed in the course of his employment and in the aid of the interest of his employers, and exonerating the company, unless it authorized, ratified or approved the act of the agent in uttering the particular slander complained of, or the agent was acting within the scope of his employment.

"d. The court instructs the jury that although you may find from the evidence in the case that the language set out in the complaint was used by the agent or employee of the company, that such language, in its common acceptation, amounts to charging the plaintiff with a breach of the criminal law, or other dishonest practice, yet if you further find from the evidence that such language was spoken by the agent of the company to another in the course of his duty, and that it was necessary or proper in the course of the investigation for such communication to have been made, in the course of duty, and not with a malicious intent to injure the plaintiff, then the court tells you as a matter of law that this would be a privileged communication for which the agent nor the company would be liable, and your verdict would be for the defendant."—Approved: Lindsey v. St. Louis, I. M. & S. Ry. Co. (Ark.), 129 S. W. 807.

§ 3736. Statement Imputing Crime Known to be False, Conclusive Evidence of Malice.

"The court charges the jury that if they believe from the evidence that the defendant made the statement as charged in the complaint, and that when he made such statement the defendant knew it was untrue, then that would be conclusive evidence of malice on the part of

the defendant."—Approved: Phillips v. Bradshaw, 167 Ala. 199, 52 South. 662.

§ 3737. Proper Elements in Assessing Damages.

"You are instructed that, in an action for slander, the law implies some damage from the uttering of actionable words; and the law further implies that the person using the actionable words intended the injury the slander is calculated to effect, and in this case, if you find for the plaintiff on that part of the complaint alleging slander, you will determine from all the facts and circumstances proved what damages ought to be given her, and in assessing the damages you are not confined to any mere pecuniary loss sustained; physical pain, mental suffering, humiliation, and injury to reputation or character, if proved, are proper elements of damage."—Approved: Townsley v. Yentsch (Ark.), 135 S. W. 882.

§ 3737a. Retraction as Evidence of Mitigation Only.

"The jury are instructed that the retraction published by defendant and the evidence in the case in regard to circumstances and current rumors, if any, tending to connect plaintiff with the burning of the house referred to in the publication complained of should be considered by them only in mitigation of damages, to be given by them such weight only as in the opinion of the jury they are entitled to receive."—Approved: Morgan v. Lexington Herald Co. (Ky.), 128 S. W. 1064, 1066.

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§ 3738. The Five Facts to be Shown for a Recovery.

"The general issue being pleaded in an action of malicious prosecution, the burden of proving these five facts, viz.: ((1) The fact of the prosecution; (2) that the defendants were the prosecutors or instigators of it; (3) that the prosecution terminated in favor of the plaintiff; (4) that the charge was made without reasonable or probable cause; (5) that the defendants, in making it, were actuated by malice." —Approved: Casebeer v. Rice, 18 Neb. 203, 24 N. W. 693.

§ 3739. Malice and Want of Probable Cause Must Concur.

"In order that the plaintiff should recover in this action it is necessary that he should establish by a fair preponderance of all the evidence,—First, that there was no probable cause for making the complaint and causing his arrest on the charge of embezzlement; and, second, that the defendants, in causing his arrest on said charge, acted maliciously. To sustain an action for malicious prosecution the facts proven ought to be such as to satisfy any unprejudiced reasonable mind that the defendants had no reasonable ground for the prosecution, and were actuated only by a desire to injure the plaintiff."—Approved: Tucker v. Cannon, 32 Neb. 444, 49 N. W. 435.

§ 3740. To Procure the Beginning or Continuation of a Prosecution is the Same.

"The court instructs the jury that if you believe from the evidence, in the case that the defendants herein, or either of them, by their servants or agents, wilfully, maliciously, and without probable cause did aid, advise, or procure an information to be filed in the Circuit Court of Lawrence county, Missouri, on or about the ——— day of May, 1902, or did willfully, maliciously, and without probable cause, aid, abet, and advise the continuance of said prosecution after the filing of said information by their servants or agents for the crime of arson in the third degree and on said information a state warrant was issued, and the plaintiff was arrested upon said warrant, and thereby required and compelled to give bond for his appearance to answer said alleged defense, and that plaintiff was in accordance with the conditions of said bond compelled to appear in said court, and that he did appear and was discharged, then the jury should find the issue for the plaintiff."—Approved: Carp v. Queen Insurance Co., 203 Mo. 295, 101 S. W. 78.

§ 3741. Malice does not Mean Hatred, but Every improper Motive.

"The term malice, in this form of action, does not mean hatred or ill will towards the plaintiff, but it includes any ulterior or improper motive. Therefore, if you should find that the defendant's property, which had been destroyed by fire, was, at the time of the fire, insured for a large sum, and that the insurance companies had not adjusted the loss, but were talking of refusing to pay the insurance on the ground that the fire had been set to obtain the insurance; and the defendant prosecuted the plaintiff with the motive and intent to allay suspicion on the part of the insurance companies, and thereby obtain the insurance money,—then the motive of the defendant was malicious, within the meaning of the law. If you find from the evidence that the defendant prosecuted the plaintiff from any motive other than honest belief in his guilt, and desire that public justice might be vindicated, then the prosecution was malicious, within the meaning of the law, for the law does not permit an individual to use its criminal process for any ulterior or improper motive."—Approved: Spear v. Hiles, 67 Wis. 350, 30 N. W. 506.

§ 3742. Malice in Law and Malice in Fact Defined and Distinguished.

"The jury are instructed that there are two kinds of malice: Malice in fact, and malice in law. The former in common acceptation means ill will against a person. The latter is a wrongful act done against a person intentionally. If, therefore, the jury believe from the evidence that the defendants, or either of them, by their servants or agents, were moved by ill will against the plaintiff, or that the prosecution of plaintiff was wrongfully and intentionally caused by them, or was wrongfully and intentionally maintained by them after said proseccution had begun, or either of them, then the jury should as against such defendant or defendants find that such was malicious."—Approved: Carp v. Queen Insurance Co., 203 Mo. 295, 101 S. W. 78.

§ 3743. Malice in Law may not be Ill-Feeling, Spite or Revenge.

"Malice in law means an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling or spite, or a desire to injure another. It is enough if defendant be actuated by improper or sinister motives."—Approved: Hackler v. Miller, 79 Neb. 209, 114 N. W. 274.

§ 3745. Or One Begun to Compel Plaintiff to Abandon Land.

"The court instructs the jury that if the defendant knew that his only remedy was in a civil action, and willfully or recklessly commenced the criminal prosecutions, this would show malice, although the defendant was in fact entitled to the possession of the premises; and malice would especially be shown if the defendant had in fact authorized T. to lease the premises upon the terms upon which it was leased by the latter, but, by reason of having got a better offer on the land, instituted the criminal prosecutions for the purpose of forcing the plaintiff to abandon the land in question."—Approved: Noble v. White, 103 Iowa, 352, 72 N. W. 556.

§ 3746. Probable Cause to Believe One Privy to a Crime is Sufficient.

"The plaintiff cannot recover in this action if the defendant had probable cause to believe the plaintiff guilty of having set fire to the buildings burned; and it is not necessary to her guilt, or to the defendant's belief in her guilt, that he believed she herself set the fire; but it is sufficient for the purpose if he had probable cause to believe that she was privy to the criminal act of any other person who may have set the fire, and such act was done with her procurement or advice, or with her consent or knowledge, for any wrongful or unlawful purpose of her own; as to gratify any feeling of revenge, ill will, or spite which she may have had against the defendant."—Approved: Spear v. Hiles, 67 Wis. 361, 30 N. W. 511.

§ 3747. Inference of Malice from Want of Probable Cause Governed by Circumstances.

(a) "In considering that H— had probable cause for instituting the criminal prosecution complained of, you should take into consideration all the facts and circumstances known to Mr. Hiles, as appears from all the evidence in the case, and, in this connection, should con-

sider the interest or loss of Mr. Hiles, as shown by the evidence, as one element or condition upon which to base your finding; for some allowance will be made when the prosecutor is so injured by the offense that he could not likely draw his conclusions with the same impartiality and absence of prejudice that a person entirely disinterested would deliberately do. All that can be required of him is that he shall act as a reasonable and prudent man would be likely to do under like circumstances."—Approved: Spear v. Hiles, 67 Wis. 361, 30 N. W. 511.

(b) "If the facts and circumstances of the taking and carrying away by the plaintiff of the drawings and plans before that time delivered to the defendant were calculated to produce, at the time, in the mind of a prudent and reasonable man, a well grounded belief or suspicion of the plaintiff's guilt of larceny or other indictable offense, then malice cannot be inferred or implied from the want of probable cause."—Approved: Lunsford v. Dietrich, 86 Ala. 250, 251, 5 South. 461, 11 Am. St. Rep. 37.

§ 3748. Malice from Want of Probable Cause is not an Inference of Law.

"The jury are instructed that from the want of probable cause in the prosecution, the jury are not bound to, but they may, imply malice: and that if they are not satisfied that the prosecution was instituted or carried on through malice, express or implied, they will find for the defendant."—Approved: Pankett v. Livermore, 5 Iowa, 277, 280.

§ 3748a. Malice from Want of Probable Cause a Question of Fact.

"From the want of probable cause in the prosecution, the jury are not bound to, but they may, imply malice; and if they are not satisfied that the prosecution was instituted or carried on through malice, express or implied they will find for the defendant."—Approved: Pankett v. Livermore, 5 Iowa, 277, 280.

§ 3749. And Its Existence not to be Testified to Directly.

"The court charges the jury that malice cannot be testified about by V. & Co., whether it existed, but the law is that the jury must look at the circumstances bearing on the inquiry, the circumstances of the issuance and levy of the attachment, and the conduct of the defendants in instituting the attachment suit."—Approved: Vandiver & Co. v. Waller, 143 Ala. 411, 39 South. 136.

§ 3750. Probable Cause Sufficient for Prosecution Defined.

(a) " 'Reasonable or probable cause within the meaning of the law' may be defined as a reasonable amount of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused is guilty; but mere suspicion alone is not sufficient."—Approved: Tucker v. Cannon, 32 Neb. 444, 49 N. W. 435.

(b) "The jury are instructed that the information that would justify the making of a criminal complaint, against another, for the purpose of having him arrested, must be of such character, and obtained

from such sources, that men, generally, of ordinary care, prudence, and discretion, would feel authorized to act upon it under similar circumstances; and in this case, if the jury believe from the evidence that the defendant made the alleged affidavit for the arrest of plaintiff, and that he was arrested in consequences thereof, then it is a question of fact, to be determined by the jury from the evidence, whether the defendant, when he made the complaint, acted upon such information as men of ordinary care, prudence, and discretion would have been warranted in acting upon under similar circumstances."—Approved: Lindsay v. Bates, 223 Mo. 294, 122 S. W. 682.

(c) "The court instructs the jury that if they believe from the evidence, that the defendant had probable cause to institute the criminal proceedings against the plaintiff, then the plaintiff cannot recover. 'Probable cause' is defined to be a reasonable ground for suspicion, supported by circumstances and evidence sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense of which he is charged."—Approved: Pinson v. Campbell, 124 Mo. App. 260, 101 S. W. 621.

(d) "The court instructs the jury, that by probable cause is meant reasonable ground for suspicion, supported by circumstances sufficiently strong within themselves, to warrant a cautious man in a belief that the accused was guilty of the offense charged; and if the jury believe from the evidence that the defendants, or their agents, were actuated with hostile and vindictive motives against the plaintiff, and that the said prosecution was without probable cause as herein defined, then you should find a verdict for the plaintiff."—Approved: Carp v. Insurance Co., 203 Mo. 295, 101 S. W. 78.

§ 3751. Acting on Report without Investigation not Justification for Criminal Prosecution.

"If you find that the defendant was informed that the plaintiff had sold property of the same kind as that mortgaged, and without using the means which an ordinarily reasonable and prudent man would exercise to learn whether it was the property mortgaged to him or other property, he would not be justified in commencing said criminal prosecution, unless the facts established that it was a part of the property mortgaged."—Approved: Walker v. Camp, 63 Iowa, 627, 630, 19 N. W. 802.

§ 3751a. Failure to Use Proper Means for Information Prior to Prosecution.

"If you find that the defendant was informed that the plaintiff had sold property of the same kind as that mortgaged, and, without using the means which an ordinarily reasonable and prudent man would exercise to learn whether it was the property mortgaged to him or other property, he would not be justified in commencing said criminal prosecution, unless the facts established that it was a part of the property mortgaged."—Approved: Walker v. Camp, 63 Iowa, 627, 630.

§ 3752. Prosecutor Must have Believed the Supposed Criminative Facts to Exist.

"But if you find from the evidence that the defendant knew the plaintiff well enough to recognize him by his voice and general appearance, notwithstanding the disguise used, and recognized the clothing worn as plaintiff's clothing, and that by reason of such facts and the other facts shown in evidence the defendant as a prudent and cautious man was warranted in the belief, and that he did so believe, and that such facts constituted reasonable ground of suspicion, then you would be justified in finding that said prosecution was upon probable and reasonable cause."—Approved: Jenkins v. Gilligan, 131 Iowa, 176, 108 N. W. 237.

§ 3753. Belief Without Sufficient Reason No Defense.

"The court charges the jury that unless Hudson, the agent of the defendant, was at the time of making the affidavit complained of in possession of sufficient facts to justify a reasonable and cautious man to believe that the plaintiff had broken open a car and taken the goods alleged to have been stolen, then it makes no difference if he did suspect and believe that Gulsby was guilty, however honestly and earnestly he may have entertained such suspicion and belief; and you must find the defendant guilty if you also find that Hudson was acting within the general scope of his employment in making said affidavit and procuring the issuance of said warrant, or if you find that the defendant authorized the act, or has since ratified his said act."—Approved: Gulsby v. Louisville & N. R. Co., 167 Ala. 122, 52 South. 392.

§ 3755. Where Plaintiff Settled the Supposed Offense this is a Defense.

"If you believe from the evidence in this case that the facts and circumstances upon which the complaining witness, Stoecker, in the criminal case, based his action in the prosecution of the plaintiff, were such as to excite the belief in a reasonably prudent man's mind, acting on such facts and circumstances as is shown from the evidence were within the knowledge of the said complaining witness at the time said prosecution was instituted, that the plaintiff, Nathanson, was guilty of the crime charged and for which he was prosecuted, then there was probable cause for his arrest; or if you find from the evidence that plaintiff, Nathanson, for the purpose of terminating the criminal cause and preventing the due prosecution of the same, settled or consented to the settlement of the transaction on which said criminal suit was based, then in either event you should find for the defendant, Stoecker, in this case."—Approved: Stoecker v. Nathanson, 5 Neb. Unoff. 435, 98 N. W. 1061.

§ 3756. Mere Suspicion or Belief not Well Founded is not Probable Cause.

"The mere fact that the defendant had lost a diamond ring by theft, and that he suspected or believed that the ring which he found in plaintiff's possession was the ring which he had lost, was not of itself

sufficient to constitute probable cause for the arrest of the plaintiff for the theft of the ring; and if he (the defendant) caused the arrest of the plaintiff for the larceny of the ring, based upon such belief only, he (the defendant) assumed the responsibility of being able to support his belief by proof of the fact that the ring found in plaintiff's possession was the identical ring which was stolen from the defendant; and if he could not produce sufficient testimony to establish that fact, and if, in addition thereto, he had no reasonable ground to believe that the plaintiff was the one who had stolen his (defendant's) ring, then the defendant had no probable cause for the arrest of the plaintiff for the larceny of the ring."—Approved: Jonasen v. Kennedy, 39 Neb. 313, 58 N. W. 122.

§ 3757. Evidence of Notorious Bad Character for Honesty Circumstance Going to Show Probable Cause.

"If the jury believe from the evidence that the plaintiff was, at the time of the guns being taken, a man of notorious bad character for honesty, it is a circumstance which goes to show there was probable cause for the prosecution."—Approved: Miller v. Brown, 3 Mo. 94, 95.

§ 3757a. Plaintiff's Innocence not Necessarily Inconsistent with Verdict for Defendant.

"The court instructs the jury, that although plaintiff may in fact have been innocent of the offense with which he was charged in the prosecution complained of, yet defendant is not liable in this action, unless such prosecution was both malicious and without probable cause."—Approved: Ahrens & O. U. Mfg. Co. v. Hoeher, 106 Ky. 692, 697, 51 S. W. 194.

§ 3758. Action Cannot be Maintained Until Prosecution has Ended.

"The third requisite, which must concur with the other two as a basis to maintain an action for damages for malicious prosecution, is the termination of the prosecution or charge, or the abandonment of the charge or prosecution. As to this it is enough for the purposes of this case to charge you, in view of the evidence submitted, that if the accused has been arrested and committed or held to bail for his appearance at court, and is discharged by the prosecuting attorney or solicitor without any true bill, or any bill or any action by the grand jury whatever, that is a sufficient termination to meet the requirements of a complaint like this. This complaint alleges that the said charge, complaint, and prosecution, and each of them are wholly ended and determined in favor of the plaintiff. It is not necessary, as I have just said, that the grand jury should have acted, or that they should have found no bill, or, if they had found a true bill, that the plaintiff should have been tried and acquitted. That would be a termination, but a verdict and judgment on the merits of the charge are not necessary. It is enough if the case has been dismissed by the court or abandoned by the prosecution, or if the case has been formally discharged by the solicitor, or the case formally dismissed by the order of the court. That is a sufficient termination of the case to comply with the require-

ments of pleading in a complaint of this character."—Approved: Baker v. Hornik, 57 S. C. 313, 35 S. E. 524.

§ 3760. Dismissal of Civil Suits May Also be Such Evidence.

"The court instructs the jury that the bringing and dismissal of the suits in the manner in which they were brought and dismissed is prima facie evidence of the want of probable cause, but is not conclusive evidence of the want of probable cause; and if the jury believe from all the evidence and circumstances as they exist, and, as shown by the evidence, excuse the bringing and dismissal of the case, and that there was in the defendant's mind a well-grounded belief, and that he had probable cause to believe the facts as testified to by him, then the plaintiff is not entitled to recover."—Approved: Kolka v. Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

§ 3761. Conniving at Testimony Known to be False May Warrant Finding of Want of Probable Cause.

"The court instructs the jury that, notwithstanding you may believe from the evidence that there was sufficient evidence produced at the trial of the criminal case against plaintiff to constitute probable cause as defined to you in other instructions, yet if you further believe from the evidence that any material part of the evidence introduced against the plaintiff in said criminal case was false, and was known to be false, by the defendants, or either of them, or their agents or servants, and that said false testimony was procured or connived in by the defendants or either of them or their agents, then the jury would be warranted against such defendant or defendants, in finding that there was no probable cause for said prosecution, and that the same was malicious."—Approved: Carp v. Queen Insurance Co., 203 Mo. 295, 101 S. W. 78.

§ 3762. Acquittal not Conclusive Either of Malice or Want of Probable Cause.

"The court instructs the jury that the mere fact that the plaintiff was acquitted is not conclusive evidence of malice or want of probable cause, for there may have been probable cause when in fact plaintiff was not insane. The plaintiff may by his own acts or folly have placed himself in a position where a reasonable suspicion of insanity might be predicated against him."—Approved: Hiersche v. Scott, 1 Neb. Unoff. 48, 95 N. W. 494.

§ 3763. Acquittal in Preliminary Trial not even Prima Facie Evidence.

"The court instructs the jury that the fact that the grand jury ignored the information, and that defendant was acquitted before the justice of the peace, is no evidence of want of probable cause, but the testimony on this point is only admitted to show that the prosecutions in question have ended."—Approved: Noble v. White, 103 Iowa, 352, 72 N. W. 556.

§ 3764. Probable Cause Acquits though there is Malice.

"If, at the time of the commencement of the prosecution against this plaintiff, the defendant had probable cause for believing the plaintiff [Green] was guilty of the crime of seducing the woman, Caroline, and he was the father of her unborn child, then your verdict should be for the defendant, although you may find that, in the part he took in the matter, he was actuated by malice; to hold him liable he must have been actuated by malice and a want of probable cause."—Approved: Green v. Cochran, 43 Iowa, 544.

§ 3765. Jury May Infer Malice from Want of Probable Cause.

"The court further instructs the jury, that if they believe, from the facts and circumstances as given in evidence, that the defendant had not a probable cause for the prosecution, they may infer malice from such want of probable cause."—Approved: Chapman v. Cawrey, 50 Ill. 517.

§ 3766. But not Want of Probable Cause from Malice.

"You cannot infer want of probable cause from malice."—Approved: Shaul v. Brown, 28 Iowa, 38.

§ 3767. Burden on Plaintiff to Show Want of Probable Cause.

"The burden is on the plaintiff to show affirmatively, by circumstances or otherwise, that the defendant had no ground for the prosecution—no such reasonable ground for suspicion, sufficiently strong in itself—as to warrant a cautious man in believing that the plaintiff was guilty of the offense charged."—Approved: Shaul v. Brown, 28 Iowa, 38.

§ 3768. Finding of Indictment Neutralizes Prima Facie Effect of Discharge by Magistrate.

"You are instructed that the fact of the finding of an indictment by the grand jury, upon the same charge on which the defendant filed a complaint against the plaintiff neutralizes the effect of the discharge by the United States commissioner, and that the fact of his discharge by the United States commissioner cannot be taken by this jury to be prima facie evidence of a want of probable cause."—Approved: Lindsey v. Couch, 22 Okla. 4, 98 Pac. 973.

§ 3769. Advice of Counsel on Material Facts Fully and Honestly Submitted a Defense.

(a) "If the jury find from the evidence in this cause that the defendant, in making the complaint and causing the arrest of the plaintiff, acted at the time in so doing in perfect good faith in making the said complaint upon which the warrant was issued upon which the arrest of the plaintiff was made, and he was subsequently prosecuted, fully believing all the facts contained in the complaint, and that before making said complaint he called upon R. R. Menzie, Esq., an attorney at law in good standing, and upon A. D. Thomas, an attorney at law

and district attorney of Walworth county, and fully, fairly, and honestly submitted and stated to them, and each of them, all the material facts implicating the plaintiff, Sherburne, including those set forth in the complaint, withholding nothing then within his knowledge or belief, and upon such statement took and acted upon the advice of Thomas and Menzie in making the complaint, and causing the arrest and prosecution of the plaintiff, then this action cannot be sustained, if such advice was honestly and in good faith given."—Approved: Sherburne, Adm'r, etc., v. Rodman, 51 Wis. 474, 8 N. W. 568.

(b) "The court charges the jury that, while it is a defense to a suit in malicious prosecution that the prosecutor had secured advice from a practicing attorney learned in the law, yet the court charges the jury, that, in order for such advice to be a complete defense, the law requires that the prosecutor shall have made a full and fair statement of the facts, and unless such full and fair statement was made it is no protection to him in a suit for malicious prosecution."—Approved: Sloss-Sheffield S. & I. Co. v. O'Neal (Ala.), 52 South. 953.

§ 3770. Any Intentional Concealment or False Representation Defeats Advice as a Defense.

"That the defendants cannot shield themselves under the advice of counsel, unless the jury find and believe from the evidence that the defendants communicated to such counsel all the facts bearing upon the guilt or innocence of the accused in the criminal case, which they knew or by reasonable diligence could have ascertained; and you are therefore instructed that if you believe, from the evidence, that the defendants or their agents intentionally concealed or falsely represented or neglected to ascertain and advise said counsel of all the facts which they knew, or by the exercise of reasonable diligence could have ascertained, bearing on the innocence or guilt of the accused in said criminal case, then the advice of counsel is of no avail as a defense in this case."—Approved: Carp v. Queen Insurance Co., 203 Mo. 295, 101 S. W. 78.

§ 3771. Advice no Protection where Prosecutor Knows Party is Not Guilty.

"In order that advice of counsel should be a protection to the defendant, he must have acted honestly, and, where the facts given are all consistent with the reasonable theory of the innocence of the party, and the prosecutor knows or has good reason to believe that the person is not guilty whom he is prosecuting, and does not believe him to be guilty, he cannot have a reasonable cause for the prosecution, and he would still be responsible for his actions no matter what some attorney may have told him. The advice of counsel is no protection for a party who acts maliciously and knows that the party whom he is prosecuting is not guilty, and further knows that all of the acts which the party against whom he complains has been guilty of are all consistent with the natural innocence of the accused, and if he proceeds under such circumstances, advice of counsel is no protection, and he

would be liable for the damages done."—Approved: Gurden v. Stevens, 146 Mich. 489, 109 N. W. 856.

§ 3772. If Consulting Particular Attorney is not in Good Faith, Advice No Protection.

"I leave it for you to say from all the evidence in the case whether the defendant acted in good faith in consulting his own attorney employed by him in the civil action, and if you find that he did not act in good faith in consulting with said attorney, then he cannot plead such advice as a defense to said action.

"It is not enough for defendant to prove generally that all the facts were laid before the attorney, but it must be shown what facts were submitted."—Approved: Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574.

§ 3773. Counselling and Advising Prosecution May Amount to Malicious Prosecution.

(a) "There is evidence tending to show that a Mr. Follett acted as attorney for the defendant in the proceedings before Mr. Barker. Of course, the defendant is liable if he either commenced these prosecutions himself or authorized and directed his attorney to do so, if in other respects the cause of action stated in the complaint is proved. Now, even if the signature to this complaint is not defendant's, yet if the defendant was there counseling and advising the prosecution of the plaintiff, and taking part in maintaining the prosecution, he would be just as liable as if he signed the complaint. However, you may consider the question whether he signed the complaint, and what he supposed as to the nature of the proceedings, whether they were tort or criminal in their nature, as bearing on the question of malice."—Approved: Eggett v. Allen, 119 Wis. 625, 96 N. W. 803.

(b) "You are instructed that it is not essential that both defendants should have signed the complaint upon which was issued the warrant for the plaintiff's arrest; but, if they were both instrumental in causing the arrest, they may both be held liable, providing you find the arrest was made maliciously, and without probable cause."—Approved: Tucker v. Cannon, 32 Neb. 444, 49 N. W. 435.

§ 3774. Direct Connection with a Prosecution may be Inferred.

"The court instructs the jury that the defendants' connection with the prosecution does not have to be proven by direct and positive evidence, but may be established by facts and circumstances in evidence in the case from which such connection with said prosecution may be reasonably inferred."—Approved: Carp v. Insurance Co., 203 Mo. 295, 101 S. W. 78.

§ 3775. Causing Arrest as a Means to Collect Money is Proof of Malice.

"If you find from the evidence that the defendant caused plaintiff to be arrested for the purpose of assisting defendant in collecting a claim for moneys which defendant thought he had against plaintiff, or to compel the delivery of property, or to satisfy some grudge or hatred,

or to accomplish some other ulterior or wrongful purpose, then it was begun maliciously, as though inspired by revenge."—Approved: Murphy v. Booth, 36 Utah, 285, 103 Pac. 768.

§ 3776. Search Warrant Sworn Out by Agent of Corporation.

"The court charges the jury that if you believe that the defendant, through its servant, wrongfully, vexatiously, purposely made the affidavit complained of, and procured the issuance of the search warrant, and without probable cause for so doing, then you must find the defendant guilty, provided you find that Hudson was acting within the scope of his authority, or was authorized by the railroad to so act, or that the railroad company has since ratified his action."—Approved: Gulsby v. Louisville & N. R. Co., 167 Ala. 122, 52 South. 392.

§ 3777. Agents of Railroad Causing Prosecuting Attorney to Begin Prosecution of Plaintiff.

"But if you find that said assistant county attorney advised or caused C. T. Warden to make a complaint, and caused the institution of said prosecution, but if you further find that said agents and servants of the defendant induced him, the said assistant county attorney, to do so by false representations to him, if there were any representations, and if they were false, or if you find that the said Penn. & F. M. Warden, acting within the scope of their authority as defendant's agents, induced him, the assistant county attorney, to do so by failing to lay before him a full and fair statement of all the facts known to them, and you further find that said complaint was made and the prosecution instituted without probable cause and with legal malice, as above defined, and you find that the charge of embezzlement against Groseclose was, in fact, false, then you will find for the plaintiff."—Approved: Missouri K. & T. Ry. Co. v. Groseclose (Tex. Civ. App.), 134 S. W. 736.

§ 3778. Malice Authorizing Punitive Damages Inferred from Wanton Charge.

"The court charges the jury that the malice required for the recovery of punitive damages in this case need not amount to ill will, hatred, or vindictiveness of purpose. It is sufficient if the defendant is guilty of a wanton disregard of the rights of the plaintiff."—Approved: Sloss-Sheffield S. & I. Co. v. O'Neal (Ala.), 52 South. 953.

CHAPTER CIV.

FRAUD—CONVEYANCES.

A. FRAUD.
B. FRAUD, STATUTES OF.
C. FRAUDULENT CONVEYANCES.

A. FRAUD.

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§ 3779. Actionable Fraud Defined.

"If one person represents to another as true that which he knows to be false, and makes the representation in such a way and under such circumstances as to induce a reasonable man to believe that the matter stated is true, and the representation is meant to be acted upon, and the person to whom the representation is made, believing it to be true, acts upon the faith of it, and suffers damage thereby, this is fraud sufficient to constitute an action for deceit."—Approved: Middleton v. Jerdee, 73 Wis. 39, 40 N. W. 629.

§ 3780. Burden of Proof Requires Clear Evidence.

(a) "The court further instructs the jury that fraud is never presumed, but must be clearly proven, to entitle a party to relief on the ground that it has been fraudulent; and the presumption of law is that business transactions of every man are done in good faith and for an honest purpose; and every one who alleges that such acts are done in bad faith, or for a dishonest purpose, takes upon himself the burden of showing, by specific acts and circumstances tending to prove fraud, that such acts were done in bad faith."—Approved: Ahlman v. Meyer, 19 Neb. 63, 26 N. W. 584.

(b) "You are instructed that you cannot find that the defendant falsely or fraudulently made representations to N. Shaw & Co. from conjecture or mere inference. Fraud must be clearly proven, and the burden of proof is on the plaintiff to establish that fact."—Approved: Shaw v. Gilbert, 111 Wis. 165, 86 N. W. 188.

§ 3781. Where Facts Consistent with Honesty Charge Fails.

"Fraud will not be presumed, but must be proved by the party charging it; and if the facts upon which the charge is predicated are or may be consistent with honesty and purity of intention, then the charge of fraud will fail."—Approved: Kenosha Stove Co. v. Shedd; Bridge v. Same; Burdett v. Same, 82 Iowa, 540, 48 N. W. 933.

§ 3782. Representation Knowingly False, Calculated to Deceive and Relied On.

"As regards the allegations of fraud and misrepresentations, charged in this case by the plaintiff in his declaration filed in this cause, the

court instructs the jury that, to entitle the plaintiff to recover damages in this case, the jury must believe, from all the evidence, that the alleged misrepresentations were, in fact, made by the defendant, or some of its duly authorized officers, that such representations were false when made, and that such person or persons making them knew them to be false when made; and further, the jury must believe, from the evidence, that they were such representations as a man of ordinary prudence would rely upon, and that the plaintiff did, in fact, rely upon such statements, and was induced thereby to purchase the stock in question in this suit, and to execute the contract complained of in this case, and has thereby been damaged, otherwise your verdict must be for the defendant."—Approved: Hutchinson F. & S. C. Co. v. Lyford, 123 Ill. 300, 13 N. E. 844.

§ 3783. Made with Intent to Induce Entering Into a Contract and was its Sole Cause.

"If, gentlemen of the jury, you find from the evidence in the case that Mr. Berringer did make this statement, and if the defendants relied upon this statement in making this contract, and that but for this statement made by the plaintiff they would not have entered into this contract, then it would vitiate the contract; and in order to determine that, it is not enough for you to find that the representations were false, but you must find, first, that these statements were made for the purpose of obtaining the contract; that Mr. Berringer made these statements for the purpose of inducing the defendants, or the defendant Cobb, to enter upon this contract. You must further find that these representations were relied upon by the defendants in making this contract, and in consequence of them, and but for them that they would not have made or entered into the contract; and you must further find that they were false. Now, gentlemen, a mere statement of opinion on the part of Capt. Berringer as to the prospects of finding ore in the mine would not be such a representation as would in law entitle the defendants to rely upon them. It must be a representation of a fact or facts, and those facts must have been relied upon, and the defendants must prove that they were not true, in order to entitle them to a defense upon this branch of the case. If, therefore, you find that he did make this statement, and that the defendants did rely on it in making their contract, and that it was false, then your verdict would be for the defendants on this branch of the case."—Approved: Berringer v. Beecher, 58 Mich. 557, 25 N. W. 491.

§ 3784. And Party Induced has been Defrauded.

"Before the plaintiffs can recover a verdict for anything in this case, you must find from a fair preponderance of the evidence that they have proved substantially the most material allegations of their petition, to wit, that the defendant wrote and sent J. C. Spangler the letter introduced in evidence as having been written and sent by the defendant to said Spangler; that the defendant wrote and sent said letter with the intent and design to induce the plaintiffs to sell grain on credit to

the said Hutley; that the representations made by said letter were false and fraudulent within the knowledge of the defendant; and that they were made intentionally to deceive, and induce the sale of the grain mentioned, to said Hutley, on credit; in other words, to maintain an action for damages for a false representation and fraud, three circumstances must combine: First, it must appear from the evidence that the representations were contrary to the fact; second, that the party making them knew them to be contrary to the fact at the time they were made; and, third, that it was the false representations which gave rise to the contracting of the other party; and, of course, before you can find for plaintiffs you must find, in addition to what is above stated, that the plaintiffs did, by reason of the said representations in said letter, sell the grain mentioned in plaintiffs' petition, or some part of the grain mentioned therein, to said Hutley, on credit; that they have not been paid therefor; that said Hutley has not sufficient means or property in this part of the country subject to execution to make the amount due from him to the plaintiffs for said grain. If you do so find, you must find for the plaintiffs; but if you fail so to find, you must find for the defendant."—Approved: Avery v. Chapman, 62 Iowa, 144, 17 N. W. 454.

§ 3785. Rescission for Fraud must be within Reasonable Time.

"The court instructs the jury that a party who seeks to rescind a sale or contract for fraud must act with vigilance and promptness, and it is his duty to disaffirm within a reasonable time after the discovery of the fraud; and if H., after he had discovered that he was in anywise defrauded, kept the property which he had received, and treated it as his own by exercising acts of ownership over it, and afterward offered it for sale, that such acts would amount to acquiescence, and to find for defendants."—Approved: Wells v. Houston, 23 Tex. Civ. App. 629, 57 S. W. 584.

§ 3785a. Purchases on False Invoices at Reduced Values—Notice of Fraud.

"If the jury believe from the evidence that by a combination between the defendant and W. J. Binley goods were shipped from the store and warehouse of the plaintiff, and that by a system of false invoices they were placed at greatly reduced values, and that the defendant, W. V. Hamilton, with the knowledge of these facts, or with the knowledge of sufficient facts to have put him, as a reasonable person, upon notice of fraud involved in it, received and used said goods and did not pay the full and actual value of the goods, then the jury will find for the plaintiff in the sum equal to the difference between the amount paid by W. V. Hamilton and their real value."—Approved: Crenshaw v. Shapleigh Hardware Co., 82 Ark. 182, 100 S. W. 882.

§ 3786. Seller Parting with Possession on Fraudulent Representations may Reclaim Property.

"If the jury believe from the evidence that defendant, in order to possession of the plaintiff's horses and money in exchange for his

mules, made false and fraudulent representations as to the age, soundness, and ability to work of his mules, known by him to be false, and which false representations were relied upon by the plaintiff, and but for which she would not have made the trade, then the plaintiff did not, as against the defendant, lose his title to the horses, and replevin will lie, provided said plaintiff did, upon discovery of the fraud and within a reasonable time thereafter, offer to return said property, or as much thereof as was practicable, to the defendant."—Approved: Faulkner v. Klamp, 16 Neb. 174, 20 N. W. 220.

§ 3788. Intentional Overvaluation of Bank Stock by Officer in a Sale.

"If you find that the defendant made such representations as to the value of said bank stock, you will next proceed to consider and determine whether or not the defendant knew at said time that said representations were false. Upon this question you will consider and weigh all of the evidence introduced by both parties upon the subject as to whether or not the defendant had knowledge of the value of said bank stock at said time. You will consider all of the evidence as to the relations which defendant sustained to the bank, as vice president and director, the condition of the bank, so far as shown, the opportunities of defendant for knowing or ascertaining the condition of said bank and the value of its stocks. You will consider the evidence as to the overdrafts in said bank, and the losses sustained thereby, and whether or not the defendant knew of the same, and, if so, to what extent his knowledge thereof extended. In short, you will carefully consider and weigh all of the evidence which will throw any light upon the question as to whether or not the defendant knew the value of the bank stock at the time of said alleged representations, and if you find that the plaintiff has established by a preponderance of the evidence that the defendant knew that said bank stock was not worth $150 per share (if you find the said representation was made by defendant), then you will proceed to the further consideration of the case, but if you do not so find, your verdict will be for the defendant. In this connection you are informed that plaintiff must establish that defendant had actual knowledge of the value of said bank stock at said time, and had actual knowledge that it was not worth $150 per share at the date of said alleged representation."—Approved: Baker v. Mathew, 137 Iowa, 410, 115 N. W. 15.

§ 3789. Negligence of Purchaser Does Not Bar Suit for Fraudulent Misrepresentation.

"If you find in the manner required that defendant made the false representations as alleged, and that he knew the same was false and that plaintiff relied upon said false representations, and did not know of its falsity, and was induced thereby to accept said stock, as heretofore explained, then it makes no difference whether he made inquiry from others, or whether he could have made inquiry from others, as to the value or condition of the stock, which would have given him knowledge of the true situation. Under said circumstances, if you so

find, he was not required to make such inquiries."—Approved: Baker v. Mathew, 137 Iowa, 410, 115 N. W. 15.

§ 3790. False Representations Need not be Sole Cause but a Material Inducement.

"If you have already found from the evidence that the defendant made the representations complained of, or some of them, and you now find from the greater weight of the evidence before you that such representations so made by the defendant, or some of them, were false, and that the defendant knew of the falsity thereof, then you should proceed to consider the next question of fact hereinafter submitted to you; but unless you do so find, your verdict should be for the defendant without proceeding further. It must next be shown by the evidence before you that the plaintiff relied upon such representation or representations so made by defendant, believing the same to be true, and was thereby induced to make such purchase. It must be shown that the plaintiff in making such purchase relied upon and believed such representation or representations made by defendant, if any were made by him. If you find, from the evidence, that the plaintiff in making such purchase relied only upon his own knowledge and observation, or upon information received from others, then he cannot recover. It is conceded that on the date of the purchase plaintiff went upon the premises in question and made some investigation and observation thereof. He must be presumed to have gained such information and knowledge from such observation as would have been plain and apparent to a man of common experience and prudence making observations under like circumstances. The law will not permit the plaintiff to recover by reason of any representations made to him which he does not believe to be true. Nor will it permit him to recover by reason of such representations unless by such representations he was induced to make the purchase in question. It is not required to be shown that such representations were the sole inducing cause, but it must appear that such representations were a material inducement, and that but for such representation or representations such purchase would not have been made. The burden of proof is upon the plaintiff to show that he relied upon such representation or representations so made by the defendant, believing the same to be true, and was thereby induced to make such purchase, and he must establish such facts by a preponderance of the evidence before you. If you have already found, from the evidence, that such representations, or some of them, were made by defendant, and that such representation or representations so made were untrue and known to defendant to be untrue, and you now find from the greater weight of the evidence that the plaintiff relied upon such representation or representations, believing the same to be true, and was thereby induced to make the purchase of the land in question, then you should proceed to consider the next question of fact submitted to you in these instructions; but unless you do so find, your verdict should be for the defendant without proceeding further."—Approved: Long v. Davis, 136 Iowa, 734, 114 N. W. 197.

§ 3791. Reckless Representations the Equivalent of Representations Knowingly False.

"Plaintiff is entitled to a verdict in this case against the defendant, Charles W. Gates, if the jury find from the evidence the following facts: First. That on June 5th, 1899, the plaintiff bought from Gates, or from E. J. Buckingham, or from both of them, five promissory notes aggregating $47,976, signed by C. J. Buckingham and Samuel Gatch and endorsed by E. J. Buckingham, dated May 15th, 1899, payable November 15th, 1899, and bearing eight per cent. interest per annum after maturity, paying therefore $45,794, which was more than the notes were in fact worth. Second. That Gates for the purpose of inducing plaintiff to buy the notes and convincing it that they were well secured, either orally or in writing, or in both ways, made, as statements of facts, any one or all of the following representations: That said notes were secured by mortgages upon 1,732 head of cattle; that they were what is known as 'Panhandle cattle;' that they were shipped from the Panhandle of Texas in 1898; that they would weigh from 750 to 850 pounds each, and that they were worth $35 per head; that Buckingham and Gates had $10,000 of their own money invested in the cattle. Third. That any or all of said representations were false and fraudulent, and plaintiff upon the faith of and reliance upon same parted with his money.

"If, to induce the plaintiff to act thereon, Gates falsely made any one of the representations of the character and for the purposes as submitted in the foregoing instruction, knowing at the time that it was false, then the jury must find that it was fraudulent. Or if Gates, without knowledge of its falsity, did make any one of such representations to induce plaintiff to act thereon, assuming or intending to convey the impression that he had actual knowedge of its truth, though conscious that he had no such knowledge; then such representation was just as fraudulent as if he had made it actually knowing that it was false. If any representation was so made and was fraudulent, as that word is herein defined, then Gates cannot claim that he did not intend thereby to actually injure or to actually defraud plaintiff, or that he was innocent and acted honestly and in good faith in relation thereto."—Approved: Western Cattle Brokerage Company v. Gates, 190 Mo. 391, 89 S. W. 382.

§ 3792. Pointing out other Land than that Purchased as being that Purchased.

"If you believe from the evidence that the defendants, or either of them, prior to the sale of the property, pointed out to the plaintiffs, or to either one of them, certain lands other than the lands described in the deed given by the defendants to the plaintiffs, and that the plaintiffs relied upon the information thus given and went to trouble and expense and work improving the lands pointed out to them, and which they believed to be the property which they bought, then your verdict must be for the plaintiffs, and in such sum as you believe they were damaged, if they suffered any damage.

"If you find from the evidence, as a matter of fact, that prior to the date of sale the defendant Vernon pointed out certain lands to one of the plaintiffs, which were not as a matter of fact the lots conveyed, and that plaintiffs believed they were the same lands, and were told by the said Vernon that they were the same lands, that plaintiffs are entitled to recover any damages which they sustained by reason of such misinformation, even if the said Vernon did not purposely mislead them; in other words, if the defendant Vernon made a mistake and pointed out the wrong property, even if his mistake were unintentional, yet he and his partner must be held for any pecuniary damage said mistake may have caused the plaintiff. * * * If you find that the defendants, or either of them, prior to the sale of the property, told the plaintiffs they would sell him the lots which he subsequently improved, and pointed out said lots to him, and that plaintiffs, acting upon such representations and relying thereon, improved the said property, they are entitled to recover damages, regardless of the nature or value of the lots described in the deeds, and the value of said lots has nothing to do with the question of the amount of damages which should be awarded."—Approved: Lawson v. Vernon, 38 Wash. 422, 80 Pac. 559.

§ 3793. Making False Representation as to a Fact not within Ordinary Care to Discover.

"If you believe from the evidence that on November 25, 1903, the defendant, T. E. George, conveyed to plaintiff, William Hesse, certain property described in plaintiff's petition, situated in Dimmitt county, Tex., in consideration of plaintiff's conveying to the defendant certain property in Bexar county, Tex., and if you further believe from the evidence that as an inducement for plaintiff to make any exchange of his property with the defendant, the defendant made a false and fraudulent representation to the plaintiff, to the effect that he had just struck a gusher of water; that is, a strong flowing well of water on his Dimmitt county land, if you so find, and that said representation, if any, was material and that plaintiff, William Hesse, believed said representation, if any, to be true, and did not know and could not, by the exercise of ordinary care, have known, whether said representation, if any, was true or false, and that the said George made such representation, if any, to the said Hesse, for the purpose of inducing the said Hesse to make the trade, and accept the Dimmitt county land, if you so find, and that the said Hesse accepted the Dimmitt county land, relying on said representation—if you so find—then you are instructed to return a verdict for the plaintiff, William Hesse; but if you do not so believe, you will return a verdict for the defendant, T. E. George."—Approved: George v. Hesse (Tex. Civ. App.), 94 S. W. 1122 (not reported in state reports).

§ 3794. Misrepresenting Indebtedness in Sale of Business—Assumption by Purchaser.

"You are instructed that if you find from the evidence that before the dissolution of the copartnership between the plaintiff and the de-

fendant the plaintiff requested the defendant to make him a list showing the amount of indebtedness not represented by notes owing at said time by the Cleburne Bottling Works, and that the defendant, Self, made out the list read in evidence as showing such indebtedness, and represented to the plaintiff that said list showed all of such indebtedness, and that plaintiff, in reliance upon the statement of the defendant that such list showed all of such indebtedness of said Bottling Works, purchased defendant's interest in said concern for $2,000, and for a conveyance of certain real estate of said concern, and for the assumption of all the debts of said concern by the plaintiff, and that plaintiff would not have so purchased defendant's said interest, and would not have assumed all the debts of said concern, had not defendant made such statements and list, then you are instructed to find for the plaintiff, and against the defendants, and so say by your verdict."—Approved: Pittman v. Self (Tex. Civ. App.), 127 S. W. 907.

§ 3795. Release Obtained by Fraud—Settlement of Claim for Injuries.

"The execution of the release by the plaintiff, which bears date March 2, 1909, and put in evidence, is not denied. But if the jury find from the preponderance of the evidence that before, or at the time, the consideration was paid for said release, and the same was executed, the physician and surgeon of the defendant railway company made an examination of the plaintiff's injuries, and thereupon assured the plaintiff that his injuries were not permanent, but that plaintiff would be able to resume his position and duties with defendant in a short time, and, relying upon said statement to be true, he executed said release, thinking it a settlement for wages for time lost on account of the injury, but soon afterwards it was developed that plaintiff was permanently injured, and that he would never be able to perform labor in his line of employment, but that at the time of making said statements defendant's physician and surgeon either knew that plaintiff was permanently injured and misrepresented that fact, or was honestly mistaken as to extent of plaintiff's injuries, and mislead him into signing said release, then plaintiff is not bound by the same, and the jury should so find."—Approved: St. Louis, I. M. & S. Ry. Co. v. Carter (Ark.), 126 S. W. 99.

§ 3796. False Representations as to What is Plainly Perceptible.

(a) "If the conditions of the land, in any respect, concerning which representations were made by the plaintiff to defendant, was readily discoverable, or plainly perceptible to the defendant by the use of his senses and his judgment, then he must be deemed to have known what was plainly perceptible to him, and he cannot be deemed to have relied on representations, the falsity of which he ought to have known under the rule herein stated. In determining the question whether the defendant is chargeable with knowledge of the condition, quality, or topography of the land in question by his view thereof, you have a right to take into consideration all the circumstances surrounding him at the time thereof and the statements, if any, made to him by the

plaintiff at the time."—Approved: Hetland v. Bilstad, 140 Iowa, 411, 118 N. W. 422.

(b) "If the plaintiffs * * * were taken over the farm by the defendants, * * * or (and) were shown the bounds so that the plaintiffs knew where the farm was and what was comprised within the bounds, it would not be of any consequence that representations may have been made by the defendant in relation to the acreage."—Approved: Mabardy v. McHugh, 202 Mass. 148, 88 N. E. 894.

§ 3797. False Representation as to a Lot Being a Corner Lot.

"You are further instructed that if you believe from the evidence that at the time plaintiff purchased said lot that said defendant knew it was intended as a residence lot; and if you further believe that plaintiff then and there told said defendant where and on what part of said lot he wished to build his house, and what the style such house should be, and in what direction it should front; and if you believe that said defendant then and there, as an inducement to plaintiff to purchase said lot for a residence, represented to him that there was a street on the east and on the north side of the same; and if you believe that by said representations plaintiff was induced to purchase said lot for the sum of $400, for the purpose aforesaid, and that such purposes were known to defendant; if you believe that plaintiff then and there made said purchase and proceeded to build and did build a residence in the north-east corner of said lot fronting east and north, and that such design was communicated to defendant at and before said sale; and if you further believe that said representations of defendant made about a street on the north were false, and known to defendant at the time they were made to be false; and if you believe that plaintiff has been damaged thereby, then you will allow him for the same."—Approved: White v. Smith, 54 Iowa, 233, 6 N. W. 284.

§ 3798. Signature Obtained by Misreading Writing to Signer.

"If you find from the evidence that the defendant, at the time of executing the paper in evidence, was unable to read or write written or printed matter, and that '3,000 bushels' was placed in writing without the knowledge of the defendant, and that he was induced to sign said contract, believing said contract embraced the agreement made between the plaintiffs and the defendant; and if you further find that the plaintiffs at the time paid to the defendant the sum of $52.50, and that the agreement between the parties was that the defendant should deliver to the plaintiffs sufficient corn to repay said money at the price named, and that the defendant should, if he had any other corn to spare, sell the same to the plaintiffs at the same price, said corn to be delivered in the month of August, 1890, after the defendant could tell whether or not he would raise a good crop of corn for that year, and after he should ascertain whether or not he would have any more corn to sell and spare from his then old crop, or any other specific quantity or amount of corn over and above sufficient to pay the $52.50 advanced by the plaintiffs to the defendant; and if you further find

that the paper signed by the defendant was not read to the defendant as the same actually was when signed by him, but was represented to the defendant as not containing the clause requiring him to deliver 3,000 bushels of corn to the plaintiffs, and that the defendant, believing such representation, executed the same, then you should find for the defendant."—Approved: Spelts & Klosterman v. Ward, 2 Neb. Unoff. 177, 96 N. W. 56.

§ 3799. Signing Without Reading Where not Induced by False Statements.

"The law requires every person to exercise reasonable prudence in business affairs, and before relieving a party from the obligations of a contract upon the ground of fraud, it must appear that he exercised reasonable care and prudence to learn the nature of the contract before executing it; if the defendant could read and had an opportunity to read the contract before signing, it was his duty to do so, unless induced not so to do by willfully false statements of the plaintiffs, or one of them, as to its being a copy of the original; and if the defendant had full opportunity to read the contract before signing it, and was not induced to sign it by false statements made by plaintiffs, or either of them, the defendant would not be permitted to deny knowledge of the contents thereof."—Approved: Standard Mfg. Co. v. Slot, 121 Wis. 14, 98 N. W. 923.

§ 3800. Fraudulent Misrepresentations by Agent Known to be Acting for Another.

"It is not sufficient to show that the representation was made, and made to induce the sale, and that said statement was in fact untrue. It is admitted that defendant was the agent of Frank, and so acted in the transaction. It is also admitted that plaintiff knew that defendant was acting for Frank, and not for himself. Under these circumstances, a mere assertion or representation concerning the said land would be presumed to be made for and on behalf of the principal, and the agent would not be liable for any such assertion or representation, concerning said land."—Approved: Riley v. Bell, 120 Iowa, 618, 95 N. W. 170.

§ 3802. Subsequent Conduct may Prove Prior Intent.

"You may, however, consider the subsequent conduct of the parties thereto in determining the fact of the existence of such fraudulent intent at the time of the making of said contract."—Approved: Prichard v. Hopkins, 52 Iowa, 120.

§ 3803. Fraud provable by Circumstantial Evidence.

"The jury are instructed, as matter of law, that fraud may be proved by circumstantial evidence as well as positive proof. Where fraud is charged express proof is not required. It may be inferred by strong presumptive circumstances. If the jury believe, from the evidence, that Buttner got possession of the goods from plaintiffs by fraudulent representations in regard to his responsibility, and that, upon the arrival of the goods at Aurora, Kranert took a mortgage upon the whole

stock for a sum larger than the amount actually owing from Buttner to him, and that Kranert knew that Buttner was insolvent at the time he obtained the goods of plaintiff, and that they were not paid for, and that Kranert knew it when he took the mortgage,—all these facts and circumstances may be taken into consideration by the jury in determining whether Kranert was a bona fide mortgagee of the goods."—Approved: Strauss v. Kranert, 56 Ill. 254, 256.

§ 3804. What Must Concur to Entitle to Relief.

"A misrepresentation, to be fraudulent, must be as to a material fact, or to material facts; must be false; must be relied on by the one to whom it is made; must constitute an inducement to enter into a transaction; must work injury or result directly in damages to the party relying thereon, and the party to whom it is made must have a right to rely thereon. If all these circumstances concur, there is fraud, and the party thus injured is entitled to relief."—Approved: Jones v. Hathaway, 77 Ind. 14, 24.

§ 3805. Fraudulently Inducing an Illiterate Person to Sign a Note.

"If you shall find from the evidence that the defendant Thomas did authorize Jones to sign his name to the note in question, and that, at the time he authorized the same to be signed, it was represented to him and he believed that it was a note for $100, and that he was unable to read or write the English language, and that he was ignorant of the fact that the note had been drawn for $180, and that he had no intention of signing a note for that amount, and was guilty of no negligence in not knowing the exact amount of said note, then he is not bound by it, and is not liable thereon to any one."—Approved: Bowers v. Thomas, 62 Wis. 480, 482.

§ 3806. Such Note Void in Hands of Innocent Holder before Maturity.

"If the signature of the defendant to the note was obtained by fraud as to the amount thereof, he believing it to be for the sum of $100, when in fact it was for $180, and the defendant was ignorant of that fact, and he had no intention of signing a note for $180, and was guilty of no negligence on his part, and he was ignorant of the true character of the note, and had no intention of signing a note for $180, then he is not liable therefor, and the note is void, even in the hands of a holder for value before maturity and without notice."—Approved: Bowers v. Thomas, 62 Wis. 480, 482.

§ 3807. Effect of Acquiescence after Discovery of Fraud.

"Every false statement made, as to facts in making a contract, does not necessarily vitiate or avoid it; but where the matter of representation relates to a material subject of the contract, and forms an inducement to the making of the contract, it may have the effect wholly to annul and avoid the contract, unless, after the discovery of the fraud, the party who might complain, acquiesces in and adopts the contract, and proceeds to act upon it and recognizes its validity."—Approved: Griffeth v. Hanks, 46 Tex. 217.

§ 3808. Sale of a Chattel, concealing an Incumbrance.

"If you are satisfied, from the evidence, that Seydel made the representations and statements, alleged in the amended answer, to the defendants, and if you also believe that the existence or non-existence of a lien or incumbrance upon the property formed a material inducement or consideration to the defendants in entering into the contract for the purchase of the engine, etc., and that the defendants relied upon the fact that there was either no incumbrance or only a small balance due upon the deed of trust, which could be readily provided against, by satisfying it, such a state of facts would constitute such a fraud as would avoid the contract, provided these representations in fact misled defendants into making a contract, which they would not otherwise have made, and provided further, that the representations were in fact untrue and false."—Approved: Griffeth v. Hanks, 46 Tex. 217.

§ 3809. Deceit in inducing Purchase of a Worthless Patent.

"Plaintiff claims that he was induced by the defendant's acts, and representations of Hess, to join him in buying a patent wheat screen, for which they were to pay each one thousand dollars, and become partners; that he paid his thousand dollars, and, believing Hess had paid the same amount, had an assignment made to them by Crampton; that afterwards he discovered that he had been deceived; that Hess had paid nothing for said patent, and it was of no value; but that, before making the agreement with plaintiff, he had combined with Crampton to make said pretended agreement with Young, and induce Young to pay Crampton a thousand dollars, which Hesss and Crampton were to divide between themselves; that so soon as he learned he had been defrauded, he rescinded the contract;—now, if you believe from the evidence that these facts are true, you should find for the plaintiff for the amount of damages he has sustained."—Approved: Hess v. Young, 59 Ind. 379, 383.

§ 3810. Where Injury Resulted from Texas Cattle Fever.

"You will first consider whether defendants are or are not guilty of the deceit charged in the declaration. If, in June, 1869, the defendants were jointly interested as copartners in the transportation of government stores from Fort Harker to Fort Arbuckle, and in order to induce the plaintiffs to enter into a contract to transport such freight for the defendants from Fort Harker to Fort Arbuckle, the defendant, Kellogg, represented to the plaintiffs, or one of them, that no Texas cattle, had been driven over or upon the road, by which plaintiffs, if they should accept such contract, must travel, and that plaintiffs, if they should accept such contract would not travel within twenty-five or thirty miles of the road by and over which Texas cattle were driven, and declared that he knew of this of his own knowledge, or spoke of it as a matter within his own knowledge; and if, in the same circumstances, a man of ordinary prudence would have relied on the same representations, and if plaintiffs did rely thereon, and, relying on

these representations, entered into such contract in the faith thereof, and proceeded to perform the same; and if, in fact, the only road between Fort Harker and Fort Arbuckle was one upon which Texas cattle were then being driven, and before had been driven, then the defendants are both liable to the plaintiffs for the damage, if any, shown to have resulted to plaintiffs by reason of the falsity of the representations made by defendant Kellogg, even though the defendant Sellar, had no actual knowledge of the alleged representations at the time, and though neither Sellar nor Kellogg had actual knowledge of whether the facts were or not according to the alleged representations."—Approved: Sellar v. Clelland, 2 Colo. 532, 538.

§ 3811. Whether Damage Accrued from a Fraudulent Representation.

"If you conclude, upon consideration of all the evidence, that the defendant Kellogg, acting about the business of the defendants, did make the representations sought to be attributed to him as true, of his own knowledge; that the representations were such, and made under such circumstances, that a man of ordinary prudence would, in the same circumstances, have relied upon the same representations as true; and that plaintiffs did rely upon the truth thereof, and on the faith of these representations entered into the contract spoken of; and that in truth the representations said to have been made by Kellogg were false, you will then consider whether the injuries said to have been suffered by the plaintiffs are or are not attributable to the cause to which the plaintiffs have attempted to assign them, i. e., to the fact that the road by which plaintiffs traveled with their train was one over which Texas cattle had before been driven."—Approved: Sellar v. Clelland, 2 Colo. 532, 539.

§ 3812. Several Liability of Defendants.

"This action is not founded on or brought upon the contract offered in evidence, and it is not necessary to the recovery of the plaintiffs that both of the defendants are shown to have been guilty. The jury may find either of them guilty, if they believe, from the evidence, that the fraud and deceit was practiced upon the plaintiffs by either, as alleged in the declaration, and that the plaintiffs sustained damages in consequence of such fraud and deceit."—Approved: Eames v. Morgan, 37 Ill. 260, 263.

§ 3813. Fraud as a Counterclaim in an Action to foreclose a Mortgage.

"If the jury believe from the evidence in the cause, that plaintiff, at or before the sale of the land in question to the defendant, knowing said land to be subject to overflow, used any artifice to mislead the mind of the defendant, and throw him off his guard, and to prevent him from making as careful an examination of the land in question as a man of ordinary prudence would otherwise have made; and that defendant was thereby misled, thrown off his guard, and prevented from examining said land, and in consequence thereof was and re-

mained ignorant of the fact that said land was subject to overflow, up to the time when he bought said land, then, and in that case, the jury should find for the defendant, and assess his damages according to the measure heretofore stated by the court."—Approved: McFarland v. Carver, 34 Mo. 195, 196.

§ 3814. The same Subject stated from the Plaintiff's Stand-point.

"The burden of proof, under the issues in the case, is upon the defendant, and the jury will find for the plaintiff the full amount of balance of principal and interest due on the notes sued on, unless it has been proven to this jury by the evidence in the cause—1st, that the defendant, Carver, when he bought it of plaintiff, was ignorant that the land in question was subject to inundation or overflow, and that plaintiff knowing that fact, failed to disclose it to defendant; 2d, that defendant was ignorant, when he bought said land of plaintiff, that it was subject to inundation or overflow, and that plaintiff represented to defendant, before said sale was closed, that it was not subject to inundation or overflow, knowing such representation to be untrue."—Approved: McFarland v. Carver, 34 Mo. 195, 197.

§ 3815. Fraud in the Transfer of Forged Notes.

"To entitle the plaintiff to recover in this case he must show by a preponderance of the evidence that the said note and mortgage were worthless or false, fictitious, and forged, as alleged in his petition; that defendants made the representations regarding the same being good and genuine, as alleged in the petition, with the object in view and for the purpose of inducing the plaintiff to trade said horse for said note and mortgage; that said representations were false and untrue, and that the defendants made them knowing that they were false and untrue, or that they made such representations without knowing the same to be true, and were ignorant of the facts so stated and stated them as true, when in fact they had no apparently good reason for believing them to be true, and that plaintiff, relying upon the same, made the trade as alleged in the petition, and that plaintiff was injured thereby,—then you will find for plaintiff in such sum as damages as is shown by the evidence he has sustained."—Approved: Palmer v. Courtney, 32 Neb. 773, 49 N. W. 754.

B. Frauds, Statute of.

§ 3816. Part Performance in Oral Contract for Sale of Land.
3817. Possession Taken in Futherance of the Contract.
3818. Oral Agreement for Surrender of Lease.
3819. Oral Agreement not to be Performed Within a Year.
3820. Necessity for Demand of Money Paid upon Contract, void if not Performed.
3821. Delivery as Part Performance Must be Unconditional.
3822. Oral Promise to Pay the Debt of Another.
3823. Oral Promise Upon Valuable Consideration to Pay Money to Another.
3824. A Verbal Lien of Which no Notice is Given is Invalid as to Third Parties.

§ 3816. Part Performance—in Oral Contract for Sale of Land.

"The jury are instructed that if they believe from the testimony that the defendant and William Spears entered into a contract for the sale and purchase of the land in controversy, and that such contract was oral and not in writing, then, in order to take such contract out of the statute of frauds by reason of the possession of the defendant it must appear from the evidence that the defendant took possession of said property solely under the contract and in reference exclusively to it."—Approved: Fox v. Spears, 78 Ark. 71, 93 S. W. 560.

§ 3817. Possession Taken in Furtherance of the Contract.

"If you find that the defendant entered into a verbal contract for the purchase of the land in question, and took possession of it under the contract, and solely in reference to it, these facts take the case out of the statute of frauds, and the contract is as good to prove the sale as if it was in writing, and if you find that the defendant, while continuing in possession, made the payment agreed upon, his title became perfect, and is good against the claim of the plaintiff, although he has no deed or other written evidence of title."—Approved: Fox v. Spears, 78 Ark. 71, 93 S. W. 560.

§ 3818. Oral Agreement for Surrender of Lease.

"In order to constitute a valid surrender of a written lease for a term exceeding one year, there must either be a surrender in writing, or there must be an agreement made between the parties, one side offering to surrender the lease and to surrender the premises, and an acceptance on the part of the landlord. If there was simply an agreement to surrender the lease, not acted upon or carried out by the parties, then there was no valid surrender of the premises and of the lease."—Approved: Goldsmith v. Darling, 92 Wis. 363, 66 N. W. 397.

§ 3819. Oral Agreement Not to be Performed Within a Year.

"The court instructs the jury that if they believe from the evidence that the contract alleged to have been made could not be performed within one year from the date of the oral agreement in relation to it,

it would not be good as a contract. It might be treated by the parties as a waiver of the right upon either side to insist upon the immediate performance of the contract, but it would not be good as a contract to take the place of the original contract."—Approved: Barton v. Gray, 57 Mich. 622.

§ 3820. Necessity of Demand for Money Paid on Contract Void if not Performed.

"Where a contract is void by the statute of frauds, and money is paid upon it, which the party is entitled to recover back, he cannot recover it back, without making a demand, because otherwise the vendor might not know but the other party was going to take possession and fulfill the contract; but the contract being void, when the party paying the money goes and demands it, that is notice that he will not perform it, and then if the vendor refuses to pay, a cause of action at once arises to enable him to recover it back, with interest from the time at seven per cent. If he does not refuse, he is to have a reasonable time to get the money and pay it. What is a reasonable time is a question of fact for you.

"I ought to say this, further, that in making the demand for the money it is not necessary that he should put it on the ground that the contract is void under the statute of frauds, but there must be such a reference to the money when the demand is made that the defendant should understand that it is the money paid on the contract which is void by the statute"—Approved: Tucker v. Grover, 60 Wis. 233, 19 N. W. 92.

§ 3821. Delivery as Part Performance Must be Unconditional.

"If the contract claimed by the plaintiff in his petition was wholly oral,—that is, by word of mouth,—and no part of the purchase money was paid, or no part of the corn was delivered thereunder, then the plaintiff has failed to make out his case, and your verdict must be for the defendant. And there would be no such delivery of the corn to the defendant, if the plaintiff simply stored his corn, or a part of it, in the defendant's crib, under an arrangement whereby it was to remain his property until such time as he saw fit to sell it to the defendant."—Approved: Powder River Live-Stock Co. v. Lamb, 38 Neb. 339, 56 N. W. 1019.

§ 3822. Oral Promise to Pay the Debt of Another.

"The plaintiff in this case, in July, 1895, was engaged in the mercantile business in this city, selling furniture. They claim that, some time in July of that year, one Felcher came to them, and represented that his wife was the owner of a boat called the 'Periwinkle,' and that they desired to purchase some chairs to be used upon this boat. They also claim that they refused to give credit to Mr. Felcher for the chairs, but that they sold the chairs to the defendant, Mrs. Felcher. The burden of proof is upon the plaintiff to establish his case, and to establish each and every element necessary to make out the case by a fair preponderance of evidence. If you find, from the evidence in this

case, that the sale of these chairs was actually made to the defendant, that she was the person that was given credit for these chairs, and that she represented to the plaintiff at the time that she was the owner of the boat Periwinkle, then the plaintiff would be entitled to recover the value of the chairs. On the other hand, it is claimed by the defendant that she did not purchase these chairs, and that the chairs were purchased by her husband. She also claims that she is not the owner of the Periwinkle. She also claims that she never gave her husband any instructions to buy any chairs for her, or to buy any chairs to place upon this boat. She also claims that she never bought the chairs, or had any conversation in regard to buying the chairs. If you should find, from the evidence in this case, that the chairs were sold to Mr. Felcher (Capt. Felcher), and delivered to him, and that afterwards the defendant in this case, Mrs. Felcher, agreed to pay for them within ten days, or return the chairs, if you should find that to be the fact in this case, then plaintiff cannot recover, because it would be the promise merely to pay the debt of another, and, in order to bind the defendant upon any such terms, it is necessary, under the law, that the promise should be in writing, and signed by the defendant, in order to bind her, or charge her with the indebtedness."—Approved: Foster, Charles & Ewen Co. v. Felcher, 119 Mich. 353, 78 N. W. 120.

§ 3823. Oral Promise Upon Valuable Consideration to Pay Money to Another.

"The jury is instructed as a matter of law that a promise made upon a valuable consideration from one person to another to pay a sum of money to a third person is valid and binding, and can be enforced by said third person in his own name. In this case, if the jury believe, from the evidence, that the defendant, as charged in the declaration, purchased the leasehold and personal property in the restaurant from Y, and as a part of the purchase price agreed and undertook to pay the indebtedness due the firm of C. & G., then the jury must find the issues for the plaintiff for the sum remaining unpaid or due at the time of making said agreement, and interest upon it at the rate of five per cent."—Approved: Kee v. Cahill, 86 Ill. App. 563.

§ 3824. A Verbal Lien of Which no Notice is Given is Invalid as to Third Party.

"A verbal lien or agreement between the defendants, by which John Johnson was to have the corn in controversy under certain conditions, would not constitute title or ownership therein sufficient to entitle him to convert the same to his own use, and thus defeat the lien of an execution creditor levied without notice of such verbal lien."—Approved: Johnson v. Walker, 23 Neb. 736, 37 N. W. 639.

C. Fraudulent Conveyances.

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3856. Taking of Possession Must be that Which the Property Permits of.
3857. Directing Clerk of Seller to Take Charge no More than Constructive Possession.
3858. Transfer of Partnership Property for Firm Debt, no Fraud Against Partner's Creditors.

§ 3825. Fraudulent Conveyance—Defined.

"It is also the law that every conveyance of any goods, made with intent to hinder, delay, or defraud creditors of their debts or demands as against such creditors, shall be void. In order to be void under this principle of law the purchaser must have participated in the fraudulent intent, or have had notice of the fraudulent intent on the part of the seller, or notice of such facts as would have put a person of ordinary care and prudence on such inquiry as would have led to knowledge of such fraudulent intent on the part of the seller. On these questions it is proper for you to consider the relations of the parties to each other, the surrounding circumstances, the manner of the alleged sale, and the kind of consideration therefor, and determine them from the whole evidence. If there was no actual and continued change of possession following the sale, the burden of proving that the sale was in good faith and valid was upon the plaintiffs. But if there was an immediate delivery at the sale, and an actual and continued change of possession, the burden of proof is upon the defendant to show by a preponderance of the evidence that the sale was void as against the defendant. This distinction you will bear in mind considering the other instructions."—Approved: White v. Woodruff, 25 Neb. 797, 41 N. W. 785.

§ 3826. Fraud not Presumed but Must be Shown.

(a) "Fraud is never to be presumed, but must be proven by good and sufficient evidence in the cases. Therefore, before you can find for the plaintiff on the ground of fraud, you will have to find that the interpleader, C. H. Sharp, at the time of the purchase had known or knew of grantor's intent to defraud the plaintiffs."—Approved: Burke v. Sharp, 88 Ark. 433, 115 S. W. 145.

(b) "You are further instructed that the validity of a bill of sale, regular on its face, cannot be overcome by oral testimony, unless it is shown to have been for fraudulent purpose, and unless you find from a fair preponderance of the evidence that the bill of sale introduced in evidence was made for the purpose and with the intent to defraud the creditors of D. P. Cullen Company, Limited, then you should find that the bill of sale is valid and entitled to full faith and credit."—Approved: Burke v. Sharp, 88 Ark. 433, 115 S. W. 145.

§ 3827. Fraud May be Shown by a Preponderance of Evidence.

"You are further instructed that the burden of proving the allegation of fraud as set forth in the answer of the plaintiffs filed to the interplea of C. H. Sharp rests upon the plaintiffs, and that unless such fraud exists and is proven to the satisfaction by a fair preponderance

of the evidence, then it is your duty to find for the interpleader therein, provided you find as hereinbefore instructed that the said interpleader purchased and took possession of said property and was the owner thereof at the time it was attached."—Approved: Burke v. Sharp, 88 Ark. 433, 115 S. W. 145.

§ 3828. Fair and Reasonable Price Surrendered to Existing Creditors Negatives Fraud.

"If you find from the evidence that a fair and reasonable price was paid for the property, and all the consideration was paid to the existing creditors of Kartus Dry Goods Company, except a certain part which was set aside for plaintiff, and a good check therefor sent to him, which plaintiff did not receive or object to because it was in the form of a check and not cashed, and that such part of such consideration still remains in the purchaser's hands subject to plaintiff's orders, then your verdict must be in favor of the claimants."—Approved: Lightman Bros. & Goldstein v. Epstein, 164 Ala. 660, 51 South. 164.

§ 3829. A Fair Consideration—One Not so Much Below Value as to Arouse Suspicion.

"You have been told in the preceding instructions that if such a sale was not in good faith, as defined for you, then defendant will be liable in this action to plaintiff for the damages caused him, which damages are hereinafter brought to your attention in other instructions. You have been also told that if said trade was not for a present, fair consideration, then defendant would also be liable for said damages. It becomes necessary, in view of this statement, to define for you the meaning of the words 'fair consideration,' as thus used. Now, if the price paid by defendant for the said stock of goods and fixtures was so much less than the fair market value of the said stock of goods and fixtures, at the time the trade was made, as in itself to put an ordinarily prudent person on guard—that is, to arouse his suspicions as to the intent or purpose of said Koell in making the trade of said stock of goods and fixtures for the price then paid—the consideration paid by defendant was not a fair consideration; that is to say if there was so great a difference between the fair market value of said stock and fixtures at the time of said trade, and the price paid therefor by defendant, as in that fact alone to arouse the suspicions on the part of an ordinarily prudent person of a wrong intent on the part of Koell to then dispose of said stock and fixtures, then the price paid by defendant was not a fair consideration. By 'wrong intent' is meant an intent to hinder, delay, or defraud a creditor or creditors."—Approved: Myers v. Fultz, 124 Iowa, 437, 100 N. W. 351.

§ 3830. A Conveyance Without Consideration Invalid Against Grantor's Debts.

"If you find from the evidence that the defendant did not have any property of her own, and that property which was originally owned by S. C. Bailey, and was in his name, was transferred to the name of D. S. Bailey, a son of E. A. Bailey, and that said money, or a note given

therefor, was taken in her name, and that the said E. A. Bailey gave no consideration for said transfer, then, as between the plaintiff and E. A. Bailey, the same would be, in law, the property of S. C. Bailey, and would be liable to the payment of his debts, and your verdict would then be in favor of the plaintiff."—Approved: Dunning v. Bailey, 120 Iowa, 729, 95 N. W. 248.

§ 3831. But Exempt Property May be Disposed as Debtor Pleases.

(a) "I say to you as a proposition of law, it being conceded that the books were exempt as A—'s library, he had the right to donate them for a consideration and the love and affection which the law presumes he bears for the plaintiffs, his children, is a sufficient consideration, and if that gift was followed by an actual manual delivery of the property to his children, it was still, as when he retained it as his library, and continued to be not liable to seizure and sale upon execution by his creditors, and thus I have taken away from you all question of fraudulent transfers, so far as the sale or gift to his children is concerned, for the books being exempt, he had the right to sell them, he had the right to donate them, and it is perfectly immaterial whether he designed to defraud creditors or not, the property being exempt, the disposal of them could not defraud the creditors, because the creditors had no right to them."—Approved: Carhart v. Harshaw, 45 Wis. 340, 345, 346.

(b) "The jury are instructed that, it being conceded, that these books were exempt as Dr. C—'s library, he had a right to sell them to any one for a valuable consideration, and, when so sold, they could not become liable to seizure and sale for his debts. He had also the right to donate them to his children in consideration of his love and affection for them, and if that gift was followed by an actual manual delivery to them, the property continued to be exempt from sale on execution by his creditors; but if he changed said library into stock in trade, and is the owner of a store, of which the books are a part of the stock in trade, and said store is carried on in the name of his children as a cover to keep the property from his creditors, then these books were liable to the execution."—Approved: Carhart v. Harshaw, 45 Wis. 340, 342.

§ 3832. To Secure Bona Fide Debt Lawful Though it Hinders Other Creditors.

"It is claimed on the part of the plaintiff in this suit that this bill of sale was not a bona fide bill of sale; that is, that it was fraudulent, and therefore void. I charge you that, in order to make this bill of sale fraudulent or void in this case, it is necessary that it should be executed with an intent to hinder, delay, or defraud creditors. If it was executed for the purpose of securing bona fide indebtedness, it would not be fraudulent, no matter if it did in effect hinder, or delay, or defraud creditors. If it was executed for the purpose of securing bona fide indebtedness, it would not be fraudulent, no matter if it did in effect hinder or delay or defraud creditors; but if executed, not to secure a bona fide indebtedness, but for the purpose of hindering, delaying, and defrauding creditors, it would be void in law, and no title

would pass under it by virtue of the bill of sale, if you should find it to be fraudulent,—that is, if it was not executed for the purpose of paying a bona fide indebtedness owed by Mr. Ouellette to the Goebel Brewing Co."—Approved: Sloman v. Goebel Brewing Co., 118 Mich. 442, 76 N. W. 975.

§ 3833. One Creditor May be Preferred to the Exclusion of Others.

(a) "The jury are instructed that a person who is indebted, and unable to pay all of his debts in full, has a right to prefer anyone or more of his creditors, to the exclusion of all others; and, in payment of a bona fide indebtedness to one of his creditors, a debtor may exhaust the whole of his property, so as to leave nothing for the other creditors, who are equally meritorious."—Approved: Chaffee v. Atlas Lumber Co., 43 Neb. 224, 61 N. W. 637.

(b) "If you believe from the evidence that the conveyances complained of by plaintiff were made upon the consideration of a certain indebtedness due from P. G. Maffi to Josefita M. Maffi, and the further consideration of the payment by said Josefita M. Maffi of certain debts and liens against the property named in said conveyances, and that such conveyances were made in good faith, and that the consideration was fair and reasonable for said property, then said sale and conveyance of said property was made upon what is deemed a valuable consideration in law, and you will find for the defendants, and in order to avoid the conveyance, on the ground of fraud, there must be a real design on the part of the debtor to prevent the application of his property, in whole or in part, to the satisfaction of his debts. A creditor violates no rule of law when he takes payment or security for his demand, if done in good faith, though others are thereby deprived of all means of obtaining satisfaction of their equally meritorious claims." Approved: Maffi v. Stephens (Tex. Civ. App.), 93 S. W. 158 (not reported in state reports).

§ 3834. The Fraudulent Intent of Vendor Will Not Alone Defeat a Sale.

(a) "Although you should find that Christian made one or both sales to plaintiff with intent to hinder, delay, and defraud his creditors, yet, if he paid a valuable consideration for the goods, such intent on the part of Christian would not alone make the sale void. In order to invalidate the sale, it must further appear from the evidence that the plaintiff, at the time he bought and paid for the goods, had notice of such intent on the part of Christian, or that he had a knowledge of facts or circumstances such as would have put an ordinary prudent man upon inquiry, which, by the use of proper diligence on his part, would have led to a knowledge of such intention on the part of Christian."—Approved: Dodd v. Gaines, 82 Tex. 429, 18 S. W. 618.

(b) "The fact that a person selling his goods is at the time indebted, and does not intend to apply the money he receives for them to the debts, is not of itself sufficient to establish a fraudulent or dishonest purpose. The sale to be void as to creditors must be made with the intent to hinder, delay, or defraud them, in which the purchaser must

participate by purchasing with a view to abet the fraudulent design. Fraud must be proved. Mere suspicions leading to no certain result are not sufficient grounds to establish it. It is incumbent upon a party who attacks a conveyance on the ground of fraud that it was made to defraud creditors, to show that if it had not been made the goods would have been liable to seizure and sale upon execution."—Approved: Purcell Grocery Co. v. Bryant, 6 Ind. T. 78, 89 S. W. 662.

(c) "A bill of sale regular on its face is prima facie evidence of a contract of sale in good faith, and, unless you find from the evidence that there was a contemplated fraud on the part of the grantor and known by the grantee at the time the bill of sale in question was executed and purchase price paid, then your verdict should be for the interpleader herein."—Approved: Burke v. Sharp, 88 Ark. 433, 115 S. W. 145.

§ 3835. Vendee Must Know of Such Intent or of Facts to Put Him on Inquiry.

(a) "The sale of the goods, if one was made, by Popofsky & Bernstein to plaintiffs, would not be fraudulent and void as to plaintiffs, although you should find—if you do so find—that in making the sale Popofsky & Bernstein intended to hinder and delay or defraud their creditors in the collection of their debts, unless it is further shown by the greater weight or preponderance of the evidence that the plaintiffs had knowledge of such intent or purpose, or had notice of such facts as would have put a man of ordinary prudence upon inquiry as to such intention, which inquiry, if made with ordinary diligence, would have led to a knowledge of the intention of Popofsky & Bernstein to thus hinder and delay or defraud their creditors, if such is the fact, and that they neglected or refused to pursue such inquiries."—Approved: Urdangen & Greenberg Bros. v. Doner, 122 Iowa, 533, 98 N. W. 317.

(b) "If you believe from the evidence that the said Rebecca A. Adams was indebted to the Texas Central Railroad Company, as alleged by the plaintiff, and that for the purpose of defrauding the said Texas Central Railroad Company out of its debt she conspired with her son, the defendant Harry B. Adams, to convey to him the land in controversy, and that so conspiring and agreeing with him, and for the purpose of defrauding her creditors, did make to him the said deed dated May 19, 1905, given in evidence, and you find and believe from the evidence that at the time said deed was made and executed that said Harry B. Adams knew of the purpose and intention of her, the said Rebecca A. Adams, and that he received the said deed for the purpose of assisting her to defraud her creditors, and you believe that said deed was without consideration and not made in good faith, then you will find for the plaintiff.

"On the other hand, if you find and believe from the evidence that the said Rebecca A. Adams executed said deed in good faith for a valuable consideration, and that said Harry B. Adams was an innocent purchaser of said land for value, then you will find for the defendant Harry B. Adams.

"Again, though you should believe from the evidence that the purpose of the said Rebecca A. Adams in making said deed was to defraud her creditors, still you should find for the defendant Harry B. Adams, unless you further find and believe that the said Harry B. Adams had notice of the fraudulent intent and purpose of the said Rebecca A. Adams."—Approved: Adams v. Hamilton, 53 Tex. Civ. App. 405, 116 S. W. 1169.

(c) "If you find from the evidence that the plaintiffs in this case acquired their alleged title to the goods in controversy by purchase from Brazda Bros., and if you further find that the Brazda Bros., in making such sale to the plaintiffs, intended thereby to hinder, delay, and defraud their creditors, and that the plaintiffs, in purchasing the same, participated in, or knew or had notice of, such fraudulent intent on the part of said Brazda Bros., before or at the time they made such purchase, then you will be authorized to find that the plaintiffs acquired no title to said goods, as against the creditors of Brazda Bros." Approved: Sonnenschein v. Bartels, 37 Neb. 592, 56 N. W. 210.

§ 3836. Where Goods Transferred for a Debt they Must Equal its Amount.

"If you believe from the evidence that Partridge was, on or before the 4th day of November, 1889, a bona fide creditor of L. G. Davis; that on or before said date Davis had become insolvent, and that he and Partridge agreed with each other that the latter should take possession of the goods involved in this controversy for the purpose of placing the same beyond the reach of Davis' creditors, with a fraudulent intent to hinder and delay such creditors in the collection of their debts,—you will find for plaintiffs; or, if you believe that at said time and place L. G. Davis was insolvent, and that Partridge was a creditor of Davis, and that Partridge purchased the goods involved in this suit in good faith for the purpose of collecting his debt, and that he paid a reasonable cash market price therefor, and if you believe that the goods were of some cash value in excess of the debt of Partridge, and that such excess was not paid to the bona fide creditors of Davis, but that such excess, or a part thereof, was paid to a person or persons holding fictitious claims or fictitious debts against L. G. Davis, you will find for the plaintiffs; or if you believe that the goods were of a cash market value, in bulk, on the market, at the time and place when they were purchased, more than Partridge paid for them, you will find for plaintiffs."—Approved: Tennent, Stribling & Ely Shoe Co. v. Davis (Partridge et al. Interveners), 82 Tex. 329, 18 S. W. 310.

§ 3837. Assumption of Indebtedness by Vendee a Good Consideration

"If you believe that C— was indebted to the plaintiff and the plaintiff assumed and agreed to pay debts due from C— to third persons, these constitute a good consideration for the sale (if proven) from C— to plaintiff."—Approved: Warner v. Carlton, 22 Ill. 415, 421.

§ 3838. Full Cash Consideration no Protection to Purchaser with Notice of Fraudulent Intent.

"A full consideration, paid in cash, will not protect a purchaser who had notice, actual or constructive, that the vendor was selling to hinder, delay, or defraud his creditors. It is not enough that a vendee is a purchaser for value. He must be an innocent purchaser."—Approved: Sonnenschein v. Bartels, 37 Neb. 592, 56 N. W. 210.

§ 3839. Where Statute Requires Actual Change of Possession Intent Immaterial.

"The law has prescribed the rule, regardless of any intent, and that rule is: That the transfer is fraudulent unless accompanied by an actual and continued change of possession of things transferred; this means that the possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the party purchasing the goods. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be placed in and remain in the usual relation to the property which owners of goods occupy to their property."—Approved: Ellet Kendall Shoe Co. v. Ross (Okla.), 115 Pac. 892.

§ 3840. Knowledge by Purchaser Shown by Facts and Circumstances.

(a) "It is not necessary that the testimony should show actual knowledge by the parties of the fraudulent purposes of Brazda Bros. in making the sale of their stock; but, if the testimony shows the existence of such facts and circumstances as would have led a man of ordinary sagacity and prudence to the knowledge of the purposes with which Brazda Bros. disposed of their stock, then you will be justified in finding that the parties had such knowledge of the fraudulent purposes of Brazda Bros."—Approved: Sonnenschein v. Bartels, 37 Neb. 592, 56 N. W. 210.

(b) "The court instructs the jury that fraud in the sale or conveyance of property is a fact that may be proved by showing the existence of other facts and circumstances surrounding or connected with the transaction, tending to show a fraudulent intent on the part of the parties to such sale or conveyance, or tending to show a purpose not consistent with an honest intent; and if the jury believe from the evidence in this case, as shown by the proof of facts and circumstances, that Brazda Bros. intended, by the sale of the property in controversy in this action, to hinder, delay, and defraud their creditors, and that the plaintiffs, in purchasing the same, participated in, or knew or had notice of, such fraudulent intent on the part of Brazda Bros. before or at the time they made said purchase, then, in such case, the defendants are entitled to recover in this action."—Approved: Sonnenschein v. Bartels, 37 Neb. 592, 56 N. W. 210.

(c) "If the sale or transfer of the property, or an interest therein, was made with the intent to hinder, delay, or defraud the creditors of Lawrence Holland, and if the plaintiff knew of such intent when he purchased the same, then such sale or transfer was void as to

such creditors, and the sheriff had a right to make the levy and seizure in question, and this action cannot be maintained. And, in such case, the payment of a valuable or full consideration for the property or interest purchased, would not protect plaintiff, but such sale or transfer would still be void as to Lawrence Holland's creditors. Seventh. If, however, the plaintiff paid a valuable consideration for the property, and bought the same in good faith, without any knowledge of an intent on the part of Lawrence Holland to hinder, delay, or defraud his creditors, then the plaintiff acquired a valid title thereto, notwithstanding any fraud, if such there was, on the part of Lawrence Holland; and notwithstanding the consideration paid was not the full value of the property, should you find that such was the fact. Eighth. In determining whether or not Lawrence Holland intended to hinder, delay, or defraud his creditors, you may inquire into the extent of his indebtedness, and of his property, and means of meeting it; and as to how far the same was secured, whether in whole or in part; and as to whether he claimed in good faith to have a defense to any apparent indebtedness against him; and, generally, as to whether he had or had not a motive or inducement to place his property beyond the reach of creditors. But the mere fact that he claimed to have, and believed he had, a good defense against the notes which he had given, would not justify him in transferring property for the purpose of protecting it against proceedings for enforcing a claim on such note. Ninth. As to plaintiff's knowledge of a fraudulent intent on the part of Lawrence Holland, it is not necessary that plaintiff should have had actual and positive knowledge of such intent, if it existed; but if he had knowledge of facts and circumstances tending to show the existence of such an intent, and sufficient to lead a man of ordinary perception, care, and prudence to suppose that there was such an intent, this would be equivalent in law to a knowledge thereof, if in fact there was such fraudulent intent on the part of Lawrence Holland. Tenth. Evidence was received during the trial as to acts and declarations of Lawrence Holland prior to the transfer in question. These were received only as against him, and as tending to show a fraudulent intent on his part; but they are not evidence against the plaintiff to show fraud, or knowledge of fraud, on his part; and it is necessary to show his participation in the fraud by other evidence. Eleventh. In determining whether the transfers in question were fraudulent as to creditors, you are at liberty to consider the relation of the parties thereto to each other, the time and circumstances thereof; whether or not Lawrence Holland was indebted beyond his means of payment, or had a motive to place his property beyond the reach of his creditors; whether or not the plaintiff knew, or had the means of knowing, his brother Lawrence's financial condition, or with what motive or purpose he was making the transfer; what the plaintiff's means of payment were, and his object in making the purchase; the value of the property, and the amount paid therefor; and all the facts and circumstances of the transactions appearing in evidence, in concluding the agreement as to the terms on which Lawrence Holland was to hold the

note taken in part payment. Twelfth. Fraud is not to be presumed; and, in this case, the burden of proof is upon the defendant to satisfy you, by a preponderance of evidence, of a fraudulent intent on the part of Lawrence Holland, and knowledge thereof on the part of the plaintiff."—Approved: Campbell v. Holland, 22 Neb. 587, 35 N. W. 871.

§ 3841. Fraudulent Conveyance to Prevent Collection of Anticipated Debt.

(a) "In determining whether the object and purpose of executing the chattel mortgage to Mr. Marsh was to defeat the collection of any judgment which might be rendered on the verdict then existing in Mrs. Doolittle's favor, it will be proper for the jury to consider the official relation of Mr. Marsh to the horse railway company, and his interest in the same, and also his knowledge of the fact that such verdict had been returned, and also the fact that said mortgage was executed just after said verdict was returned, and while a motion for a new trial was pending, as well also as all other circumstances accompanying and surrounding said transaction. And if from all such circumstances, as shown by the evidence, it appears that Mr. Marsh caused to be executed to himself the said mortgage to hinder, delay, and prevent the collection of any judgment which might be rendered in Mrs. Doolittle's favor, then it will be your duty to find your verdict in favor of the defendant."—Approved: Burley v. Marsh, 11 Neb. 291, 9 N. W. 48.

(b) "If you believe from the evidence that the said Nette, Sr., did not become indebted to Schloemann until after, and not for a debt existing at the time of, the execution of the deed from Nette, Sr., to defendant, then plaintiff would be a subsequent creditor of Nette, Sr., and in that event, if you believe from the evidence that said Nette, Sr., made said deed to his son with intent to place the lot in question beyond the reach of, and to hinder, delay, or defraud, his creditors, whether prior or subsequent creditors, and in contemplation of contracting future debts, said deed would be void as to plaintiff, and your verdict should be for the plaintiff."—Approved: Dosch v. Nette, 81 Tex. 265, 16 S. W. 1013.

§ 3842. The Intent to Defraud Subsequent Creditor to be Specific.

"The jury are instructed that, in order to find a verdict for the defendant, O., in this case, it is necessary to find from all the evidence that at the time when the property in question was transferred from C. H. to M. A., this plaintiff, that there was an express design and specific intent to defraud the subsequent creditor who obtained the judgment against C. H. which has been shown in this case or subsequent creditors generally."—Approved: Aldous v. Olverson, 17 S. D. 190, 95 N. W. 917.

§ 3843. Fraud Not Presumed in Transactions Between Husband and Wife.

"Fraud is not presumed, but must be shown by the evidence. In determining whether or not the transactions between the said S. C.

Bailey and D. S. Bailey and the defendant E. A. Bailey were in good faith, you may consider the relations between the parties, and you should scan the transfer of property between husband and wife and children carefully, when the rights of creditors are concerned; and you can consider whether or not the defendant explained the transaction, as to their good faith, when she had an opportunity, as a circumstance bearing upon the question of good faith."—Approved: Dunning v. Bailey, 120 Iowa, 729, 95 N. W. 248.

§ 3844. But are Subject to Close Scrutiny in Favor of Creditors.

"Dealings between the husband and wife in relation to the property, by which the rights of the husband's creditors may be prejudiced, are to be scrutinized closely and carefully, because the marital relation is one which affords facilities and opportunities for fraudulent concealment of property to such an extent that, where the husband and wife deal together, either directly or indirectly, and the property of the husband is in any manner transferred, or the title of it in any manner transferred, to the wife, the transaction, when questioned by any creditor of the husband, is to be scrutinized very closely, very carefully; but when a married woman takes a title to real estate from a stranger, the presumption of the law is the same in regard to the conveyance as it is in the case of any other grantee, and that presumption is that she herself paid the consideration for the purchase. A party attacking the bona fides of the transaction, therefore, is called upon to rebut that presumption by evidence that she had no separate estate, or that the consideration in fact came from the husband."—Approved: Arndt v. Harshaw, 53 Wis. 269, 10 N. W. 390.

§ 3845. A Relative May be Preferred Just as any Other Creditor.

"The only remaining question is this: Was the mortgage executed by Overpeck Bros. to their father-in-law, Tyler, a valid mortgage at the time of the levy of the execution in the case of the Studebaker Bros. Manufacturing Company against Overpeck Bros. And likewise you shall find whether or not it was a valid and subsisting mortgage at the date of refusal of the sheriff to levy upon the second execution, there being two judgments in favor of the Studebaker Bros. Manufacturing Company and against Overpeck Bros. The plaintiff relies upon circumstances tending to show the fact, or possible fact, that the mortgage given by the Overpeck Brothers to their father-in-law, Tyler, was not given for a valid and subsisting obligation. I instruct you that upon this you are the sole judges of all the facts before you as to whether or not, as a valid and subsisting debt, it existed at the time of the execution of the Overpeck Brothers' mortgage to Tyler. If said debt existed, they had the right to prefer their father-in-law, or any other creditor, to all other creditors they may have had, if they so desired. If they owed their father-in-law $8,000 at the date of the execution of the mortgage, it is good as against the world and as against this plaintiff. This is the question: Was the mortgage given for a bona fide, good-faith indebtedness, or in fraud of other creditors? If you find it was given in fraud, it is invalid, and must be so determined in this

action. If you find that it was given in good faith, it was a first lien upon this property; and the sheriff had not only the right, but it was his duty, to decline to proceed under the levy, and your verdict will be for the defendants."—Approved: Studebaker Bros. Mfg. Co. v. Zollars, 12 S. D. 296, 81 N. W. 292.

§ 3846. Sale Must be Followed by Open and Notorious Possession.

"The sale of goods or property by one who is involved deeply in debt and unable to meet his obligations, in order to be valid against the creditors of the grantor, must be accompanied by open and notorious change of possession from the grantor to the grantee; and in this connection the court instructs you that unless you believe from the evidence that the plaintiff purchased goods in question from A. C. Pickens in good faith, and immediately took open and notorious possession of said goods, such as would apprise the defendant and community of such change of possession, you must find for the defendant as to any goods he claimed he purchased from the said A. C. Pickens. By 'open and notorious possession' I mean public change of possession, which is to continue and to be manifested continually by the outward and visible signs, such as render it evident that possession of the judgment debtor has ceased."—Approved: Swartzburg v. Dickerson, 12 Okla. 566, 73 Pac. 282.

—N. B. The rule above announced is statutory.

§ 3847. Acts Constituting Badges of Fraud.

"The court instructs that fraud is never presumed, but must be proved by the party asserting it. It is very seldom that fraud can be established by direct evidence, and it is usually shown, if at all, by circumstantial evidence. There are certain facts or things which the law denominates badges of fraud; for instance, if a party in failing circumstances or largely indebted should make a sale of his goods to a near relative; or, if he should sell for a price greatly inadequate in value; or, if a sale should be made on an unusually long credit; or, to an irresponsible person without being secured; or, if made in unusual haste and not made in the manner in which men of ordinary care and prudence usually transact their own affairs,—these and similar acts are badges of fraud. They are not fraud, but may be considered, when they exist, by the jury as facts and circumstances which may tend to show fraud. A person greatly indebted and in failing circumstances may sell and give a good title to his property. It would be a great misfortune if such persons could not, as that is often the only means they have of paying honest debts. The law forbids such sales only as are made for the purpose of and with the intent of either hindering, delaying or defrauding creditors."—Approved: Moon v. Helfer, 25 Kan. 139.

§ 3848. Sale without delivery Raises Presumption of Fraud.

(a) "Unless the alleged sale of the sheep by George to his father, in August, 1884, was accompanied by an immediate delivery, and was followed by the actual and continued change of possession of the sheep, such sale was presumptively fraudulent and void, as against

the plaintiff, and is conclusive evidence of fraud, unless it is made to appear on the part of the defendant that the sale was made in good faith, and without any intention to defraud the plaintiff, or any other creditor of George W. Starks."—Approved: Wright v. Starks, 77 Mich. 221, 43 N. W. 868.

(b) "It is the law of this state that every sale made by a vendor of goods and chattels in his possession, or under his control, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the thing sold, shall be presumed to be fraudulent and void as against the creditors of the vendor, and shall be conclusive evidence of fraud unless it shall be made to appear on the part of the person claiming under such sale that the same was made in good faith, and without any intent to defraud such creditor."—Approved: White v. Woodruff, 25 Neb. 797, 41 N. W. 785.

§ 3849. This Presumption Rebutted by Proof of Full and Adequate Consideration.

"The laws of this state provide that a sale of such goods as are involved in this action shall be presumed fraudulent as against creditors, unless the same be accompanied by an immediate delivery and followed by an actual and continued change of possession. You will note that this rule only applies when there has not been some immediate delivery and change of possession. If there had been no such delivery or change of possession, the presumption of fraud is fully rebutted by proof that a full and adequate consideration has been paid for the property in question. Giving credit on an existing bona fide indebtedness is such full and adequate consideration."—Approved: Griswold v. Nichols, 126 Wis. 401, 105 N. W. 815.

§ 3850. Or where Sufficient Property Remains to Pay Debts.

"If you believe from the evidence that the deed, from G. to his wife, was in her iron box containing her private papers during her lifetime, and if you further believe from the evidence that the said G. was, at the date of said deed, possessed of sufficient property, exclusive of the northeast quarter of outlot number sixty-two (62), in W, to meet his obligations then existing at the time, you will find your verdict for defendant."—Approved: Gonzales v. Adoue, 94 Tex. 120, 58 S. W. 951.

§ 3851. Or by Proof of Good Faith and without Fraudulent Intent.

"You are instructed that if you find that the property in controversy had been the property of Mrs. Meserve and in her possession, and that until the constable levied upon and took the same there had been no change of possession evidenced by any acts that would give notice to outsiders of such change, such as a change of location of the property, or transfer of the keys, where the property was kept, change of business signs, change of business advertising, change of dominion or control thereof, or other visible acts indicating a change of ownership to such an extent that one would say there had been no apparent change of possession, and if you find that Helen Trautwein was a creditor of

Mrs. Meserve at the time said property was taken in execution, then the sale claimed by the plaintiff is presumed to be fraudulent and void, and the burden of proof is upon the plaintiff in such case to establish that such purchase was made in good faith and without fraudulent intent. The burden, however, in this case would be upon the defendant to show that there was no apparent change of possession such as above indicated, provided you find that at the time of the levy the goods were in the immediate possession of the plaintiff."—Approved: Neeley v. Trautwein, 79 Neb. 751, 113 N. W. 141.

§ 3852. Knowledge by Purchaser of Seller's Indebtedness a Circumstance.

"The court instructs the jury that if they believe from the evidence that Brazda Bros. were insolvent, or were largely indebted, and that they were being pressed by creditors for payment of their respective claims, and that while so indebted they made sale of all their property to plaintiffs, and that such sale had the effect to defeat the creditors of Brazda Bros. in the collection of their debts, and that such indebtedness of Brazda Bros. was known to plaintiffs before purchasing the property, then these facts, if shown in the evidence, are circumstances to be considered by the jury as showing a fraudulent intent in the sale of such property."—Approved: Sonnenschein v. Bartels, 37 Neb. 592, 56 N. W. 210.

§ 3853. All Surrounding Circumstances and Subsequent Conduct to be Considered.

"The court instructs the jury that fraud in the sale and conveyance of property is often difficult to detect, and hard to prove, and for this reason the law permits fraudulent purpose and intent to be shown by proof of the existence of other facts and circumstances, surrounding or connected with the fraudulent act, that tend to show a dishonest purpose; and in this case, if the jury believe from the evidence that the plaintiffs were not merchants or dealers in the character of goods in controversy, and that they purchased all the property in controversy from the Brazda Bros at and for a price less than its real value; that prior to said purchase no invoice of said property had been taken, whereby the quantity and value of the same could be ascertained; that, at the time of such purchase, Brazda Bros. were insolvent and largely indebted; that the remainder of the property of the Brazda Bros., and the separate property of Anton Brazda and Dominik Brazda, who composed said firm, were so incumbered as not to be available for the payment of their creditors; that such sale would have the effect to hinder, delay, or defeat the creditors of said Brazda Bros. in the collection of their debts; that plaintiffs knew of such indebtedness of Brazda Bros. or could have known it by ordinary inquiry; that said sale was secretly and hurriedly made and consummated in the night time; that immedately after the plaintiffs came into possession of said stock of goods they proceeded to advertise and sell said goods at cost, and less than cost, and did sell a large amount of said goods at original cost, and at less than original cost price, and continued to do so until stopped by the

service of a writ of attachment upon them at suit of the defendant in this action; that the plaintiffs did not intend to sell said goods and run a mercantile business after the manner and custom of merchants, but expected to make money out of the goods by closing out the entire stock at cost, and less than cost, at private sale or by auction,—then these and similar facts and circumstances, if shown in evidence to the jury, are to be considered by them in determining whether the sale of the property in controversy by Brazda Bros. was fraudulent or not."—Approved: Sonnenschein v. Bartels, 37 Neb. 592, 56 N. W. 210.

§ 3854. Reasonable Time to Take Possession.

"If you find from the evidence herein that the sale of said property and the payment therefor took place in Kansas City, Mo., on February 23, 1907, and that at that time a part of said property was located in the state of Louisiana and a part in the state of Texas, and you further find that one U. B. McCurdy went to the place where said property was located at the request of the said C. H. Sharp and took possession thereof for him within such time as was required by law to travel to the place where said property was located by the usual mode of travel, then I instruct you that the taking possession of said property was within a reasonable time as contemplated by law."—Approved: Burke v. Sharp, 88 Ark. 433, 115 S. W. 145.

§ 3855. Seller Leasing from Purchaser Constitutes Change of Possession.

"The jury is further instructed that, as the owners of the property described in the bill of sale introduced in evidence herein, the said C. H. Sharp had the right to lease, rent, or hire, said property or any part thereof to the said Cullen-McCurdy Construction Company, and that, if at the time he so leased, rented, or hired said property to the said Cullen-McCurdy Construction Company, he was the owner thereof, such leasing, renting, or hiring said property did not divest him of the constructive possession thereof, and the fact that the Cullen-McCurdy Construction Company had the physical possession of said property at the time it was attached herein gave the plaintiffs no rights in said property against the right of the said C. H. Sharp."—Approved: Burke v. Sharp, 88 Ark. 433, 115 S. W. 145.

§ 3856. Taking of Possession Must be that which the Property Permits of.

In an action of replevin by a vendee, of timber against one who had purchased it at a constable's sale under an execution against the vendor, the jury were thus instructed, as to symbolical possession, and the judgment was affirmed: "But the possession of some personal property cannot thus be delivered. Such, for example, is timber made in the woods. It is not pretended that Ralston [the plaintiff] has not complied with his contract; that he has not made the payments as he agreed to do. Did he take such possession of it as he could? As we have said, timber made and lying in the woods is not the subject of manual delivery; but everything in the power of the parties should be done, to indicate the

change of possession. A symbolical delivery of a ship at sea has been held to be sufficient. In this case, if you believe the evidence, the symbolical possession was given, and the plaintiffs exercised acts of ownership over the timber, by marking it. Was there such a delivery and change of possession as the nature of the property was capable of? * * * Your verdict will depend on the evidence as to the delivery and change of the possession. If the plaintiffs took such possession as the nature of the property was capable of, they are entitled to your verdict; if they did not, then you will find for the defendant."—Approved: Chase v. Ralston, 30 Pa. St. 539.

§ 3857. Directing Clerk of Seller to Take Charge no More than Constructive Possession.

"The court further instructs you that if you find from the evidence that the vendee merely went into the store and directed one of the clerks, who had formerly worked for the vendor, to take charge of said stock of goods and commence selling them at cost, such possession would amount to no more than a constructive change of possession, and would not amount to such an immediate delivery 'and actual continued possession of the things transferred,' as is contemplated by the statutes of Oklahoma, section 2775, which I have read to you."—Approved: Ellet Kendall Shoe Co. v. Ross (Okla.), 115 Pac. 892.

§ 3858. Transfer of Partnership Property for Firm Debt no Fraud against Partner's Creditors.

"If you find that the fixtures were partnership property, and were transferred to L. Griswold, Sr., to pay a partnership debt, there can be no fraud in such transfer, as against the creditors of L. Griswold, Jr., if the fixtures transferred are of less value then the amount of the debt."—Approved: Griswold v. Nichols, 117 Wis. 267, 94 N. W. 33.

CHAPTER CV.

HUSBAND AND WIFE.

§ 3859. Marriage Defined.
3860. Abandonment by Wife Forfeits Obligation by Husband to Support.
3861. Presumption of Valid Marriage not Overcome by Showing Former Marriage Without More.
3862. Marriage Lawful as by Law Where Solemnized.
3863. Insanity, but not Mere Weakness of Mind at the Time, Ground for Annulment of Marriage.
3864. Husband not Wife's Agent as to Her Separate Property.
3865. Having Knowledge of his Acts, She Should Repudiate.
3866. No Implied Obligation to pay Husband for Labor Bestowed on Her Property.
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3870. Separation by Consent and Provision by Husband Free Him from Liability.
3871. Husband Liable for Necessaries Furnished to Wife Where She is Justifiably Absent.
3872. Wife Feme Sole as to Real and Personal Property Owned by Her.
3873. Husband in Management and Control of Community Property.
3874. As also of Wife's Separate Estate Under Texas Rule.

§ 3859. Marriage Defined.

"The court instructs the jury that marriage is the civil status of one man and one woman capable of contracting, united by contract and mutual consent for life, for the discharge to each other and to the community of the duties legally incumbent on those whose association is founded on the distinction of sex.

"If the jury believe that the parties J. J. Adams and Della May Dram, did not intend to enter into the agreement of matrimony, but simply agreed to abide together for the purpose of illicit sexual intercourse, then there was no marriage between them."—Approved: State v. Adams, 179 Mo. 334, 78 S. W. 588.

§ 3860. Abandonment by Wife Forfeits Obligation by Husband to Support.

"It is the reciprocal duty of the wife to live with the husband on his providing, or offering to provide, a suitable home and suitable support for her. She may not, on his so offering, refuse to live with him in

such home, and still look to him for support, and if she does so refuse he is then under no legal obligation to provide for her."—Approved: Spencer v. State, 132 Wis. 509, 112 N. W. 462.

§ 3861. Presumption of Valid Marriage Not Overcome by Showing Former Marriage Without More.

"The court instructs the jury that if you believe from the evidence that plaintiff and John C. B. Johnson were married on the 7th day of August, 1900, you are instructed that, notwithstanding the fact that John C. B. Johnson had contracted a prior marriage, said last marriage was legal and valid, unless you find from the evidence that the woman with whom John C. B. Johnson was formerly married is alive, and that no divorce was secured in this or any other state by John C. B. Johnson or the woman whom John C. B. Johnson married prior to the time of contracting the marriage with plaintiff, and the burden is upon defendants to overcome the fact of marriage, if you believe there was a marriage between plaintiff and John C. B. Johnson, by proving to your satisfaction that the woman with whom John C. B. Johnson intermarried prior to his marriage with plaintiff is still alive, or that there was no divorce granted either John C. B. Johnson or the woman with whom he had contracted marriage prior to the marriage with plaintiff."—Approved: Johnson v. St. Joseph Terminal R. Co. and Atchison, Topeka & Santa Fe Railway Co., 203 Mo. 381, 101 S. W. 641.

§ 3862. Marriage Lawful as by Law Where Solemnized.

"You are instructed that in this case, so far as the invalidity of the alleged first marriage is concerned, it makes no difference whether or not the defendant, Hills, or the witness Eliza Cook Hills, or either of them, resided or had their place of abode or residence in the parish of Sheffield, England, before obtaining the license, or before the marriage ceremony; and you will therefore disregard all evidence received upon the trial of this case on the subject of said residence and places of abode prior to the marriage ceremony on September 11, 1885, in so far as the question of the validity or invalidity of the license and marriage ceremony are concerned."—Approved: Hills v. State, 61 Neb. 589, 85 N. W. 836.

§ 3863. Insanity, but not Mere Weakness of Mind at the time, Ground for Annulment of Marriage.

"The plaintiff sues, by his next friend, the defendant, to annul the contract of marriage between Sydney Rabb and defendant, Sarah Schneider, upon the alleged ground of insanity of the said Sydney Rabb on May 2, 1904, the date of said marriage. The defendant denies the insanity of said Sydney Rabb. If the jury believe from the evidence that at the date of the marriage that said Sydney Rabb was insane—that is, he was mentally incapable of comprehending and understanding the marriage relation, the reciprocal duties, and obligations thereof—then you should find for the plaintiff. Mere weakness of mind is not sufficient to avoid a marriage; but it must appear that the mind was not capable of comprehending and understanding the nature

of the contract; that is, the reciprocal duties and obligations of the marriage relation. The plaintiff must by a preponderance of the testimony establish to your satisfaction that said Sydney Rabb did not have mind enough at the time of the marriage to contemplate and understand the nature of the contract—that is, the reciprocal duties and obligations of the marriage—and, if the testimony fails to so satisfy your minds, you will find for the defendant. The jury are the judges of the credibility of the witnesses and the weight of the testimoney."—Approved: Schneider v. Rabb (Tex. Civ. App.), 100 S. W. 163 (not reported in state reports).

§ 3864. Husband Not Wife's Agent as to Her Separate Property.

"If R. S. Young, plaintiff's husband, did enter into a contract or agree that he would ditch if Johnson would, and that he would pay $2 per rod for a ditch, he would be personally bound thereby, but his agreement would not bind the plaintiff unless she authorized him to contract for her or ratified the contract when made, and no evidence in this case shows there was any ratification by the plaintiff of any contract made."—Approved: Young v. Inman & Nelson, 146 Iowa, 492, 125 N. W. 177.

§ 3865. Having Knowledge of His Acts She Should Repudiate.

"The court instructs the jury that though they may believe from the evidence that the plaintiff did not instruct or authorize her husband, ————, to have her licenses transferred to said husband, agent, or to have her business advertised as that of said husband, agent; yet if they further believe from the evidence that after her said husband had had her licenses so transferred, and had so advertised the business, the plaintiff knew of her husband's action in those respects, and did not correct or repudiate them, then by her silence and acquiescence, after having knowledge of her husband's said acts, she ratified them, and made them just as binding on her as if she had authorized them in advance."—Approved: Hoge & Hutchinson v. Turner, 96 Va. 624, 32 S. E. 291.

§ 3866. No Implied Obligation to Pay Husband for Labor Bestowed on Wife's Property.

"The jury are instructed that the husband acquires no right in the nature of a lien or title to compensation for the labor upon his wife's separate property, and, in the absence of an express agreement to that effect, there is no implied obligation on the part of the wife to compensate the husband for his supervision of and labor bestowed upon her separate property."—Approved: Broadwater v. Jacoby, 19 Neb. 77, 26 N. W. 629.

§ 3868. One Inducing Wife to Remain Away Cannot Recover for Necessaries Furnished to Her.

"If you find from all the evidence that Mrs. Lackey left or remained away from her husband, not because of his acts or conduct, but for the purpose of having the marriage relation between them dissolved, that she might marry another man, and if you further find that Mrs.

Corry took any part in inducing Mrs. Lackey to leave or remain away from her husband under such circumstances and for such purposes, then, under the law, she cannot recover for necessaries furnished Mrs. Lackey or her daughter either. The law will not favor improper interference between husband and wife, and he or she who may be guilty thereof cannot, under the law, be permitted to profit thereby."—Approved: Corry v. Lackey, 105 Mich. 363, 63 N. W. 418.

§ 3869. Burden on One Furnishing Necessaries to Show Wife Justified.

"That if the jury believe, from the evidence, that the merchandise for which this action is brought, was sold by plaintiff to defendant's wife, and at the same time the wife was living apart from the defendant, then in order to justify the plaintiff in recovering, the burden falls upon the plaintiff to prove, to the satisfaction of the jury, that the wife left with the consent of her husband, or that his treatment of her was cruel or his conduct so violent as to lead her to fear or apprehend personal violence, and that the evidence offered by the plaintiff of partiality in the treatment of his wife, children, or the treatment of the wife during the confinement, and the quality of the provisions furnished by the defendant, detailed in evidence, is not such evidence as would justify the jury in finding that she left from mal-treatment or fear of personal violence."—Approved: Rea v. Durkee, 25 Ill. 503.

§ 3870. Separation by Consent and Provision by Husband Free Him from Liability.

"The court instructs the jury that if the husband and wife part by consent, and he secures to her a separate maintenance suitable to his condition and circumstances in life, and pays it according to agreement, he is not answerable even for necessaries; and the general reputation of the separation will, in that case, be sufficient to protect the husband from liability to tradesmen selling goods to the wife."—Approved: LeBoutillier v. Fiske, 47 Hun, 323, 13 St. Rep. 439.

§ 3871. Husband Liable for Necessaries Furnished Wife, Where She is Justifiably Absent.

"While a husband and father is charged with the duty I have mentioned, yet, if he conducts himself in a manner proper to the relations, he has a right to select the place where he will discharge such duties. But if he treats his wife in the home so as to subvert the happy relations which should exist between husband and wife, and is guilty of such conduct, either by word or act or both, as to make his wife's condition an unhappy one, without fault on her part, and to such an extent as justifies her leaving the home, then in such case she takes with her the implied authority to pledge the credit of the husband for such purposes, and for such articles as are necessary to her support and maintenance in the manner of life before that time maintained and supported by the husband to an extent commensurate with his means. Provided that the jury find from all the evidence that Mrs. Lackey was justified in leaving her husband and leaving his home by reason of his conduct and treatment of her, and that plaintiff furnished her necessaries, it would be the duty of the husband to pay for the same; and,

if such necessaries have not been paid for, then plaintiff is entitled to verdict for the value of such necessaries, with interest at six per cent. from the date upon which they were furnished. But if you find that Mrs. Lackey did not leave her husband because of his acts or doings, or that she was not justified in so doing, then she had no right to pledge her husband's credit for necessaries for herself to be furnished away from defendant's home."—Approved: Corry v. Lackey, 105 Mich. 363, 63 N. W. 418.

§ 3872. Wife Feme Sole as to Real and Personal Property Owned by Her.

"The jury is instructed that in Nebraska a married woman has the same right to own, control, and dispose of both real and personal property, as if she were single, and she is entitled to the same protection, with relation thereto, as are men or unmarried women."—Approved: Fike v. Ott, 76 Neb. 439, 107 N. W. 774.

§ 3873. Husband in Management and Control of Community Property.

"Gentlemen of the jury, you are instructed that the undisputed evidence shows that on the 26th day of January, 1907, one of the plaintiffs, Joaquin Salazar, acting for himself and his mother, the other plaintiff herein, and Macario Moreno, one of the defendants, for himself, executed the agreement in writing in evidence before you adjusted the disputed boundary between them and fixing and establishing the same on the line of fence mentioned in evidence by the witnesses and as contended for by the plaintiffs. And you are instructed that, this being a boundary dispute, the said Moreno had the lawful right to so adjust and settle same as to his community homestead and by such agreement bind both himself and his wife, Cresentia Moreno, and, the evidence showing that he did so, you will return a verdict in favor of plaintiffs for the land sued for."—Approved: Moreno v. Salazar (Tex. Civ. App.), 116 S. W. 391.

§ 3874. As also of Wife's Separate Estate Under Texas Rule.

"And you are instructed under the evidence in this case that defendant and Flo B. Knight were legally husband and wife, and their cohabitation would not be illicit and adulterous, and that all property acquired by either Ike S. Knight or Flo B. Knight, during the existence of their marriage relation through their joint community or individual efforts, is community property, and under the law the husband has the legal right to manage and control the same. And you are further instructed in this connection that the husband has the exclusive management and control of the separate estate of the wife, and by the term 'separate estate' is meant any property acquired before marriage or any property which may be acquired by the spouse by gift, devise, or descent after marriage. And in this connection you are further instructed that the wife cannot without the consent of her husband sell, convey, or otherwise dispose of even her separate property."—Approved: Knight v. State, 55 Tex. Civ. App. 243, 116 S. W. 56.

CHAPTER CVI.

REAL PROPERTY.

A. Real Property—Injuries to.
B. Nuisances.

A. Real Property—Injuries to.

§ 3875. Fires from Locomotives—Duty of Railroad as to Equipment of Engine.
3876. Burden is on Plaintiff to Show Origin of Fire.
3877. When Shown to be from Sparks from Engine, Negligence Presumed.
3878. This Presumption Rebutted by Showing Proper Equipment and Handling.
3879. Ordinary Care Measure of Duty to Equip, Maintain, and Manage Engines.
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3881. But Jury must find Fire originated from at least One of such Causes.
3882. Proof to this Conclusion must Preponderate in Plaintiff's Favor.
3883. Competent to show Other Fires set out by same Engine.
3884. Accumulation of Dry Weeds, etc., on Track—Fire Spreading.
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3886. Spread of Johnson Grass from Railroad Right of Way.
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3895. Same—Measure of Damages to Property.
3896. Fire—Permitting Escape to Adjoining Property.
3897. Same—Anticipating Escape from Wind that is Blowing.
3898. Same—No Duty to Guard Against Possible Misdemeanor.

§ 3875. Fires from Locomotives—Duty of Railroad as to Equipment of Engine.

(a) "The jury are instructed that by law it is the duty of the defendant to furnish its locomotive engines with the best and most improved screen and spark arresters in practical use, and keep same in proper order; and if they believe from the evidence that the defendant failed to so furnish or keep such screen or spark arrester, and because thereof the plaintiff Wilson's goods in McGeoughey's barn were ignited through a spark escaping therefrom, and such contents destroyed, they should find for the plaintiff. If the jury believe from the evidence that the defendant's engine was properly equipped with such screen or spark arrester, yet, if they believe from the evidence that the defendant was otherwise negligent in the management and operation of its engine and train, and because thereof the plaintiff's property was ignited and destroyed, they should find for the plaintiff."—Approved: Southern Ry. Co. v. McGeoughey: Same v. Wilson (Ky.), 102 S. W. 270 (not reported in state reports).

(b) "Railroad companies, being authorized by law to employ the powerful and dangerous agency of steam, are required to exercise all ordinary and reasonable care and diligence in the construction, equipment, operation, and management of their locomotives. Ordinary and reasonable care and diligence, however, does not require the adoption of every new invention or contrivance which science may or can suggest. They fulfill the measure of their duty in this respect by adopting such improved appliances and contrivances as are in general practical use by well-regulated railroad companies, and which have been proved by experience to be adapted to the purpose. When they have discharged this duty, and the locomotive is properly and prudently managed, they are not liable for accidental injuries caused by the escape of fire from their engines."—Approved: Gracy v. Atlantic Coast Line R. Co., 53 Fla. 350, 42 South. 903.

§ 3876. Burden is on Plaintiff to Show Origin of Fire.

"You are instructed that in this case the plaintiff claims that the brick plant was set on fire by sparks or fire emitted from one of the engines of the Kansas City Southern Railway Company; therefore before you can find a verdict in favor of plaintiff, you must find that the fire was started in that way. Even if you should believe that the fire was started from some locomotive, yet, if it was not from one of the engines of the Kansas City Southern, plaintiff is not entitled to recover."—Approved: Taylor & Sons Brick Co. v. Kansas City Southern Ry. Co., 213 Mo. 715, 112 S. W. 59.

§ 3877. When Shown to be from Sparks from Engine, Negligence Presumed.

(a) "If you are reasonably satisfied from the evidence in this case that the building was set on fire by the engine of the railroad company, then you will return your verdict in favor of the plaintiff, unless the defendant has reasonably satisfied you from the evidence in the case that the engine was not improperly constructed, nor in defective

condition as regards the throwing of sparks or fire, and that the same was skillfully handled as regards the throwing of sparks."—Approved: Alabama Great Southern Ry. Co. v. Sanders, 145 Ala. 449, 40 South. 402.

(b) "If you find and believe from the preponderance of the evidence in this case that hot cinders or sparks of fire, or both, escaped from the defendant's engine and set fire to plaintiff's house and other property as alleged by him in his petition, and such property was destroyed or consumed, then such facts constitute a prima facie case of negligence on the part of the defendant, and in the absence of rebutting evidence, such prima facie case of negligence will render the defendant liable for the injury, if any, occasioned thereby."—Approved: St. Louis Southwestern Ry. Co. v. Ross (Tex. Civ. App.), 119 S. W. 725.

§ 3878. This Presumption Rebutted by Showing Proper Equipment and Handling.

(a) "I charge you that, if the plaintiffs have reasonably satisfied you from the evidence that the fire was caused by defendant's locomotive, then the plaintiffs have nothing to do until the defendant has reasonably satisfied you of each and all of the three following things: (1) That so far as regards the throwing of sparks the engine was properly built; (2) that in that respect said engine was not in a bad or defective condition; (3) that the throwing of sparks is not caused by unskillful or careless management of the locomotives. And even should the defendant in its turn reasonably satisfy you of all the three things above named, yet the plaintiffs may by their evidence overcome the evidence of defendant, and show you that the fire was set out from the engine, either because it was badly built, or in bad condition, or badly handled; and if, from all the evidence in the case, you believe that the fire was caused by the negligence of the railway, your verdict must be for the plaintiffs."—Approved: Southern Ry. Co. v. Darwin (Ala.), 47 South. 314.

(b) "This presumption of negligence, if you find from the evidence that the fire causing the damage was communicated from defendant's engine, is a rebuttable presumption, and may be overcome by proof on the part of the defendant that the engine or engines alleged to have been the proximate cause was or were properly constructed and had the most approved appliances for arresting sparks and cinders, and was carefully operated in a skillful manner by competent employees. What is meant by that is that, if you find from the evidence that this fire was caused by sparks being emitted from defendant's engine, then, as I stated to you, there is a disputable presumption raised to the effect that defendant was negligent, and this is for him to overcome by the defendant showing that the engines were properly constructed and managed."—Approved: Chenoweth v. Southern Pac. Co., 53 Ore. 111, 99 Pac. 86.

(c) "Even though you find that defendant's engines caused the fire complained of, if you further find from the evidence that defendant's enginess were properly constructed, and had the most approved appliances for arresting sparks and cinders, and were carefully operated by skillful and competent employees, then I instruct you that this pre-

sumption is overcome, and plaintiff cannot recover without making proof of other negligence or want of ordinary care, as alleged in the complaint, and if you find that plaintiff has failed to introduce such proof, then your verdict must be for the defendant."—Approved: Chenoweth v. Southern Pac. Co., 53 Ore. 111, 99 Pac. 86.

(d) "If you find by a preponderance of the evidence that the fire was started by sparks emitted and thrown from one of the defendant's engines while being operated on defendant's railroad, the defendant will be liable, unless you further find that at that time it had in use on said engine the best appliances for the preventing of the setting out of fires, and that the said engine was at the time properly handled."—Approved: German Ins. Co. v. Chicago & N. W. Ry. Co., 128 Iowa, 386, 104 N. W. 361.

(e) "That it is the duty of the defendant railway company to exercise reasonable care in providing its engines with the most approved appliances and contrivances in general use by railroads throughout the country for the prevention of the escape of sparks, and it is also the duty under the law of the railway company to exercise reasonable care in keeping said appliances in good condition, so as to prevent the escape of sparks from its engine; and in this case, if you believe from the evidence that the fire which destroyed the barn of plaintiff with its contents was caused by sparks that escaped from the engine of the defendant, a presumption of negligence on the part of the defendant arises, which is not rebutted by proof that the engine was equipped with proper appliances, unless it is shown to your satisfaction by the evidence, by the defendant, that said engine was operated with reasonable care so as to prevent the escape of sparks at the time it passed the building which was consumed."—Approved: St. Louis Southwestern Ry. Co. v. Trotter & Minnis, 89 Ark. 273, 116 S. W. 227.

(f) "If you believe from the evidence that fire was communicated from a locomotive or locomotives of the defendant to the premises of plaintiffs and interveners at a point or points without defendant's right of way, as alleged in their petition and plea, and that said fire or fires burned over the premises of plaintiffs and interveners, or part or parts thereof, and destroyed any grass, cane, or wood thereon, or destroyed or injured any grass turf, or destroyed or injured any timber thereon, as alleged in plaintiffs' petition and interveners' plea, and if you further believe from the evidence that the defendant had used ordinary care to have its locomotives equipped with the best appliances in general use by railway companies for preventing the escape of fire and sparks, and that defendant had used ordinary care to keep such appliances in repair and serviceable condition, and that defendant's employees in charge of its locomotives used ordinary care to operate the said locomotives, so as to prevent the escape of fire and sparks, then upon all claims made by plaintiffs and interveners in their pleadings for damages, if any, resulting from fires so communicated at points without defendant's right of way, you will find for defendant."—

Approved: St. Louis Southwestern Ry. Co. v. Connally (Tex. Civ. App.). 93 S. W. 206 (not reported in state reports).

(g) "If the jury believes from the evidence that sparks of fire escaped from defendant's engine on the 9th of February, 1909, as it was passing along the defendant's road, near the plaintiff's pasture, and set fire to the grass growing therein, and that said fire was communicated to the plaintiff's barn, and which destroyed said barn, and all of its contents, as alleged by plaintiff, and all of the other property described, then such facts constitute a prima facie case of negligence on the part of the defendant, and, in the absence of rebutting evidence sufficient to overcome such prima facie case of negligence, will render the defendant liable for the injuries occasioned thereby, and you should find a verdict for the plaintiff. If from the evidence the jury should believe that sparks of fire escaped from the defendant's engine, and set the fire which caused the plaintiff damage, but if, from the evidence you believe that the engine from which the sparks escaped was equipped with the most improved spark arrester in use, and that the agents and employees of the defendant in charge of said engine used ordinary care in operating said engine to prevent the escape of sparks, then the jury are charged that the prima facie case made out by proof of the escape of sparks and fire resulting therefrom is rebutted, and, if the jury so believe, they will find for the defendant. But, if from all the evidence they believe that the defendant failed to equip its engine, from which the sparks escaped that caused the fire, with the most approved spark arrester in use, or that the agents and employees of the defendant engaged in operating said engine failed to use ordinary care to prevent the escape of sparks, then the jury is charged that the prima facie case made out by proof of sparks escaping and causing the fire has not been rebutted, and they should find for the plaintiff as charged above."—Approved: Houston & T. C. Ry. Co. v. Ellis (Tex. Civ. App.), 134 S. W. 246.

§ 3879. Ordinary Care Measure of Duty to Equip, Maintain and Manage Engines.

(a) "A railroad company in running its trains over its road is required to exercise ordinary care to equip its engine or locomotives drawing such train with the most approved appliances in general use to prevent the escape of sparks and fire therefrom, and to exercise ordinary care to keep such appliances in good repair to prevent such escape of sparks and fire, and to exercise ordinary care to keep the land included within its right of way sufficiently free of combustible and inflammable material as to prevent same catching fire from sparks or fire emitted from passing engines, and communicating such fire to adjacent property, and a railway company is liable for damages from fires directly and approximately caused by its negligent failure to exercise such ordinary care in the keeping of its said right of way, or to exercise such ordinary care in the equipment and maintenance of its said engines, as above instructed. But a railway company has complied with the requirements of the law when it has exercised such ordi-

nary care in the equipment and maintenance of its engine alleged to have set out said fire, and has exercised such ordinary care in the so keeping of its said land inclosed in its said right of way, and, when a railway company has exercised such care in the above-named respects and particulars, it is not liable for any damages from fire set out by its said engines."—Approved: Missouri, K. & T. Ry. Co. v. Neiser (Tex. Civ. App.), 118 S. W. 166.

(b) "If you believe from a preponderance of the evidence that the fire which destroyed the property described in plaintiffs' petition was directly and proximately caused and occasioned by sparks emitted from one of defendant's switch engines, as alleged in plaintiffs' petition, you will return a verdict for plaintiffs, unless you further believe from the evidence that defendant exercised ordinary care on said occasion to have said engine provided with one of the best and most approved kind of appliances in use by railway companies for preventing the escape of fire from railway engines, that the defendant exercised ordinary care to see that said appliances, if there were such, were in reasonably good repair and condition on said occasion to prevent the escape of fire from said engine, and that said engine was on said occasion handled with ordinary care and skill to prevent the escape of fire, or unless you find in defendant's favor on the issue of contributory negligence, hereinafter submitted to you."—Approved: Womack & Sturgis v. International & G. N. Ry. Co., 100 Tex. 453, 100 S. W. 1151.

§ 3880. If Engine Improperly made, in Bad Condition or Badly Handled there is Negligence.

(a) "Uncertainty in your minds as to whether the fire was caused by reason of the engine being improperly made, or being in bad condition, or being badly handled in respect to the throwing of sparks, is no reason for failing to find a verdict for the plaintiffs; and it will be your duty to find your verdict for the plaintiffs if you believe from the evidence that the fire was caused by either one of those three causes."—Approved: Southern Ry. Co. v. Darwin (Ala.), 47 South. 314.

(b) "If the jury believe from the evidence that the plaintiff's building was set on fire by sparks or coals from the defendant's engine, and that said sparks or coals were emitted or dropped from said engine, either because of the defective condition or improper construction of said engine, or because of the negligent handling or management of said engine, they will return a verdict for the plaintiff, J. W. Sanders." —Approved: Alabama Great Southern Ry. Co. v. Sanders, 145 Ala. 449, 40 South. 402.

§ 3881. But Jury Must Find Fire Originated from at least One of such Causes.

"(1) To warrant the jury in finding for the plaintiff, you must first determine from the evidence whether the fire which occasioned the damage complained of originated from the engine of defendant, as averred in plaintiff's petition; and, in addition thereto, you must

find that the fire originated from the negligence of defendant's servants by means of their carelessness, or by means of defective engines or machinery, and the plaintiff did not directly by his own negligence contribute towards the destruction of the house and oats sued for herein. (2) If the evidence fails to satisfy you that the fire which caused the injury originated from the defendant's engine, you will inquire no further, and at once render a verdict for the defendant; and you will bear in mind that it is incumbent upon the plaintiff, by a preponderance of evidence, to satisfy you that the fire which did the injury originated from the defendant's engine. (3) If you are satisfied that the fire did originate from the defendant's engine, as claimed, then the burden is upon the defendant to remove a presumption, though small, indeed, of negligence; to show you that the engine of the defendant from which the fire escaped was in good order, properly constructed, and provided with the usual appliances and spark arrester to prevent the escape of fire; and if you so find, then it is your duty to find for the defendant, as the defendant would not be liable if it used the most approved appliances, engine, and machinery, and it was carefully handled and managed by the servants of the defendant, unless the jury believe the defendant or its employees were guilty of actual negligence. (4) Though the jury believe from the evidence that the engine of defendant was supplied with a 'spark arrester' and other contrivances to prevent the escape of fire from the engine, of the most approved style and pattern, yet, if the jury believe from the evidence that the employees or servants of defendant operating its locomotives at the time of the fire mentioned in the petition failed or neglected to exercise due care and caution in so operating and running said locomotives, and that for want of such due care and caution the said fire was communicated by said locomotives or engines to the house of plaintiff, described in the petition, then they will find for the plaintiff. (5) If you find the fire which occasioned the damage complained of originated from defendant's engine by the carelessness of defendant's servants having same in charge, or from a defective engine, and one without latest appliances to prevent escape and spread of fire, and you further find the negligence of the plaintiff did not contribute towards the damage, you will find for the plaintiff, and assess his damages at such sum as you think the evidence shows the house and oats were damaged."—Approved: Union Pac. Ry. Co. v. Keller, 36 Neb. 189, 54 N. W. 420.

§ 3882. Proof to this Conclusion Must Preponderate in Plaintiff's Favor.

(a) "As stated in a previous instruction, the burden of proof is upon the plaintiff to show by the fair preponderance of the evidence that the fire by which he claims to have lost the property described was caused by sparks and cinders from a locomotive operated by defendant over its line of railroad at the time and place claimed. It is not required that proof be presented that some one actually saw a spark or cinder from one of the defendant's locomotives fall upon and ignite

the building claimed; but the facts and circumstances appearing in the evidence and relied upon for establishing the fact alleged that defendant's locomotive set out said fire must be such as weigh heavier and preponderate in support of such conclusion, as against the theory or claim that the fire might have resulted, or did result, from other causes."—Approved: Helverson v. Chicago, R. I. & P. Ry. Co., 139 Iowa, 423, 116 N. W. 699.

(b) "If the evidence, fairly considered, leaves this matter in doubt, so that you are left to guess or conjecture as to whether the fire from defendant's right of way or some other fire caused the damage complained of, there can be no recovery for the plaintiffs by reason thereof, and your verdict upon that issue must be for the defendant."—Approved: Clifford v. Minneapolis, St. P. & S. S. M. Ry. Co., 105 Wis. 618, 81 N. W. 143.

§ 3883. Competent to Show Other Fires Set out by Same Engine.

"If from the evidence the jury find that defendant's engine set out the fire alleged, and also that the same engine set out several successive fires on the same trip and on the same day, then the fact of the repeated setting out of such fires will be evidence tending to show that defendant's engine was not properly constructed as to its appliances for prevention of escape of fire, or that the same was not properly used at the time, or that it was not in repair, and as such must be considered by you in making up your verdict, and in determining as to whether or not this fire occurred through the fault or negligence of defendants or its employees."—Approved: Slosson v. Burlington, C. R. & N. Ry. Co., 60 Iowa, 214, 14 N. W. 244.

§ 3884. Accumulation of Dry Weeds, etc., on Track—Fire Spreading.

(a) "If you believe from the evidence that the defendant negligently permitted grass and weeds to accumulate and become dry on its right of way, and that fire was communicated from locomotives of defendant to such grass and weeds and spread therefrom to the premises of plaintiffs and interveners, or any of them, and burned over part or parts of said premises, and destroyed grass and cane thereon, and destroyed any cord wood thereon and damaged and injured or destroyed grass, turf or trees thereon, as alleged in their petition and plea, then you will find for the plaintiffs and interveners for all such damages, if any, so caused."—Approved: St. Louis Southwestern Ry. Co. v. Connally (Tex. Civ. App.), 93 S. W. 206 (not reported in state reports).

(b) "You will determine from the evidence whether the defendant permitted such an accumulation of dry grass and weeds and other combustible matter within their right of way, exposed to ignition by their engines, as would be permitted or done by an ordinarily prudent man upon his own premises, if exposed to the same hazard from fire as an accumulation of dry grass and weeds upon the right of way of the defendant. If you find that the defendant in this respect acted as an ordinarily careful and prudent man would have done under the same circumstances, then it is not in law guilty of negligence in thus

acting. But if the evidence fully satisfies you that the defendant did in fact permit such an accumulation of combustible matter, as above mentioned, upon its right of way, as would not have been permitted by an ordinarily prudent man upon his own premises, if exposed to the same hazard from fire escaped from an engine operated by the defendant setting fire to the accumulated grass and weeds within the right of way of the defendant's road, in consequence of which the plaintiff's property was destroyed, then the defendant is liable."—Approved: West v. Chicago & N. W. Ry. Co., 77 Iowa, 654, 35 N. W. 479.

(c) "You are instructed that it is the duty of the railway company to exercise reasonable care to keep its right of way at all points adjoining the private property of others free from combustible materials which are liable to become ignited from passing trains. And, should you believe from the evidence that the grain in question was burned because of a fire which originated on the right of way of the company through sparks escaping from a passing engine, which thereafter spread to the grain field in question, then it is immaterial whether the engine of the railway company was improperly equipped or not. And it is likewise immaterial, should you find that the fire which caused the injury escaped from the right of way of the railway company under the circumstances just stated, whether the employes in charge of the engine were skillful or careful, or negligent and careless, in the operation of said railway engine, and your verdict should be for the plaintiff in either case, should you find that the fire escaped from the right of way of the railway company, after having been set through sparks escaping from a passing engine."—Approved: Fireman's Fund Ins. Co. v. Northern Pac. Ry. Co., 46 Wash. 635, 91 Pac. 13.

(d) "You are further charged that though you may believe that the defendant's said engines were equipped with the most approved spark arresters, and the defendant's said agents used ordinary care to prevent the escape of sparks, yet if you believe from the evidence that the fires caught from the defendant's engines and caught in combustible matter which was allowed to accumulate on the right of way, and you believe from the evidence that defendant in allowing such combustible matter to so accumulate was guilty of negligence, as herein defined, and that the fire was in this manner communicated to plaintiffs' wood, and that plaintiffs were damaged, it will be your duty to find for plaintiffs, unless you find against them under other portions of this charge as given you."—Approved: Freeman v. Waters & Bro. (Tex. Civ. App.), 136 S. W. 84.

§ 3885. Measure of Damages from Fire Set Out by Engine.

"You are instructed that the plaintiff sues for damages by reason of the depreciation of the value of her real estate, occasioned by fires communicated by engines of the defendant. If you find for the plaintiff, you can allow her nothing for the loss of hay or grass or any injury occasioned to the grass upon the land, except as it affects the value of the land. To enable you to arrive at a verdict under the issues joined in this case, you should find the fair market value of

the land before and after the fire, as shown by the evidence, and, if you find that the value of the land was depreciated by reason of the fires, allow the plaintiff the loss occasioned by said depreciation; but, if the market value of the land was not affected by the fire, the plaintiff cannot be said to be damaged, and you must find for the defendant.

"Plaintiff is not suing in this case for the loss of hay, grass, or pasture, except for the purpose of enabling you to arrive at the value of the land before and after the fire; but, for such purpose, you have a right and are justified in considering the same.

"If you find for the plaintiff, in determining the measure of damages to be allowed, you should not allow for differences in the fair market value of the land over which the fires were burned, where the ground so burned was irregular in shape and extended over different portions of a quarter section; but you should allow, if at all, for the depreciation in the price of the real estate as a whole—that is, as a quarter section."—Approved: Matson v. Chicago, R. I. & P. Ry. Co., 80 Kan. 272, 102 Pac. 254.

§ 3885a. Jury to Look to Entire Evidence as to Origin of Fire.

"In ascertaining the cause of the fire the jury may, under the evidence that sparks may be emitted from locomotives without negligence of the defendant, consider the evidence of the way in which plaintiff used its property, and particularly the evidence of the cellar door having been open just prior to the fire, and of the existence of the waste in and about the bin and baling press near the door at the point where the fire is said to have started."—Approved: Hitchner Wall Paper Co. v. Pennsylvania R. Co., 168 Fed. 602, 93 C. C. A. 598.

NOTE: This instruction is by a court having a right to comment on the facts.

§ 3886. Spread of Johnson Grass from Railroad Right of Way.

"The plaintiff sues for injury to her lands, alleged to have been created by the defendant company permitting Johnson grass to mature or to go to seed on its right of way, and thereby communicating the Johnson grass to his contiguous lands, by which it became infested with Johnson grass. It is unlawful for the railroad company to permit Johnson grass to mature or go to seed upon its right of way; and, if they have done so, and by that means communicated the seeds of said grass to the lands adjoining their right of way, by which it became infested with Johnson grass, then the plaintiff should recover. Unless the plaintiff, or her deceased husband before her, permitted Johnson grass to go to seed or mature upon his lands contiguous to said right of way, and, in this last event the plaintiff could not recover, and you should find a verdict for the defendant. The plaintiff cannot recover for any damages that accrued for more than two years preceding the filing of this suit, July 6, 1905, but only since that date, if any."—Approved: International & G. N. Ry. Co. v. Doeppenschmidt (Tex. Civ. App.), 120 S. W. 928.

§ 3887. Fire from Threshing Machine Poorly Equipped—Anticipation of Injury.

"If you find that there was no baffle plate in the engine while the same was being operated when the fire occurred, and that, in view of the direction of the wind and dryness of the oats, and other circumstances under which it was being operated on that day, it was negligent to so operate it, and find that there was no danger, and the fire would not have occurred, had said engine been operated with the baffle plate, with coal for fuel, when the wind was blowing from the engine towards the oats stack while they were operating it, and the plaintiffs did not know that it was being operated without a baffle plate, then the plaintiffs would not be guilty of contributory negligence in requesting it to be located as it was located on that day, if you find they did request it."—Approved: Richardson v. Douglas, 100 Iowa, 239, 69 N. W. 530.

§ 3888. Adjoining Property Damaged by Raising Railroad Track.

"The court instructs the jury that if they believe from the evidence that the property of the plaintiffs has been permanently injured and its value depreciated by the laying and construction of the embankment and railroad track, and that the defendant constructed and laid, or had constructed and laid by its agents, the said embankment and track, then the plaintiffs are entitled to recover damages."—Approved: Hast v. Railroad Co., 52 W. Va. 396, 44 S. E. 155.

§ 3889. Flooding Land—Railroad Embankment.

"If you find from the evidence that plaintiff's land or crop and vegetables were injured by high water, or overflow on Wheeler creek, yet if you find from the evidence that the flood was of such character that it would have injured plaintiff's land and crop to the same or a greater extent, even if said railway line had never been constructed at all, then you will find for the defendant, even though you find that the passway under defendant's bridge across Wheeler creek was not sufficient to carry said water, and even though you find that defendant was negligent in not making other passways under its track in that vicinity."—Approved: Missouri, K. & T. Ry. Co. v. Bell (Tex. Civ. App.), 93 S. W. 198 (not reported in state reports).

§ 3890. Same—Culverts to Prevent Diversion of Water.

"It is the duty of a railway company, in constructing and maintaining its roadbed and track to provide and maintain the necessary culverts and sluiceways to carry the waters of all streams which it may cross and the surface waters resulting from rainfall as the natural lay of the land requires, so as not to divert such waters from their natural course."—Approved: Ft. Worth & D. C. Ry. Co. v. Suter (Tex. Civ. App.), 118 S. W. 215.

§ 3891. Shade Trees—Reasonable Trimming by Telephone Company.

"You are instructed that if you believe from the evidence that there was unnecessary trimming and cutting off of the branches you must take into consideration, in determining the amount of damages, if any,

therefor, the cutting and trimming of limbs which was necessary, for that the defendant had the right to do reasonably necessary trimming; and to the extent such trimming and cutting of branches was reasonably necessary plaintiff is not entitled to damages, and you must separate and distinguish the damages suffered, if any, by unnecessary cutting, from the injury by reason of the necessary trimming, so that you will not allow damages, if any, caused by the cutting which was reasonably necessary to be done in the construction of the telephone system."—Approved: Meyer v. Standard Telephone Co., 122 Iowa, 514, 98 N. W. 300.

§ 3892. Lateral Support—Excavation and Failure to Notify.

"If the jury believe from the evidence that the engineer of the defendant, the City of St. Louis, had in charge the construction of the sewer in question, and if they further believe from the evidence that he prepared the plans and specifications for the same, and fixed the location for the construction, under its contract which said city introduced in evidence, or caused the same to be done, and if the said engineer so in charge of the work on behalf of the city knew, or had reason to believe that the construction thereof on the north line of plaintiff's premises as required by said plans and specifications was likely to injure and damage the north wall of plaintiff's house, then it was the duty of the defendant, the city of St. Louis, before it permitted the Heman Construction Company to begin the excavation of said sewer along the north wall of plaintiff's house, to notify plaintiff of said proposed excavation and of the probable injury which would result therefrom to plaintiff's house and to request the plaintiff to take the necessary steps to prevent such injury, unless the jury should find from the evidence that the plaintiff or her agent had actual knowledge of said proposed excavation, and if said defendant, the city of St. Louis, failed and neglected to give such notice and make such request, and failed itself to take any steps to prevent such injury before or at the time it permitted the Heman Construction Company to make said excavation and construct such sewer, and if the jury further find and believe from the evidence that the Heman Construction Company had reason to believe that the proposed excavation was likely to occasion injury to the plaintiff's house, and it failed and neglected to give notice of said proposed excavation to the plaintiff before making the same, and to request the plaintiff to take the necessary steps to prevent such injury, unless the jury should find from the evidence that the plaintiff or her agent had actual knowledge of said proposed excavation, and if the jury further find from the evidence that the plaintiff's house was damaged in consequence of the failure to give such notice, and by reason of the failure, if any, on the part of the said defendant, the city of St. Louis, and the said defendant, the Heman Construction Company, to take the necessary and proper steps to prevent such injury, then their verdict should be for the plaintiff and against both of the defendants, namely, the City of St. Louis and the said Heman Construction Company, and for such reasonable sum as the jury may believe from the

evidence the plaintiff was necessarily compelled to expend to repair the injury done to said house by said excavation and the failure aforesaid, if the jury find there was such failure, and also for such other sum. if any, as the jury may believe from the evidence the plaintiff has lost in rents in consequence of said injury, and last, for such further sum, if any, as the jury may believe from the evidence will fully compensate plaintiff for the permanent depreciation, if any, in the value of the house of the plaintiff occasioned by such injury, deducting from said amounts so found such amount as the jury may believe from the evidence the plaintiff would have necessarily been compelled to expend in order to prevent injury to said house if she had received timely notice from the defendants, or either of them, of said proposed excavation along the north wall of her house."—Approved: Gerst v. City of St. Louis, 185 Mo. 191.

§ 3893. Same—Care Required in Making Excavations.

"The defendant, in making such excavation, under the law, was not bound to exercise such extreme care as an owner might exercise in the protection and preservation of his own property from loss or damage by reason of the act complained of. He was only bound to use such care in making the excavation as a man of ordinary care and prudence would deem sufficient—such care as a man of ordinary prudence would say was sufficient—in the exercise of his right to make this excavation. If he failed in using such a degree of care, and by reason of his want of care, which constitutes negligence, the plaintiff was injured, the plaintiff would be entitled to recover in this case."—Approved: Novotny v. Danforth, 9 S. D. 301, 68 N. W. 749.

§ 3894. Defective Sewers—Anticipating Rainfalls.

"The court instructs the jury that it is the duty of the city to construct and maintain its sewers in such a manner as to make them safe against danger of breaking from any rainfall which is reasonably to be expected, and while the city is not bound to construct its sewers so that they will withstand extraordinary rainfalls or any act of God, yet it is the duty of the city to guard, as far as reasonable foresight and prudence can, against danger from extraordinary rainfalls by constructing and maintaining its sewers in accordance with the ordinary and usual methods adopted for the proper and safe construction and maintenance of sewers. Therefore, even if you find from the evidence that the break in the sewer shown in evidence resulted from an extraordinary rainfall, yet if you further find that the city failed to properly construct the sewer, or failed to keep it in proper repair, or failed to cover the sewer with earth, and that the failure of the city to so construct, repair, or cover the sewer with earth, contributed to the breaking of the sewer,—that is to say, if you find that notwithstanding the unusual rainfall, the break would not have occurred if the city had performed its full duty in the construction, repair and covering of the sewer,—then your verdict will be for the plaintiff, if you find that she was damaged by the breaking of the sewer."—Approved: Brash v. City of St. Louis, 161 Mo. 433, 61 S. W. 808.

§ 3895. Same—Measure of Damage to Property.

(a) "If you find for the plaintiff on the negligent and improper construction of the sewer, then his measure of damage will be the difference in the rental value of the property prior to the construction of the sewer, and after its construction, from the time that the sewer became injurious to the property until August 5th; provided you find that the defendant had not obtained a license or permit to construct the sewer, and further find the plaintiff entitled to damage by reason of sickness of plaintiff and his family, and expenses incurred. Then you will find such additional sum as will compensate plaintiff for his loss of time and expense incurred by reason of sickness of himself and family."—Approved: Loughran v. City of Des Moines, 72 Iowa, 382, 34 N. W. 172.

(b) "That where a public work, for instance a sewer, as the same was originally planned and constructed, is found to result in direct and physical injury to the property of another, that would not otherwise have happened, and which, from its nature, is liable to be repeated and continuous, but is remediable by a change of plan or the adoption of prudent measures, the corporation is liable for such damages as occur in consequence of the original cause, after notice and an omission to use ordinary care to remedy the evil."—Approved: Tate v. City of St. Paul, 56 Minn. 527, 58 N. W. 158.

§ 3896. Fire—Permitting Escape to Adjoining Premises.

"On the other hand, if you find from the evidence that the defendant, either by himself or his servant, acting within the scope of his employment, negligently set out, or negligently suffered to escape, the fire which ran upon, burned over, and injured plaintiff's premises, and that such injury was the proximate consequence of such negligent act or omission, then you should find for the plaintiff, and award him just compensation for the loss which he has sustained."—Approved: Wickham v. Wolcott, 1 Neb. Unoff. 160, 95 N. W. 366.

§ 3897. Same—Anticipating Escape from Wind that is Blowing.

"If the jury find, from the evidence, that, from the violence of the wind then blowing, and the dryness of the atmosphere and of the immediate surroundings of the mill and plaintiff's property, the operating of the mill endangered plaintiff's property, by fire from the mill, to that extent that a reasonably prudent man, conversant with the business and the existing conditions, would have shut down said mill until the violence of the wind had abated, the failure of the defendants to do so was negligence. And if, by reason of such negligence, fire was communicated from said mill to the barn, and then to the plaintiff's property, and destroyed it, she is entitled to a verdict, if she did not contribute to the injury. And this would be so, even if defendants made use of fire or spark arresting appliances on their mill. It was the duty of defendants, if, in the operating of their mill, they thereby endangered plaintiff's property by fire, to use such reasonable means as were known to them, or were in such general use that, by reasonable care and inquiry, they might have known of them, to prevent fire from said

mill from spreading to or falling on the plaintiff's property and injuring it; and, if they omitted to use such means, such omission was negligence. And if the jury find, from the evidence, that such negligence directly caused the firing of the barn and the plaintiff's property, and its destruction, she is entitled to a verdict, if she did not contribute to such injury."—Approved: Webster v. Symes, 109 Mich. 1, 66 N. W. 580.

§ 3898. Same—No Duty to Guard Against Possible Misdemeanor.

"You are instructed that the law of Nebraska makes it a misdemeanor for persons to negligently or carelessly set on fire any prairie in any part of this state. You are further instructed that every one has a right to presume that no one will be guilty of a misdemeanor, and is therefore under no obligation to anticipate such negligence or to guard against it. Therefore, if you find that the defendant or his agent did negligently or carelessly set fire to the prairie, and that such fire burned the plaintiff's hay, the defendant would be liable for the damage, notwithstanding you might find from the evidence the further fact that the plaintiff had not sufficient fire-guard around the stacks, unless the plaintiff neglected, after he discovered the fire, to use all reasonable means within his power to prevent the injury therefrom."—Approved: Powers v. Craig, 22 Neb. 621, 35 N. W. 888.

B. Nuisances.

§ 3899. Nuisance—Giving Right of Action Defined.
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3900a. Inconveniences and Discomforts from Industries in Large City.
3901. Noises and Smoke from Shops Nuisance to Church Previously Located.
3901a. Noise, Dust and Smoke to Residence from Operation of Cotton Gin.
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3903. Engine Operated in Ordinary Way not Nuisance.
3904. Factory in Locality of Other Factories Conducted in Ordinary Way.
3905. Dangerous Pit in Close Proximity to Highway a Nuisance.
3905a. Nuisance must be Proven to be Proximate Cause of Injury.

§ 3899. Nuisance—Giving Right of Action Defined.

"A nuisance is, in contemplation of law, literally an annoyance, and signifies such a use of property or such a course of conduct as, irrespective of actual trespass against others, or of malicious or actual criminal intent, transgresses the just restriction upon the use of property or the conduct of business due to the limitation which the law imposes upon the enjoyment of the property where it interferes with the rightful enjoyment of the property of others. A private nuisance is one that affects a single individual, or a determinate number of per-

sons, in the enjoyment of some private right in contradistinction to the public."—Approved: Merchants' Mut. Telephone Co. v. Hirschman, 43 Ind. App. 283, 87 N. E. 238.

§ 3900. Defective Culvert Causing Flooding of Land.

"And now, with particular reference to the defendant, the Union Trust Company, you are instructed that, while it may not have constructed the culvert in question, it would still be liable for any damage occurring during the time the said trust company had charge of the road, occasioned by its wrongful construction, if you find that prior to such injury the said company had actual knowledge that the culvert in question was constructed in such a way as to overflow and flood the land above said culvert, and, knowing such fact, still maintained said culvert in such condition. But, without this knowledge, the Union Trust Company would not be liable. It is not necessary, in order to hold defendant, the Union Trust Company, liable for the damage claimed to have been sustained in 1877, that any request should have been made by plaintiff to said trust company to remodel said culvert. All that would be necessary would be for plaintiff to show that defendant, the trust company, knowing the damage likely to be occasioned by the culvert, permitted it to remain in such condition."—Approved: Martin v. Chicago, R. I. & P. Ry. Co., 81 Kan. 344, 105 Pac. 451.

§ 3900a. Inconveniences and Discomforts from Industries in Large City.

"People living in a populous city, such as ———, must suffer, one in common with the other, certain inconveniences and discomforts. They are the necessary and inevitable consequences of living in a large city. This is particularly true as to the noise and dust on the public streets, the continuous rumbling of street cars from early morning until late at night, and the roar of railway traffic on the railways which are great highways of commerce. The same proposition is true to a certain extent as to manufacturing industries, factories, coal mines, iron and steel works, planing mills and other such works, owned and operated by private individuals and corporations. In the course of the progress and development of a town like ———, one must expect inconveniences and discomforts. Smokestacks, smoke and odors, are necessarily incidental to the operation of many of the industries of the city. The smoke and odors ascend into the air and impregnate it. The community at large suffer some inconvenience and annoyance on account of this. But such inconvenience and annoyance must be endured by the public without redress. No damages can be recovered by anybody under such conditions. The individual must sacrifice some comforts for the sake of the general welfare. Nor can a person recover damages if his personal preferences as to choice of residence are interfered with. A livery stable, a saloon, or a distillery may be located next to one's residence, and would naturally diminish its comfort and value, but the owner would be without redress so far as mere proximity is concerned. At the same time, if the business is so con-

ducted as to affect the reasonable use of adjoining property or the health of its occupants, such tangible and substantial injuries might sustain an action for damages."—Approved: Gavigan v. Refining Co., 186 Pa. 604, 606, 40 Atl. 834.

§ 3901. Noises and Smoke from Shops Nuisance to Church Previously Located.

"If the jury find from the evidence that the engine house of the defendant is used for receiving its engines when they come into the city after a trip; that after coming into said engine house such engines more or less frequently blow off their steam, and that such blowing off of steam makes a loud and disagreeable noise, and that such engines are put in the stalls in said house, and emit the smoke from their fires through the chimneys of said house, and that the said engine-house is used for the purpose of a shop in which to make a certain class of repairs upon the engines and cars of the defendant, and that a loud noise of hammering is created in making such repairs, and that said engine-house is also used to receive coal for coaling the engines of defendant before going out, and that they are all coaled therein, and also get up their fire and steam therein, and further find that said house is located so near the church of the plaintiff that the noises from said engine-house can be distinctly heard inside of said church, and also that the chimneys of said engine-house are so constructed that the tops thereof are not as high as the tops of the windows of said church, and shall further find that the smoke from said chimneys is thrown through said windows into said church in such quantities and so generally as to be a common annoyance and inconvenience to the congregation worshipping therein, and that said noises in said yard of blowing off steam are of daily and nightly occurrence, and are so distinctly heard in said church on Sundays, as well as the days of the week, as to annoy, harass, and inconvenience the congregation when engaged in divine worship therein, and that they disturb and greatly inconvenience the congregation in the enjoyment of said building as a church, then the plaintiff is entitled to recover, provided the jury find that said church was located upon the spot where it now is before the defendant established its engine-house in its present position, and provided the jury further find that the annoyance and inconvenience to said congregation from the smoke and noises above mentioned occurred within three years before the date at which this suit was brought, and provided further that said noises and smoke depreciated the value of the property of the plaintiff within the period from April 1st, 1874, to March 22d, 1877."—Approved: Baltimore & Potomac R. R. Co. v. Fifth Bap. Church, 108 U. S. 317, 322, 2 Sup. Ct. Rep. 719.

§ 3901a. Noise, Dust and Smoke to Residence from Operation of Cotton Gin.

"The jury are instructed that the business of operating a cotton gin is a lawful business and not necessarily a nuisance, but that it might become so when conducted in such close proximity to a private residence as to materially interfere with the comfort of such residence as a

home, and that if defendants in operating their gin created noise and generated dust and smoke, which were carried into plaintiff's residence, [there established before the gin was built] so as to interfere with its comfortable enjoyment as a home, and plaintiffs were thereby subjected to annoyance and discomfort, then plaintiffs were entitled to recover." —Approved: Faulkenbury v. Wells, 28 Tex. Civ. App. 621, 68 S. W. 327.

§ 3902. Owner of Greenhouse not Using Ordinary Care to Protect Plants Against Damage from Nuisance.

"The plaintiff cannot excuse himself for failure to use reasonable and ordinary care in the arrangement of his greenhouse, or in the manner of placing the plants therein, by relying upon any promises of relief from further flooding of his premises made by the city of Garrett or by any of its officers or agents, and if you find that there were promises of relief made by the city of Garrett or any of its officers or agents to the plaintiff, and that the plaintiff relied thereon, and because of relying thereon failed to use reasonable and ordinary care thereafter in the arrangement of his greenhouse and the placing of his plants thereon, and that by the exercise of such reasonable and ordinary care the plaintiff could have prevented injury thereafter to his plants and greenhouse, then, in that case, plaintiff would be guilty of contributory negligence, as to the injury resulting thereafter, and which he might have avoided and prevented by the exercise of such reasonable and ordinary care, and he had no right to rely upon any of said promises made by the city of Garrett or of any of its officers or agents, and you should find for the defendant as to any such injury thereafter occurring."—Approved: City of Garrett v. Winterich (Ind. App.), 84 N. E. 1006 (not reported in state reports).

§ 3903. Engines Operated in Ordinary Way not Nuisance.

"The court instructs the jury that the defendant had the right to operate its engines and cars in the usual and ordinary way, and to make such noises or movements as are usually and necessarily made by trains in motion under similar circumstances."—Approved: Louisville & N. R. Co. v. Sights, 121 Ky. 203, 89 S. W. 132.

§ 3904. Factory in Locality of Other Factories Conducted in Ordinary Way.

"If the jury find from the evidence that the defendant conducted his factory in the ordinary business way, and in a locality where there are other factories, then the wrong complained of must be naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits to entitle the plaintiff to recover, and the injury complained of must be material and direct from conduct of the defendant, without the operation of the other factories and manufacturing establishments, situate in the neighborhood of the dwelling of the plaintiff."—Approved: Lurssen v. Lloyd, 76 Md. 360, 25 Atl. 294 (295).

§ 3905. Dangerous Pit in Close Proximity to Highway a Nuisance.

"The jury are instructed that the owner of property adjoining a highway is bound to use his property so as to do no harm to persons lawfully traveling upon the highway, and if he digs a pit near a sidewalk, so that one, in passing along, falls in, and is thereby injured, he is liable for damages to the person injured, provided said pit or cellar was not properly guarded, and such pit-falls or cellars, if contiguous to the public street, are nuisances for which the owner of the land is liable."—Approved: Cannon v. Lewis, 18 Mont. 402, 45 Pac. 572 (574).

§ 3905a. Nuisance must be Proven to be Proximate Cause of Injury.

"The court instructs the jury that, if they believe from the evidence that the sickness which plaintiff claims to have suffered may as well have resulted from other causes as from stagnant water in the canal bed, then they must find for defendant."—Approved: Chesapeake & D. Ry. Co. v. Whitlow, 104 Va. 90, 93, 51 S. E. 182.

CHAPTER CVII.

INSURANCE.

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B. Life Insurance.
C. Fraternal Insurance.
D. Accident Insurance.
E. Marine Insurance.
F. Indemnity Insurance.

A. Fire Insurance.

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§ 3906. General Agent as to all, or a Particular Class of Business—Powers.

"When one is the general agent of an insurance company for the transaction or management of any and all of its business, then such agent can bind such company with reference to such transaction or management. Where one is general agent only for the transaction of some particular business for an insurance company, then he can only bind such company in the transaction of the particular business which he is by the company employed to transact. So, if you find that A— did have notice, before the renewal, of the erection of the buildings to the east of plaintiff's, then it will be your duty to find what was the power of said A— at said time. If he did have the notice before the renewal, and then had the power to transact any or all of the business of the defendant, with reference to insuring the property and granting renewals, then he was such agent as could bind defendant. If, however, he was only an agent of the defendant's to establish local agencies, and superintend the same, and had not the power to grant policies or renewals, then he could not bind defendant; and if he was such agent, and such only, then notice or knowledge to him would not bind the company, unless it was by him communicated to defendant's secretary or president."—Approved: King v. Council Bluffs Ins. Co., 72 Iowa, 310, 33 N. W. 690.

§ 3907. Proper Disclosure as Necessary to Validity of Contract.

"Unless you are satisfied that a preponderance of the evidence establishes that information as to other insurance was given to S—, as claimed by plaintiff, your verdict must be for the defendant."—Ap-

proved: Bruger v. Princeton & St. Marie Mut. Fire Ins. Co., 129 Wis. 281, 109 N. W. 95.

§ 3907a. Constituents of Parol Contract of Insurance.

"The court instructs the jury that in order to make a valid contract of insurance several things must concur: First, the parties must agree upon the company in which the insurance is to be placed; second, the amount of the insurance must be definitely fixed; third, the duration of the risk must be agreed upon and the contract must be definite and certain. The absence of either or any of these requisites is fatal, and, if you believe from all the evidence in this case, that all of the above requisites were not mutually agreed upon and understood prior to the destruction of the property, then the plaintiff is not entitled to recover and your verdict should be for the defendant."—Approved: Insurance Co. of North America v. Bird, 175 Ill. 42, 43, 51 N. E. 686.

§ 3908. Misrepresentation Which Makes a Policy Void.

(a) "If you find that James A. M—made an untrue or fraudulent statement of a fact material to the risk, in the application for the policy, then you should find for the defendant, unless you further find that the defendant was informed of and knew the truth in regard to such fact, and, after knowing such fact fully, received the application, the premium money and notes, and issued the policy; in which case you should find for the plaintiff."—Approved: Miller v. Mutual Ben. Life Ins. Co., 31 Iowa, 216, 222, 223.

(b) "Gentlemen of the jury, if you believe from the evidence that, at the time the defendant, through its agent, Jesse D. W— solicited the insurance of the plaintiff, the representation was made by the plaintiff that the barn was a stock barn, and was not then a tobacco barn, or was not to be used as such during the term of the life of the contract of insurance, and, but for such representations, if made, the defendant would not have written the insurance, or would not have written it for the premium therein named, then you will find for the defendant; and unless you so believe you will find for the plaintiff the sum of $500, with 6 per cent. interest thereon from March 6, 1905."—Approved: Moss v. Home Ins. Co. of New York (Ky.), 99 S. W. 308 (not reported in state reports).

§ 3909. But if Agent Soliciting Insurance is not Misled Misrepresentation Immaterial.

"The defendant would be bound by any knowledge which its agent, Drake, gained while soliciting insurance or taking applications for it, even if he failed to communicate such knowledge to the other agents or officers of the defendant company. Therefore, if he learned or knew the value of the property when he received plaintiff's application for insurance, the defendant must be deemed to have known the value thereof when it issued the policy, and in that case it could not be held to have been deceived by, or to have relied upon, the plaintiff's representations."—Approved: Helm v. Anchor Fire Ins. Co., 132 Iowa, 177, 109 N. W. 605.

§ 3910. And so Where by His Fault or Negligence this Occurs.

"The court instructs the jury that an agent, authorized to take applications for insurance, should be deemed to be acting within the scope of his authority where he fills up the blank application for insurance; and if, by his fault or negligence, it contains a material misstatement, not authorized by the instructions of the party who signs it, the wrong should be imputed to the company, and not to the assured."—Approved: Rowley v. Empire Ins. Co., 36 N. Y. (9 Tiff.) 550.

§ 3911. If Agent Agrees to Issue Policy for Unearned Premium on Another House, the Insurance then Begins.

"The court instructs the jury that if they should believe from the evidence that the plaintiff's sons, or either of them, acting as her agent, requested the defendant's agent to insure for plaintiff the G— house for $1,000 against loss by fire, to expire at the same time that the policy for that amount then held by plaintiff on the W— house expired, in consideration of the unearned premium on the W— house, and that the defendant company by its agent agreed to issue said policy, and that hereafter in February, 1906, said G— house was destroyed or damaged by fire, then and in that event the jury should find for the plaintiff the fair cash value at that time of plaintiff's life estate in the property or the part thereof so destroyed not exceeding $1,000, the amount claimed."—Approved: American Central Ins. Co. v. Leake (Ky.), 104 S. W. 373 (not reported in state reports).

§ 3912. Condition of Absolute Ownership to Make Policy Effective.

" 'If the interest in the property be any other than the entire, unconditional, sole ownership of the property,—for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of this policy; otherwise the policy shall be void.' And you are instructed as a matter of law, that the above condition in said policy is binding on plaintiff, and that, unless his ownership was that of entire, unconditional, sole ownership of the property for the use and benefit of himself, (no other title or interest being shown in writing upon the face of the policy, or indorsed on said policy,) then plaintiff cannot recover in this action for the loss. You are instructed, as a matter of law, that if the plaintiff to this action was not the absolute owner of the property insured at any time, and particularly at the time of the loss by fire, but only held an equitable interest therein as collateral security, then plaintiff cannot recover upon this policy for the loss, under the pleadings in this action."—Approved: Hennings v. Western Assurance Co., 77 Iowa, 319, 42 N. W. 308.

§ 3915. Unlawful use of Property Vitiating Policy—Selling Intoxicating Liquors.

"Plaintiff has alleged that the liquors named in the policy of insurance were not owned or possessed by him for the purpose of sale in violation of law. This question is an issue, and you are told that, before plaintiff can recover the value of such intoxicating liquors, it

must appear, in addition to all other necessary conditions, and that by a preponderance of the evidence, that plaintiff did not own or possess such liquors with intent to sell the same within this state. If he has not so established such facts, then you should find for the defendant on this issue. Plaintiff had the right to keep said liquors if he did not intend to sell them within this state; or, if he kept them with intent to sell the same outside of the state, his ownership and possession would not be unlawful."—Approved: Erb v. German-American Ins. Co., 98 Iowa, 606, 67 N. W. 583.

§ 3916. Manufacturing Plant Operated at Night.

"As to the knowledge of the agent that the Improved-Match Company was operating its factory at night, you have heard the testimony concerning that. The policy itself contains this language: 'This entire policy, unless otherwise provided by agreement, shall be void if the insured now is or shall hereafter make or procure any other contract of insurance, or if the subject of insurance be a manufacturing establishment, and it be operated, in whole or in part, at night later than ten o'clock.' Now, the testimony in this case shows that the establishment was operated at night, and the loss actually occurred at three or four o'clock in the morning. I charge you, however, as I have already indicated, that if, at the time this policy was delivered by the agent of the insurance company, he knew that the manufactory was being operated at night, * * * the company is estopped from making this claim; that is to say, the company, under such circumstances as that, must be assumed to have that knowledge, and make the insurance with it. So that, in disposing of that question, the simple thing for you to determine is whether or not the agent had the knowledge at the time he delivered the policy. If he did, then the policy is valid; * * * if he did not, the policy is void."—Approved: Improved-Match Co. v. Michigan Mut. Fire Ins. Co., 122 Mich. 256, 80 N. W. 1088.

§ 3917. Cessation of Insurance by Building or Any Part Falling.

"By the terms of the policy of insurance in this case it is provided that if the insured building or any part thereof fall, except as the result of fire, the insurance thereon immediately ceases. As to what constitutes a falling of the building within the meaning of this clause, I charge you that the meaning of the language is that the building must have fallen in whole or part to such an extent that its integrity as a building was destroyed or substantially impaired.

"If you find from the evidence that the building was substantially in its entirety, and not materially impaired after the falling of such parts thereof which the evidence shows to have fallen, then your verdict should be for the plaintiff.

"Defendant is not entitled to a verdict in this case unless you find from the evidence that the substantial integrity of the building was impaired to such an extent as to render it unsuitable for use as an entire building, or unless the falling of such parts as you shall find did fall exposed the interior of the building or its contents to the inclemency of the weather or render the building or its contents more easily

subject to ignition by fire, and thereby materially impairing the building as a building."—Approved: Clayburgh v. Agricultural Ins. Co., 155 Cal. 708, 102 Pac. 812.

§ 3918. Building Blown from its Blocks but Remaining Intact.

(a) "The court instructs you that, even though you may believe from the evidence that the plaintiff's building which was insured by the defendant was blown from its blocks by the wind and turned over on its side, yet if you further believe from the evidence that said building remained intact and retained its identity as a building, then and in such case the said building did not fall within the meaning of the clause in defendant's policy of insurance, providing that if said building, or any part thereof, should fall, except as a result of fire, all insurance by said policy on such building or its contents should immediately cease.

(b) "Before it can be held that the plaintiff's house had fallen, you must find from the evidence that his house had fallen to pieces, and was not left intact as a building after it had been blown from its foundation or posts upon which it was standing before the storm."—Approved: Teutonia Ins. Co. v. Bonner, 81 Ill. App. 231.

§ 3919. What Alteration Will Avoid the Policy.

"If any alteration in the building insured was made by plaintiff, or under his direction, or with his knowledge or consent, after insurance made with defendant, whereby said building was exposed to greater risk or hazard from fire than when insured, the policy became void, unless plaintiff has proved to the satisfaction of the jury that an additional premium and deposit, after such alteration, was settled with and paid to defendant or agent before the fire happened."—Approved: Kern v. South St. Louis Mut. Ins. Co., 40 Mo. 19, 22.

§ 3920. A Similar Instruction Drawn from the Plaintiff's Standpoint.

"The jury are instructed that no alteration or repairs, made on premises insured by plaintiff, would avoid his policy, nor can his recovery be defeated by means of alterations or repairs,—unless the same were such as to increase the risk or hazard from fire to the injured premises. If the jury find from the evidence that defendant made the policy sued on, and the property insured was destroyed by fire, as stated in petition, and plaintiff complied with the agreements and conditions in the policy to be complied with on his part, they will find for the plaintiff. * * * The jury are instructed that the policy sued on could not be made void, nor can the recovery of plaintiff be defeated by the erection of any building immediately adjacent or adjoining premises insured, unless such erection materially increased the risk or hazard of fire."—Approved: Kern v. South St. Louis Mut. Ins. Co., 40 Mo. 19, 22.

§ 3921. Vacancy as to Dwelling House Avoiding the Policy.

"Defendant claims that under this policy plaintiff has lost all right, because from some time in November or December, 1898, up to the time of the fire, in January, 1899, the house in which the furniture was stored was vacant or unoccupied, against the form and condition

of this policy. The defendant also claims that in the fall of 1898 Mr. M— permanently removed from this residence, and took up his residence downtown in the gallery, intending to remain away until warm weather, or at least until after February, 1899. Now, gentlemen, as to whether this house was vacant or unoccupied,—I am using the words of the policy now,—I have concluded to leave the question to you. I will tell you what the law means by 'vacant or unoccupied,' in reference to a dwelling house: For a dwelling house to be in a state of occupation, there must be in it the presence of human beings as at their customary place of abode; not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage. It is not sufficient, therefore, that tools or other chattels may be left in the building, or that it is occasionally visited or inspected by some one, or is used and controlled, though not inhabited, by a tenant, or is used temporarily as a place of abode, or that unsuccessful efforts have been made to procure an occupant; and occupancy by one who has conspired to burn the building will not be considered occupancy. Referring back to the definition, a dwelling house, to be in a state of occupancy, must have in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous; but that must be the place of usual return and habitual stoppage. * * * Then temporary absence, either on pleasure or from accident or for business purposes, does not constitute a dwelling vacant or unoccupied, within the terms of this policy; and I charge you that if M— left the place only temporarily, and if it was his permanent home, and if he intended to return to it; if, as you ordinarily view houses and homes, it was his residence and his home, and that this was only a temporary absence,—why, then, that absence would not defeat his policy. But if he left it, as claimed by the defendant here, with the intention of remaining permanently downtown all winter, and not to return until spring, or until February, with the definite purpose in his mind to live down here during this time, then his absence would not be called, in the law, a temporary absence, and his policy would be avoided, unless the company assented to the absence or vacancy, or want of occupancy, as is contended. If you find that, at the time of the fire, plaintiff was only temporarily absent from his dwelling house, and left his household furniture, etc., in the house with the intention of returning,—that the premises would not be unoccupied and vacant, within the meaning of this policy,—and, if otherwise liable, this company would be responsible for the loss. At the same time, in giving you this request, I remind you again of the definition which I gave you of what constitutes occupancy of a dwelling house."—Approved: Morgan v. Illinois Ins. Co., 130 Mich. 427, 90 N. W. 40.

§ 3922. Temporary Vacation of Premises Does not Avoid Policy.

"If a man insures his dwelling house and lives therein at the time, and contracts not to let the building become vacant and unoccupied, he cannot, as a matter of fact, vacate it absolutely, leave it in that condition, and recover on the policy in case of loss. But if he goes off tem-

porarily, on business or matters for his own benefit or otherwise,—temporarily merely, with the intention of coming back to his place and there living, and with no intention of abandoning the place,—the contract will not be vitiated by that kind of a transaction; and had the tenant in this case gone away on temporary business before he surrendered up the premises to this Mrs. N—, and had the fire occurred while the tenant occupied it, there would be no question but that the company would be responsible for the loss, if the going away was merely temporary, with the intention of coming back and making it the home of the tenant. I think in this case, gentlemen, if you are satisfied by a fair preponderance of the evidence, or are clearly convinced, that Mrs. N— put her things into that building with the intention of making it her home and her residence as a matter of fact,—did not live in it in person before the fire, but, after placing those things in, she went away on mere temporary business with the intention in her mind to come back and live there,—that the premises would not be unoccupied and vacant within the meaning of this policy, and that the company would be responsible for the loss. She must, of course, have placed her goods in that building with the intention in her mind to make it her residence—to make it her home, and must have gone away on business—temporarily gone away, simply for a temporary purpose, not permanently,—not with the idea of abandoning the place. If she went away temporarily, to be gone a few weeks or a few days, on business of her own, with the intention of coming back and living there, I do not think the policy is vitiated; and I think the plaintiff in this cause, who sues as assignee of the policy, can recover, if you so find."—Approved: Shackelton v. Sun Fire Office, 55 Mich. 290, 291.

§ 3923. Possession, Cleaning and Moving in Furniture Constitute Occupancy.

"If you are satified, by a preponderance of credible testimony, that, immediately upon the removal of the tenant, the plaintiff took possession of the house in controversy, by himself and his employes, for the purpose of making that his home, and commenced cleaning the house, and moving his furniture therein; and so continued to work in cleaning and moving into said house, without any cessation or abandonment of his purpose of making that his home; and had therein at the time of the fire certain of his furniture and household goods, so put there for use in his family; and that nothing was wanting to complete personal occupancy, except that he lodged and took his meals at another house, near by; and that he intended to personally occupy the house the next day with his family, had the house not been destroyed,—then the premises were not vacant and unoccupied, within the meaning of the policy."—Approved: Eddy v. Hawkeye Ins. Co., 70 Iowa, 472, 30 N. W. 808.

§ 3924. False Statements in Proofs of Loss Avoid the Policy.

"The jury are instructed that, if they believe from the evidence, that the policy sued on contained a provision that all fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture

of all claims under the policy, and that, if they further believe from the evidence that plaintiffs have fraudulently offered to defendant proofs of loss under the policy, containing material statements in regard to their loss under said policy, which the plaintiffs knew to be false at the time the same were offered, they will find for defendant."—Approved: Schulter v. Merchants' Mut. Ins. Co., 62 Mo. 237.

§ 3925. But the False Statements Must be Willful.

"If you find from the evidence that the proofs of loss signed and sworn to on the 3d day of October, 1904, and introduced in evidence, were made out and prepared by E. P. F— in the capacity of adjuster, duly appointed and authorized by defendant insurance company to ascertain and adjust the loss occasioned by the fire alleged in the complaint, and you further find that, at the time plaintiff M— signed and swore to said proofs of loss and delivered them to said insurance company, he had not read or heard read the contents of said proofs of loss, and did not know the contents thereof, then I instruct you that any misstatements therein contained, of which M— was ignorant, do not work a forfeiture of said policy of insurance or deprive the plaintiffs of the right of recovery thereunder."—Approved: Miller v. Firemen's Fund Ins. Co., 6 Cal. App. 395, 92 Pac. 332.

§ 3926. And Made with Fraudulent Intent.

"That to defeat the plaintiff's right to recover upon the basis of false swearing, you must not only find that he swore to that which was false, but that he did so with fraudulent intent; and in weighing the question of false swearing with fraudulent intent, it is your duty to take into consideration the knowledge that the affiant, Mr. T—, had of the facts that he is alleged to have sworn to, and it is for you to determine what statements in that paper or items he understood he was swearing to. If you should come to the conclusion from the evidence that any of the items that he understood he was swearing to were false, you will then inquire whether he made it with a fraudulent intent; that is to say, with an intent knowingly to get a greater price for an article than he knew it to be worth or to get pay for articles that he knew he had not lost."—Approved: Tiefenthal v. Citizens' Mutual Fire Ins. Co., 53 Mich. 306, 19 N. W. 9.

§ 3927. Destruction of Premises by Assured Avoids the Policy.

"Now upon that issue, upon that defense, the defendant here has the affirmative, and must satisfy you by a preponderance of the evidence that this plaintiff either directly or indirectly caused the destruction of that building by fire, in order to entitle it to the defense it has set up."—Approved: Schornak v. St. Paul Fire & Marine Ins. Co., 96 Minn. 299, 104 N. W. 1087.

§ 3928. And so if by Ordinary Diligence he Could Have Saved His House.

"If the house accidentally caught on fire, and the plaintiff, when he could thereafter have had the fire put out by the exercise of ordinary diligence, fraudulently contrived or allowed the house to be de-

stroyed by fire, and fraudulently desisted from the exercise of ordinary diligence, the plaintiff cannot recover."—Approved: Schmidt v. Mutual City & Village Fire Ins. Co., 55 Mich. 432, 21 N. W. 875.

§ 3929. Gross Negligence of Assured Causing Fire Avoids the Policy.

"If you believe from the evidence that plaintiff was guilty of gross negligence in putting the stove in said barn, and in the use thereof under the circumstances and conditions that existed at the time of the fire, then the law is for the defendants, and you will so find. Gross negligence, as used, is the failure to use that degree of care that careless and inattentive persons would usually exercise under the circumstances as then and there existed."—Approved: Moss v. Home Ins. Co. of New York (Ky.), 99 S. W. 308 (not reported in state reports).

§ 3931. The Right of an Agent to Consent to Additional Insurance.

"If, from the evidence, you are satisfied that he (McK—) had the authority to act as the general agent of the defendant company, and that, within the scope of such agency, he was authorized to receive notice of additional insurance in other companies, and did, in fact, receive such notice, then such notice was notice to the defendant. * * * If, from the evidence, you find that McK—'s agency was only to procure risks and take premiums, and then deliver policies, his agency would, in that event, be a particular, as contradistinguished from a general, agency; and, in that case, his authority would not extend to waiving any of the terms of the policy. * * * It is the duty of a holder of a policy of insurance to inform the company or its agent of any change of the status of the thing or risk; in like manner, it is his duty, within a reasonable time, to duly notify the company in which the first policy was taken out, of any additional security by additional insurance, in order that said company may inquire into the solvency and standing of the companies, which, in case of loss, must share such loss. * * * Where it is in evidence that the insured obtained further insurance in other companies, contrary to the stipulations of policy sued on, such policy is vitiated. * * * By the terms of the policy sued on, consent in writing on the policy itself is requisite; but if such consent in writing were in fact given by the defendant company, or by some agent who had the authority to give such written consent, and if plaintiffs, after obtaining additional insurance in other companies, they having previously notified the agent who, according to the terms of his agency, was charged with the duty of receiving such notice,—then such written consent is binding upon the company; but the burden of proof is upon plaintiffs, and plaintiffs must satisfy the jury by proof that McK— did give the written consent, after he was informed of the amount of additional insurance, and the company in which such additional insurance was so obtained; and furthermore, plaintiffs must prove that McK— had the authority to give such consent. No presumption of such authority arises, but such an authority must be proved by plaintiffs."—Approved: Ins. Co. v. Lyons, 38 Tex. 256, 257, 258.

§ 3932. Increased Hazard Knowledge of by Agent.

"The court instructs the jury that the defendant cannot be held to have waived the condition of the policy with respect to the increase of risk, unless the jury believe, from the evidence, the defendant, by its agents, had knowledge of the extent and character of the increase of risk, if the risk was increased; and with such knowledge of the extent and character of such increase of risk consented thereto, or so conducted themselves toward the plaintiff as to induce a reasonable belief in the mind of the plaintiff that such increase of risk would not be insisted upon by the defendants as a defense to the policy."—Approved: North British Ins. Co. v. Stieger, 124 Ill. 81, 16 N. E. 95.

§ 3933. And Where not Known to Insured or its Agents.

"If you believe, from the evidence, that shortly after the first fire, and from that time forward until the second fire, there was a material and considerable increase of the hazard from fire to the insured property, occasioned by reconstruction of the premises and building mentioned in the policy, and changes, alterations, and repairs of the same, and by the continuous presence during that time in said premises and building of a large number of workmen and mechanics, engaged in said work and that the plaintiff, during all of said time, had knowledge of said continuous work by said workmen, and that the plaintiff did not notify the company of said facts, so known to him and so increasing said hazard, and that the agents of the company at Chicago, named in the policy, did not have knowledge of such fact while such work was in progress, then you are instructed that the policy in this case, by reason of said increased hazard, became and was wholly void, and in that case no verdict can be rendered upon it as to the loss or damage by the second fire."—Approved: Mech. Ins. Co. v. Hodge, 149 Ill. 298, 37 N. E. 51.

§ 3934. Waiver of Condition of Forfeiture by Promise to Rebuild.

"Although the jury may believe that, at the time of making the application for the policy sued on by plaintiffs, or their agents, it was represented by them or their agents, that a watchman was and would be kept in charge of the premises insured, and that that matter was regarded by the agents of defendant as material to the risk—that is, without such representations the risk would not have been taken, or a higher rate of premium would have been charged therefor; and that the building was damaged or lost by fire, and at the time there was no watchman in charge of the premises; and that the defendant, by its authorized officers and agents, knew these facts, and with such knowledge the defendant alone or in conjunction with other companies, agreed to make good the loss by rebuilding the premises, and notified plaintiffs thereof, and failed or refused to rebuild, and made no objections to making good the loss on the ground that no watchman was in charge of the premises at the time of the fire, until after the institution of this suit; from these circumstances the jury are authorized to infer that defendant waived the matter, and in such case it constitutes no defense

to this suit."—Approved: Bersch v. Globe Mut. Fire Ins. Co., 31 Mo. 550, 551.

§ 3935. Failure to Make Proofs of Loss Defeats Recovery.

"Under the terms of the policy sued on, the plaintiff was required to make proof of loss, and the making of such proof in accordance with the terms of the policy was a condition precedent to plaintiff's right to recover, unless such proof of loss was waived by the defendant; and if the jury find from the evidence that proof of loss was not made by the plaintiff, and that defendant did not waive such proof of loss, then the plaintiff cannot recover, and the jury must return a verdict for defendant."—Approved: Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180, 19 South. 540.

§ 3936. Adjusters Adjusting Loss and Then Denying Liability is Waiver of Proofs.

"As to the proof of loss not being furnished within a reasonable time. If the proof of loss was not furnished until six months after the fire, this would defeat a recovery, unless adjusters for defendant company, with others, were on the ground immediately after the fire, and adjusted the loss, and then informed plaintiff that he would have to get his insurance at law; then he would not be called upon to furnish the proofs of loss, and you will find against the defendant company on this issue."—Approved: East Texas Fire Ins. Co. v. Brown, 82 Tex. 631, 18 S. W. 713.

§ 3937. Soliciting and Receiving Proofs of Loss Waiver of Condition of Forfeiture.

"A party to a contract containing stipulations releasing him from liability thereon is at liberty, if he sees fit, to not insist on said conditions, but to waive the same; but, in order that the acts of such party shall constitute a waiver, he must act with full knowledge of the circumstances releasing him. And if, with a full knowledge of the circumstances releasing him, he continues to treat the contract as of binding force, and induce the other party to act in that belief, he will be deemed to have waived the conditions releasing him. And in this case, if the plaintiff has established, by a preponderance of the evidence, that the defendant company was notified of the loss of said barn, and that in pursuance of said notice it sent to the home of the plaintiff its state agent and adjuster, before going to the home of the plaintiff, had full knowledge of the existence of said mortgage, and that the same was placed on the property without the consent of the company, and with this knowledge intentionally gave plaintiff to understand that he was willing and ready to pay the loss in full, and induced plaintiff to come from his home to the city of Lexington for the purpose of receiving the pay for said loss, and induced plaintiff to assist in making an estimate of the cost of said building, and induced plaintiff to make and furnish proof of said loss as provided by the terms of said policy of insurance, this conduct by said agent or defendant would be sufficient to establish the claim of plaintiff that the

said condition of forfeiture in the policy had been waived by the defendant company; and, if you find that each and all of these acts have been established by a preponderance of the evidence, it would then be your duty to find for the plaintiff in the sum of $1,000.00, with interest thereon at seven per cent. from September 29th, 1897."—Approved: German Ins. Co. v. Stiner, 2 Neb. Unoff. 308, 96 N. W. 122.

§ 3938. Waiver of Condition to Submit to Examination as to Details of Loss.

"The policy introduced in evidence provides that all persons having a claim under this policy for loss or damage, if required, shall produce books of account and other proper vouchers and extracts to be made therefrom, and be examined and re-examined under oath, by any person appointed by the company, at such time or times, and place or places, as the company or such person may require, touching all questions relating to the claim, and subscribe to the same; and until such examination is submitted, if required, the loss shall not become payable. The above conditions of said policy are binding upon the assured. The burden is upon the defendant to show notice to said D. McG— requiring him to appear at a certain time and place to be so examined; but if you shall find from the evidence that such notice was served by the defendant upon D. McG—, the burden would then be upon said D. McG— to show by a preponderance of the evidence that he complied with said notice and submitted to such examination under oath, or that the defendant, by some act of its own, waived such condition of the policy. And if you shall find from the evidence that said D. McG— was required by the defendant, by notice served upon him, to appear at a certain time and place to be examined and re-examined under oath touching said loss, and that said D. McG— failed to comply therewith, the verdict must be for the defendant, unless it be shown as above stated that the defendant waived such condition. If you shall find that the defendant did notify said McG— to appear at Des Moines to submit to an examination under oath touching said loss, but that said McG— made excuse for not appearing at said time and place, and that defendant accepted said excuse, and then sent an agent to Council Bluffs, and at said latter place said McG— submitted to examination as required by the terms of said policy, then you are entitled to find that defendant waived its right under said policy requiring said McG— to appear for said examination at Des Moines, as required by its said notice, and such waiver will also apply to any subsequent notice for re-examination at Des Moines."—Approved: Eiseman v. Hawkeye Ins. Co., 74 Iowa, 11, 36 N. W. 780.

§ 3939. Denial of Liability for Alleged Failure to Pay Premium Waives Proofs of Loss.

"If you find from the evidence that, after the issuing of the policy in question and before its termination, the property insured thereby was destroyed accidentally by fire; and further find that its value exceeded the insurance thereon; and further find that, on the day following such destruction, plaintiff telegraphed to the secretary of defend-

ant, at its home office in Freeport, Illinois, the fact of the destruction of such property by fire; and further find that immediately thereafter, and before the time within which plaintiff was bound by the terms of said policy to furnish defendant proofs of loss, the defendant repudiated its contract of insurance and denied all liability upon the policy in question, solely upon the ground that plaintiff had failed to pay the premium due upon such policy; and further find that defendant has, at all times since, repudiated said contract of insurance and denied all liability thereon, solely upon such ground,—then you are instructed that such acts of defendant amount in law to a waiver of the condition in said policy that proofs of loss shall be furnished, and defendant cannot now insist upon the failure of plaintiff to furnish such proofs as a defense to this action. The burden of proof is on the plaintiff to satisfy you by a preponderance of evidence that he did so notify defendant of said loss, and that defendant repudiated the alleged contract; and, unless he does so satisfy you, your verdict will be for the defendant."—Approved: Carson v. German Ins. Co., 62 Iowa, 433, 17 N. W. 650.

§ 3940. Informal Notice Not Objected to is Sufficient Notice of Loss.

"And, upon the issues found, it devolves upon the plaintiff to prove, by a preponderance of the evidence, its ownership of the property insured, and the destruction of the same by fire, as alleged, and the value of said property at the time of its destruction; and that the plaintiff, immediately after such loss, notified the said company, or its adjusting agent, of the destruction of said property, or that the plaintiff gave defendant notice of such loss, although not in exact conformity with the requirement of said policy; and that the notice was received by the company without objections, and without suggesting that it did not conform to the terms of the said policy. In such case defendant will be deemed to have waived other or further proof of the said loss."—Approved: Phoenix Ins. Co. v. Rad Bila Hora C. S. P. S., 41 Neb. 21, 59 N. W. 752.

§ 3941. Limitation of Time to Sue Waived by Conduct.

"If you find from the evidence that the defendant, by any conduct or statement of its adjusting agent, while attempting to adjust the said loss, did that which was calculated to induce a reasonable belief in the plaintiff that the claim would be paid without suit, and that the plaintiff was reasonably induced by such conduct of defendant and proposition to settlement to withhold bringing suit until after six months after said loss, then defendant will be deemed to have waived the right to insist upon requiring such suit to be brought within six months from the date of the loss."—Approved: Phoenix Ins. Co. v. Rad Bila Hora C. S. P. S., 41 Neb. 21, 59 N. W. 752.

§ 3942. Tender of Premium Before Loss Saves Policy.

"The jury are instructed that it was incumbent on the plaintiff, under the terms and conditions of the policy issued by defendant to him or his assignee, that the premium must have been paid before loss in order to hold the defendant liable on the policy; and if they find

from the evidence that premium was tendered, or that C. E. McC— & Co. offered to pay the same, to the agent of the defendant, and that for any reason the same was not accepted at that time, and a loss occurred after the tender or offer of payment of premium, the defendant would be liable for that loss."—Approved: Western Home Ins. Co. v. Richardson, 40 Neb. 1, 58 N. W. 597.

§ 3943. Building Destroyed Presumed to Equal Insurance Burden on Defendant.

"If you find that defendant waived its right to demand and receive the notice in writing and affidavit from plaintiff, then your next subject of inquiry should be as to the value of said buildings at the time of said fire, and this sum, when found, will be the measure of plaintiff's recovery; that is, she cannot recover more in this action than said buildings were worth at the time they were burned. The law presumes that each of said buildings was worth, at the time the policy in suit was issued, the sum for which it was insured, but this presumption is not conclusive. It may be rebutted or overcome by evidence showing that they were of less value. Stating the rule in different language, the plaintiff is, prima facie, entitled to recover the amount for which said buildings were insured; and, if defendant claims they were in fact worth less than this amount, the burden is upon it to establish such fact by a preponderance, or greater weight, of evidence. In order to determine the value of these buildings at the time they were destroyed, you may consider their condition at that time; their cost, age, and size; the material of which they were built; the uses to which they were put; their depreciation in value from wear and tear; the action of the elements, or any other cause; and also the cost of constructing new buildings like them at the date of the fire; and generally, I may say, any other facts in evidence bearing upon the matter. Keep in mind that the sole, ultimate object of your inquiry is to ascertain what these buildings were actually worth on the day when the fire occurred; and, when you have ascertained the value of each of said buildings so insured and destroyed, the total sum of such values, with interest added, will be the amount of plaintiff's recovery. While, as I have said, you may consider the original cost of the buildings, and also the cost of erecting on May 2, 1893, new buildings of similar character, you will understand that these facts, when found, are but preliminary. They are merely starting points, from whence you are to reason, in the light of all the evidence, to the ultimate fact which you are to find, viz. the value of the burned buildings on May 2, 1893, in the condition they were in at that time. For instance, when you have ascertained the original cost of said buildings, you should allow for the difference, if any, in cost of labor and materials between the time when such buildings were constructed and May 2, 1893, and this would be one way of ascertaining the cost of erecting such buildings at the last-named date. When, in this way, or by any other evidence, you have ascertained the cost of the erection of said buildings on May 2, 1893, if you then deduct the difference in value between such new buildings and the buildings burned as they were at

the time of the fire, you will have arrived, by one method, at the actual value of the property in question, and which would be the amount of plaintiff's loss."—Approved: Scott v. Security Fire Ins. Co., 98 Iowa, 67, 66 N. W. 1054.

§ 3944. Destruction of Building—What Constitutes.

"If the property or any part of it was so damaged by fire as to render it useless for the purposes for which the property had been used, then that is a destruction within the meaning of the law."—Approved: Manchester Fire Assur. Co. v. Feibelman, 118 Ala. 308, 23 South. 759.

§ 3945. Renewal of Policy by Oral Contract.

"If you find from the evidence that the parties agreed that the insurance should be renewed without a payment of premium, and their minds met and they fully understood the terms of such renewal in all respects, and nothing remained to be done thereafter except to make out the renewal receipt on the part of the company, and the payment of the premium by the plaintiff, notwithstanding this was a verbal agreement, it was nevertheless a valid contract for the renewal of the policy, and the defendant is liable for the loss to the amount of the insurance. * * * If you find that, previous to January 15, 1882, the defendant company had issued a policy of insurance upon the building and stock in question, which would expire on that date, and that, about the time of its expiration, the agent of the company, for and in its behalf agreed with the plaintiff, or his authorized agent, to renew said policy, and that he, the agent of the company, would attend to it right away; and that their minds met as to the terms of such agreement; and that there was nothing further to be done between the parties, except that the agent of the defendant should make out and deliver to the plaintiff or his agent the renewal, receipt or evidence of renewal, and that the plaintiff or his agent should then, or at some subsequent time, pay the premium,—then I instruct you that such an agreement would bind the defendant company to renew the policy, and they could only avoid liability upon such contract by tendering the renewal and demanding the premium, and the failure of the plaintiff to pay the same, or by giving the plaintiff or his agent notice that the defendant company had refused to carry the risk; and such tender of the renewal and demand of the premium, or the giving of the notice, as before stated, in order to relieve the defendant from liability, must be done before the loss accrued and before they knew of the loss."—Approved: King v. Hekla Fire Ins. Co., 58 Wis. 514, 515.

§ 3946. Damage to Party Walls—Mode of Estimating.

"The court instructs the jury that if they believe from the evidence that the fire which occurred in the B— building on February 15, 1908, damaged by fire the building of plaintiffs, you will find for the plaintiffs the damage, if any was sustained by them, to the said building, not exceeding the sum claimed, $4,335. And in estimating such damage you will estimate the difference in value, if anything, between

said building just before the fire occurred and the same building immediately thereafter that you may believe was approximately caused by the fire; such difference, if any, in value to be determined by the reasonable cost of repairing or restoring any damage or injury caused solely by the fire.

"The court instructs the jury that the west wall of the plaintiffs' building is a party wall, and one-half of same belongs to plaintiffs to the second story, and all the balance belonged to the plaintiffs, but plaintiffs had the use of all the said wall, and the jury are instructed in this case, in estimating the plaintiffs' damages, to consider the difference in value of this wall to their building as the same exists as the result of the fire afterwards."—Approved: Citizens' Fire Ins. Co. v. Lockridge & Ridgeway, 132 Ky. 1, 116 S. W. 303.

§ 3947. Value of Premises—Opinions of Witnesses.

"You are not obliged to rely wholly on the opinions of the witnesses as to the value of the property in question. You may use, and be guided by, your own judgment, and general knowledge of such values in connection with the opinions of the witnesses."—Approved: Helm v. Anchor Fire Ins. Co., 132 Iowa, 177, 109 N. W. 605.

§ 3948. Subrogation With Right to Sue for Negligence Causing Fire.

"The jury are instructed, if they find from the evidence that the plaintiff, the Fire Association of Philadelphia, did insure the plaintiff, the Southwestern Commercial Company, in the sum of three thousand dollars, against the loss or damage by fire on certain cotton, described in the policy of insurance No. 764,308, and that said cotton, or any portion of it, was destroyed or damaged by fire, wholly under the terms and condition of said policy, and that the said Fire Association became liable to pay and did pay said Commercial Company the sum of one thousand four hundred and ninety-three dollars and seventy-nine cents, and that, in consideration of said payment, and prior to the institution of the suit, the said commercial company did assign, set over, and transfer to said Fire Association all the rights, claims, and interest and demand which said company had against the St. Louis, Arkansas & Texas Railway Company, or any person, party, or corporation who may be liable for the burning or destruction of said cotton, then is said association subrogated to all the rights of said company under said policy; and if you further find from the evidence that any portion of said cotton was damaged or destroyed by fire escaping from defendant's engine, and that this was caused by the negligence of defendant, then your verdict may be for the plaintiff, the Fire Association of Philadelphia."—Approved: St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 55 Ark. 163, 18 S. W. 43.

B. Life Insurance.

§ 3948a. Policy Issued without Consideration Requires Redelivery to Validate.
3949. Rescission for Misrepresentation by Insurer's Agent as to Effect of Policy.
3950. Per Contra—Insured Accepting Policy is Bound to Know its Contents.
3950a. Plaintiff's Instructions as to Misrepresentation.
3951. Defendant's Instruction as to Effect of Material False Representation by Assured.
3952. Representations which Amount to Warranties.
3953. Misrepresentation of Matters Contributing to Produce the Death of Assured.
3954. Disorders and Ailments of a Temporary Nature.
3955. Representations in Application Knowingly False—Willful Concealment.
3956. Misrepresentation in Respect to Previous Applications for Insurance.
3958. Knowledge by Agent of Untruthful Representation as to Age.
3959. Delivery of Policy to Insured Known by Agent to be Ill.
3960. Waiver of Right to Avoid Policy for Misrepresentations in Application Must be on Full Notice of the Facts.
3961. Waiver of Payment of First Premium.
3962. Payment of Premium Subsequent to Delivery of Policy.
3963. Course of Dealing Postponing Time of Payments on Policy.
3964. Retaining Policy Unreasonable Time Bars Right of Rescission.
3965. Insurable Interest of Grandson in Life of Grandfather.
3966. Assignee of Policy on Life of one in which Insured has no Insurable Interest not Protected.
3967. Suicide—Insanity—Intent.
3968. Waiver of Forfeiture by Putting Plaintiff to Trouble and Expense.
3969. Release Obtained by Fraud.
3970. Furnishing Proofs of Death before Beginning Suit.
3971. Substantial Compliance All that is Required.
3972. Expense and Trouble Incurred at Instance of Insurer in Furnishing Proofs as Waiver.
3973. Denial of all Liability as Waiver of Proof.

§ 3948a. Policy Issued without Consideration Requires Redelivery to Validate.

"The defendant has alleged that said policy was obtained from it by fraud. Fraud is never presumed, but must be proved by a preponderance of all the evidence by the party claiming the existence thereof. If you believe from the evidence that said policy was obtained in the first instance under an agreement entered into by said D— and C— that said policy should not be paid for, and should be used

by D— solely for the purpose of showing it and soliciting risks for said company, and that defendant was ignorant of said facts, then you are instructed that such conduct on the part of said D— constituted a fraud sufficient to render the policy void; and said policy could thereafter be made valid only by a new delivery, with the intent of the defendant and deceased that it should be binding on both."—Approved: Union Life Ins. Co. v. Haman, 54 Neb. 599, 74 N. W. 1090.

§ 3949. Rescission for Misrepresentation by Insurer's Agent as to Effect of Policy.

"If you believe from the evidence that it was verbally understood and agreed between plaintiff and E— before or when the application was made out that upon making 15 annual payments of $378.70 each, the policy would be fully paid up, and that E— made out such application for a policy requiring such payments to be made annually during life, and by words or conduct induced plaintiff to sign the same and the note, believing that the policy called for was to be fully paid up at the end of 15 years, and if you believe from the evidence that plaintiff would not have correctly understood the application had he read it and would not have signed it had he correctly understood it, and if you further believe from the evidence that such words or conduct of E—, if any, were intended by him to deceive plaintiff, and operated as a fraud upon him, then you will find your verdict for plaintiff for cancellation of the note and policy, and unless you so believe you will find for the defendant."—Approved: Mutual Life Ins. Co. v. Hargus (Tex. Civ. App.), 99 S. W. 580 (not reported in state reports).

§ 3950. Per Contra: Insured Accepting Policy is Bound to Know its Contents.

"If the policy recites on the face thereof that said agent had no authority to make, alter, or discharge contracts, and that all the agreements were in writing, then said agent, P—, had no authority to make any of the alleged representations or agreements claimed by the plaintiff; and even if they were made they are void as against the defendant, for when the plaintiff accepted said policy she was bound to know its contents, and was bound to know said agent was not a party to said contract."—Approved: Clevenger v. Mut. Life Ins. Co., 2 Dak. 114, 3 N. W. 313.

§ 3950a. Plaintiff's Instruction as to Misrepresentations.

"The plaintiff is entitled to recover unless the defendant satisfied the jury by a fair preponderance of the evidence, that the policy was obtained by misrepresentations which either increased the risk of loss or were made with the actual intent to deceive. If the insured without intent to deceive the company, misrepresented certain facts that would not avoid the policy, unless they increased the risk. Unless the jury find that S— intended to deceive or misrepresented facts which materially increased the risk under the policy, the plaintiff is entitled to recover."—Approved: Reagan v. Union Mut. L. Ins. Co., 207 Mass. 79, 84, 92 N. E. 1025.

§ 3951. Defendant's Instruction as to Effect of Material False Representation by the Assured.

"A misrepresentation or false statement, made in his application for insurance, by a person whose life is insured, respecting a material fact, avoids the policy issued upon that appplication, and this, whether the misrepresentation was made innocently or designedly. If, therefore, the jury believe from the evidence that George S—, in his application for the policy or certificate here sued on, stated that he had no serious illness, or stated that he had not had, during the last seven years, any disease or severe sickness, and that either of those statements was false in any respect, deemed by the jury material,—then, whether the said S— intended to deceive or not, the said policy or certificate is void, and the jury should find for the defendant; unless they further believe that the avoidance of the policy or certificate has been waived by the defendant, in the manner elsewhere explained."—Approved: Schwarzbach v. Ohio Valley Protec. Union, 25 W. Va. 622, 640, 641.

§ 3952. Representations which Amount to Warranties.

"If the jury believe from the evidence that the policy in suit was issued upon an application containing the following provision: 'I hereby apply for insurance for the amount herein named, and I declare and warrant that the answers to the above questions are complete and true, and were written opposite the respective questions by me, or strictly in accordance with my directions. I agree that said answers with this declaration shall form the basis of a contract of insurance between me and the P. I. Company of America, and that the policy which may be granted by the company in pursuance of this application, shall be accepted subject to the conditions and agreements contained in such policy. I further agree that no obligation shall exist against said company on account of this application, although I may have paid premiums thereon, unless said company shall issue a policy in pursuance thereof and the same is delivered to me'—then the court instructs the jury, as a matter of law, that by virtue of said provision, each and every answer in said application was warranted to be true, and if the jury believe from the evidence that any answer in the said application was not true, then the court instructs the jury that they must find for the defendant."—Approved: Prudential Ins. Co. v. Fredericks, 41 Ill. App. 419.

§ 3953. Misrepresentation of Matters Contributing to Produce the Death of Assured.

"The court instructs the jury that by the policy of insurance offered in evidence defendant promised and agreed to pay $2,000.00 to Mary M. K—, if living, immediately upon receipt and approval of proof of death of the said August W. K—, provided the policy was then in force; that if you shall find from the evidence that the said August W. K— died on the 15th of June, 1900, and that plaintiff, Mary M. K—, is his widow, and shall further find that proof of death was

furnished to defendant, or that defendant, after the death of said K—, offered to return to the plaintiff the premium or advance payment made to it by him for said policy, and refused to pay plaintiff the amount specified in said policy, then plaintiff is entitled to recover the amount of said policy, with six per cent interest from the time of such refusal to pay, unless you shall find from the evidence that the execution of such policy was procured by said August W. K— by misrepresentations made by him to defendant or its agent of matters which actually contributed to cause his death. And the court further instructs you that no misrepresentations in securing said policy of insurance are material or sufficient to avoid said policy, unless it shall be shown by the evidence that the matters misrepresented actually contributed to produce the death of said W. K—."—Approved: Keller v. Home Life Ins. Co., 198 Mo. 440, 95 S. W. 903. This instruction is based on a statute.

§ 3954. Disorders and Ailments of a Temporary Nature.

"The court instructs the jury that the questions and answers contained in the applications mentioned herein do not concern accidental disorders or ailments lasting only for brief periods and unattended by any substantial injuries or inconveniences, and do not relate to a slight and temporary indisposition speedily forgotten, but apply only to matters of a substantial character, or if such a nature as to affect the hazard or risks incurred or assumed by reason of the issuance of the policy of insurance mentioned herein."—Approved: Ill. L. Ins. Co. v. Lindley, 110 Ill. App. 161.

§ 3955. Representations in Application Knowingly False—Willful Concealment.

"If it is shown by the fair preponderance of the evidence that, in his answer to any one or more of the interrogatories which are charged by the defendant as having been untruthfully answered, the applicant, William L—, answered them, knowing at the time that the answer so given by him was false and untrue, or if he in making such answers, or any one of them, knowingly concealed any facts which he was in good faith at the time required to state, then the plaintiff cannot recover."—Approved: Ley v. Metropolitan Life Ins. Co. of New York, 128 Iowa, 203, 94 N. W. 568.

§ 3956. Misrepresentation in Respect to Previous Applications for Insurance.

"Gentlemen of the jury: You should find for the plaintiff in the sum of $1,000, with interest from November 1, 1905, unless you shall believe from the evidence that some other man than John F— named in the policy of insurance issued by the defendant was examined by the medical director of the defendant for the John F—named in the petition. If some other man was substituted for John F—, and procured to be examined by the medical director in the place of the John F— named in the petition and in the policy of insurance, then the law is for the defendant, and you should so find. When John F—

made application to the company for insurance, there were certain questions submitted to him by the company to be answered by him if the John F— named in the policy was the man who answered the questions submitted. The questions and answers were as follows: '(1) To what daily or other extent do you use alcoholic stimulants?' To which he answered: 'Two whiskies a week.' '(2) To what daily or other extent do you use wine or malt liquors?' To which he answered: 'No.' '(3) Have you ever applied to any life insurance company, order, or association for any insurance on your life without receiving exact kind and amount of insurance applied for? (If "yes," give particulars.)' To which he answered: 'No.' '(4) State name of life insurance company, order, or association which has declined to issue a policy on your life, or after issuing has recalled it, or has postponed you, except as stated in the foregoing answer.' To which he answered: 'No.' '(5) Have you ever undergone examination for life insurance upon which you did not receive the exact amount and kind of policy applied for? (If "yes," give particulars.)' To which he answered: 'No.' Now, if you shall believe from the evidence that the answers given by John F— to these questions or to either of them were not substantially true, and you shall further believe from the evidence that he drank materially more whisky or other intoxicants named in these questions than he stated in the answers he did drink, then the law is for the defendant, and you should so find. Or, if you shall believe from the evidence that he had applied to another insurance company, and had not received the exact amount of insurance that he had applied for, and that he had been informed of that fact by the company to which he had made application, or he had knowledge of the fact that his application for other insurance had been refused, then the law is for the defendant, and you should so find. But unless you shall believe from the evidence that the answers given by John F—to the questions named, or either of them, were not substantially untrue, or that some other person was substituted for John F— in the medical examination, then the law is for the plaintiff, and you should so find for the plaintiff to the extent that I have indicated to you in the beginning of these instructions."—Approved: Metropolitan Life Ins. Co. v. Ford, 126 Ky. 49, 102 S. W. 876.

§ 3958. Knowledge by Agent of Untruthful Representation as to Age.

"The court instructs the jury that if they believe from the evidence that B. J. H—, defendant's agent, knew at the time he sold Dr. Alexander C— the policy of insurance sued on that said C— was over 65 years of age, they will find for the plaintiff, unless they further believe from the evidence that Dr. C—at the time knew that said agent had no authority to issue said policy, in which event they will find for the defendant."—Approved: Travelers' Ins. Co. v. Crawford's Adm'r. (Ky.), 106 S. W. 290 (not reported in state reports).

§ 3959. Delivery of Policy to Insured Known by Agent to be Ill.

"The delivery of the certificate of policy of insurance, whether the party were sick or not, if done by the agents of the defendant, was

a waiver of any representation of the deceased; and the receipt of the dues by the agents of the B. Union was an acknowledgment that the deceased, H., was a member of the order, and entitled to all of its benefits under the policy. If the agent of the defendant knew at the time of the delivery of the certificate or policy of insurance whether the party was sick or not, and knew he was sick, and delivered the policy, then it would be a waiver. A waiver implies the idea that one has a right, and, with knowledge of his rights and that which might defeat his rights, does an act by which he waives the right to stand upon his legal position or his legal right."—Approved: Hollings v. Bankers' Union of the World, 63 S. C. 192, 41 S. E. 90.

§ 3960. Waiver of Right to Avoid Policy for False Representations in Application Must be on Full Notice of the Facts.

"There can be no waiver of the avoidance of a policy by reason of material false statements or misrepresentations in the application, unless the acts relied upon as showing the waiver were done with full knowledge of the facts. While, therefore, the receipt of premiums or assessments, with full knowledge, on the part of the defendant, of facts working a forfeiture of the policy, might constitute a waiver of such forfeiture, yet the receipt of such premiums or assessments, in ignorance of such facts, would not constitute a waiver. If, then, the jury believe from the evidence that the policy or certificate sued on was forfeited or avoided, by reason of false statements respecting material facts made by George S— in his application, and that the defendant, when it accepted assessments from him, did not know that such statements were false,—then the acceptance of such assessments would not constitute a waiver of such forfeiture or avoidance."—Approved: Schwarzbach v. Ohio Valley Protective Union, 25 W. Va. 640.

§ 3961. Waiver of Payment of First Premium.

"You are further instructed if you find from the evidence that said policy was delivered without requiring payment of the first premium, and without any intention on the part of said D— of taking and retaining said policy, and paying the premium accruing thereon, but that subsequently it was agreed between said D— and the general manager of said defendant that D— should retain said policy, and should pay to said defendant the amount of the first premium thereon at a later date, then you are instructed that such transaction amounted to a valid delivery of the policy and a giving of credit for the first premium, and said policy took effect, and became a binding contract, at and from the time such arrangement was made, and, for all the purposes of this case, it would be immaterial whether such first premium was ever paid or not; and, if you find such arrangement was made and such credit was given, plaintiff will be entitled to recover in this case."—Approved: Union Life Ins. Co. of Omaha v. Haman, 54 Neb. 599, 74 N. W. 1090.

§ 3962. Payment of Premium Subsequent to Delivery of Policy.

"If the policy mentioned in the first and second instructions was issued by the defendant, and, after being so issued came into the

possession of Ralph A. L—, this was not a delivery of said policy, unless the premium of $15.12 was paid; but, if said policy came into the possession of said Lindsay, and after it came into his possession, said premium was paid to and accepted by defendant, said policy, after said payment and acceptance, became a policy delivered to said L—. And if said policy was so in the possession of said L—, and if said payment of said premium was so made to and accepted by the defendant, the jury should find for the plaintiff."—Approved: Metropolitan Life Ins. Co. v. Lindsay's Adm'r, 124 Ky. 707, 100 S. W. 295.

§ 3963. Course of Dealing Postponing Time of Payments on Policy.

"Now, if you find from the evidence that she made all of the payments of these monthly installments of premium towards the latter part of the month, after the making of the new arrangement, and that the company received them without objection and without calling her attention to the fact that they were payable sooner, and if you further find that, by such course of dealing, she, as a prudent person, was led to believe, and did believe, that she was making these payments according to the terms of this new arrangement, by making them at any time during the month, if you find that she so understood the new arrangement, and that the custom and conduct of the company in receiving these payments without objection were calculated to lead an ordinarily prudent person to so understand and believe, and that she was thereby induced to rest in that belief and understanding at all times previous to her death, and that, in consequence of such conduct on the part of the company, she had good reason to believe, and did believe, up to that time that she had paid all these installments as they became due, and that the last one was then overdue, if you find all these facts from the evidence in the case—then I instruct you that the company is estopped and has waived its right to insist upon the forfeiture of this policy by reason of the nonpayment of the last installment of premium; and in that case your verdict should be for the plaintiff."—Approved: Morgan v. Northwestern Nat. Life Ins. Co., 42 Wash. 10, 84 Pac. 412.

§ 3964. Retaining Policy Unreasonable Time Bars Right of Rescission.

"There is another element in this case. It appears that the defendant received a policy of insurance, or a bond, as it is called, from the plaintiff, in response to this application which she had signed, and in payment of the premium for which the note in question is claimed to have been given. It was the duty of the defendant on receiving this policy, if she believed it was obtained by fraud, to have either returned the policy to the company, notifying the company or its agent that she would not accept the policy, and to do this within a reasonable time after receiving it, or within a reasonable time after learning of the fraud she claimed was practiced upon her. This question is, in a sense, independent of whether or not the defendant was induced to sign the note by misrepresentation on the part of the agent. That is to say, if you should find that the defendant signed the note by

reason of some fraud practiced upon her in the manner she claims, still, it appearing that this application was sent in to the company, and the policy sent to the defendant, which she retained, if, under all the evidence in the case, it has appeared in the evidence she retained it an unreasonable length of time, or failed for an unreasonable length of time to notify the company or its agent that she repudiated the transaction and would not be bound by the note, then such retention of the policy without complaint would be a waiver of any fraud she claimed, and would bind her to pay the note."—Approved: National Life & Trust Co. v. Omans, 137 Mich. 365, 100 N. W. 595.

§ 3965. Insurable Interest of Grandson in Life of Grandfather.

"I instruct you that a grandson with whom a grandfather resides, has an insurable interest in the life of the grandfather; and a policy of insurance taken out by the grandfather in favor of the grandson, in the absence of fraud, is valid and binding on the company issuing it."—Approved: Elkhart Mut. Aid Ass'n v. Haughton, 103 Ind. 286, 290.

§ 3966. Assignee of Policy on Life of one, in which Insured has no Insurable Interest, not Protected.

"The jury are instructed that if R— and S— bore no blood relation to A—, then they would have no insurable interest in the life of A—; the policy of insurance taken out in the nameof such stranger, or transferred to such stranger, without some specific valuable consideration would be void in law, as the same would be a mere wager policy.

"The jury are instructed that if a person procures a policy on the life of another person, who bears no blood relation to the person procuring such insurance, or if such person procures the assignment of the policy from a person who bears no blood relation to such assignee, then I charge you as a matter of law that such policy would be held to the extent of the money or other valuable consideration actually advanced for the procurement of such policy or the assignment thereof."—Approved: Westbury v. Simmons, 57 S. C. 467, 35 S. E. 764.

§ 3967. Suicide—Insanity—Intent.

(a) "If the jury believe from the evidence that Phillip T— intentionally took his own life by taking carbolic acid at a time when his mind was so far gone as to render him unconscious that he was taking his life, the act will not be deemed his act, but will be regarded, in law, as an accidental killing; and, if the jury find from the evidence that the said T— so took his own life at a time when his mind was so far gone as to render him unconscious that he was taking his own life, they should find for the plaintiff in the sum of $1,000, the amount of the policy sued on, with 6 per cent. interest from the 6th day of March, 1906."—Approved: Metropolitan Life Ins. Co. v. Thomas (Ky.), 106 S. W. 1175 (not reported in state reports).

(b) "If the jury believe from the evidence that at the time said Thomas took his life, although his mind may have been deranged, he had mind enough to know that the act he was then committing would

probably result in his death, and committed said act with the intention to take his own life, then the jury should find for the plaintiff in the sum of $69.32, the amount of premiums paid to defendant company by said T—."—Approved: Metropolitan Life Insurance Co. v. Thomas (Ky.), 106 S. W. 1175 (not reported in state reports).

§ 3968. Waiver of Forfeiture by Putting Plaintiff to Trouble and Expense.

"You are further charged that if you find from the evidence that, after the death of Mrs. Sallie Z. C—, the plaintiff made, or caused to be made, proofs of the fact, and the cause of the death of his wife, and caused the same to be forwarded to McC— & L—, the agents of defendant at Ft. Worth, Tex.; and if you further find that, after the said proofs were received, the said agents, while acting within the scope of their authority, returned the same and thereby demanded certain additions to be made thereto; and if you further find that, at the time they did so, they were in possession of all the facts now relied on and pleaded herein as a ground for avoiding said policy; and if you further find that the plaintiff, at some considerable time, trouble, or expense, complied with such demand, if any, and completed said proofs and returned them to said agents; and if you further find that said proofs were sent to the home office of defendant, that, after such proofs were received at the home office of defendant, its medical director, while acting within his authority, wrote the plaintiff requesting him to give additional information regarding the sickness and the cause of the death of his wife; and if you further find that the plaintiff, at some time and trouble furnished such information; and if you further find that, in requesting the additions to said proofs, if any, and in calling for the additional information, if any, after said proofs were received at the home office of defendant, its agents did not intend to insist on a forfeiture of the policy on account of the existence of said untrue statements in the application, if any there were, or on account of the condition of the health of deceased at the time the policy was delivered and the premium paid; and if you further find that thereafter one H. J. McC—, an inspector and adjuster of defendant, caused the plaintiff to go from Point, in Rains county, to Greenville, in Hunt county, for the purpose of there conferring with plaintiff and his counsel with a view of arriving at an adjustment or settlement of the policy; and if you further find that, in doing so, said McCormick was acting within the scope of his authority, and plaintiff was thereby put to considerable trouble, expense, and loss of time; and if you further find that, at the time said McC— caused plaintiff to go to Greenville (if he did so cause the plaintiff to act), the said McC— was in possession of all the facts now urged and pleaded as a defense herein, and that, before doing so (if you find that he did), the said McC— did not deny defendant's liability under the policy—then you are charged that in law defendant is estopped to insist thereon, and, if you so believe, you will find for the plaintiff. But, unless you so find, you will find for defendant."—Approved:

Security Mut. Life Ins. Co. v. Calvert (Tex. Civ. App.), 100 S. W. 1033 (not reported in state reports).

§ 3969. Release Obtained by Fraud.

"You are further instructed that if you found from the evidence in this case that one or more of the defendant's agents made false representations of fact to plaintiff, or used fraud or deceit in inducing her to sign the receipt introduced in evidence, or used undue influence upon her to induce her to sign same, and she, believing that such representations were true, was induced thereby or by fraud, deceit, or undue influence to sign same, such receipt will not estop plaintiff from recovering whatever amount be found due her under the terms of the contract of insurance."—Approved: Industrial Mut. Indemnity Co. v. Thompson, 83 Ark. 574, 104 S. W. 200.

§ 3970. Furnishing Proofs of Death before Bringing Suit.

"Under the stipulations in the policy, defendant, upon receiving notice of the death of the insured, was to use reasonable diligence in furnishing the beneficiary or her agent proper blank forms upon which to make proofs of death; that, under the policy, which provided that proofs should be made out upon forms to be furnished by the insurer, it was incumbent on defendant to do more than inclose such blanks in an envelope duly addressed and properly stamped, and to deposit the same in the post office at Minneapolis, but it must actually deliver such forms to the plaintiff or her agent, using all reasonable diligence to accomplish that end. Further, that, upon receipt by defendant of notice of the death of the insured on or before the ——— day of ————, it did, in compliance with a request for the blanks, mail the same to plaintiff, but that such forms were never received by the beneficiary or her agent."—Approved: Robinson v. Northwestern Nat. Ins. Co., 92 Minn. 30, 100 N. W. 226.

§ 3971. Substantial Compliance All that is Required.

"The court instructs the jury that a substantial compliance with the conditions of the policy of insurance as to the manner and mode of giving notice of the death of the insured to the company is all that can be required on the part of the plaintiff in giving such notice."—Approved: Travelers' Ins. Co. v. Harvey, 82 Va. 949.

§ 3972. Expense and Trouble Incurred at Instance of Insurer, in Furnishing Proof as Waiver.

"The jury is instructed that if they believe, from the evidence, that soon after the death of J— the plaintiff called at the general offices of the defendant company in the city of C—, and there informed M—, the president of the defendant insurance company, of the real facts in relation to the sickness and condition of health of J— on and prior to the —— day of ————, and that the said J— had consulted and been treated by physicians prior to said time, and said M—, president of said company, after he knew all of said facts, informed the plaintiff that if she would make out, or cause to be made, proofs and certificates

of the death of said J—, and present the same to said defendant company, that said policy would be paid, and that the plaintiff, relying upon said statements, thereafter, at trouble and expense to her, if any there was, caused proofs and certificates of death to be prepared and presented to the defendant company, which said proofs and certificates were accepted and retained by said company and its officers, the defendant thereby waived its right to insist upon the policy being void because of misrepresentations contained in the application for reinstatement."—Approved: Traders Mut. L. Ins. Co. v. Johnson, 200 Ill. 359, affg. Triple L. L. Ins. Co. v. Johnson, 101 Ill. App. 559, 65 N. E. 634.

§ 3973. Denial of All Liability as Waiver of Proof.

"The court instructs the jury that if they believe from the evidence that the plaintiff wrote to the defendant the letter dated ————, giving notice of the death of B. H—, the insured, and that after receipt of said letter, and in consequence thereof, the company sent its agent, O—, to inquire and ascertain all the facts in reference to said death, and that the said agent came to ————, the place of said death, and investigated the facts as to the death and the cause thereof, and that after making such investigation the said agent, upon the sole ground of ———— at the time of the accident, told the plaintiff 'that he had no case, and that in his opinion the company ought not to pay, and would not pay, the policy,' and that such denial of liability was not because the formal proofs of the death had not been given, then it was not incumbent on the plaintiff to furnish any further proof of said death, and the plaintiff had the right at any time thereafter to institute this suit."—Approved: Travelers' Ins. Co. v. Harvey, 82 Va. 949.

C. Fraternal and Beneficial Insurance.

§ 3974. Presumption of Death—Absence Seven Years.
3975. Suicide does not Raise Presumption of Insanity.
3976. Burden of Proof to Show Suicide.
3977. Sanity Required to Commit Suicide.
3978. Intemperate Use of Liquor Means Addicted to Excessive Use.
3979. Misrepresentation in Application as to being so Addicted.
3979a. Or as to Insured not Consulting a Physician.
3980. Death as Result of Duel is Death by Violation of Law.
3981. Burden on Company to Show Insurance Forfeited.
3982. Custom and Course of Dealing as to Payment of Assessments.
3983. Application to Grand Lodge Condition Precedent to Suit for Benefit.
3984. Incapacity for Manual Labor—Defined.
3985. Expulsion on Charges Forfeiting Insurance.
3986. Death as Result of Engaging in Unlawful Combat.
3987. Death as Result of Attempted Self-Defense.
3987a. Acceptance of Check for Assessments which Check Later Proved Worthless.

§ 3974. Presumption of Death—Absence Seven Years.

(a) "The court instructs the jury, as a matter of law, that if you find from the preponderance of the evidence in this case that James R—, the insured, left his residence and home and has been continually absent therefrom for over a period of seven years, without any intelligence being received of his whereabouts by the members of his family, relations, neighbors, and acquaintances within said period or at any time thereafter, then such continuous absence, together with such lack of intelligence, raises the presumption of death of the said James R—, and the jury on such proof have a right to presume his death."—Approved: Policemen's Benevolent Association v. Ryce, 213 Ill. 9, 72 N. E. 764.

(b) "You are further instructed that you are carefully to weigh the proofs concerning the presence of Charles A. S— in the city of Petoskey in 1908. Of course, you will understand that if the witnesses for defendant saw Charles A. S— alive in Petosky, as claimed, then the plaintiff cannot recover, whether his absence has been explained or unexplained. It is not the duty of the defendant to pay the amount of the certificate held by a member, unless it is shown that the member is dead, either actually or presumptively, as I have explained. If Charles A. S— was alive and in Petoskey as claimed then it is established that the payment of his assessments had made him a living member of the order, in good standing, and nothing more. His wife would have no more claim for the payment of this certificate than the beneficiary of any other living member of the order in good standing. There is no evidence that directly contradicts the evidence of the witness Frank E. B— to the effect that he was acquainted with Charles A. S—, and that he saw him, recognized

him, and talked with him September 28 or 29, 1908. If you believe that either B— or the witness Paul saw Mr. S— in 1908, then that ends the case, and your verdict must be for the defendant. The evidence of B— can be overcome only upon the finding by you that he was either mistaken in his identification of Samberg, or that he is falsifying. I shall leave it for you to determine whether he did see and know S— as he claims. This is to be considered by you in connection with all the other proofs of the plaintiff and defendant in the case respecting the disappearance, absence, and all other matters that will enable you to determine whether Mr. S— was seen alive in Petoskey in 1908, as claimed. As I have explained, if the defendant has shown by proof that Mr. S— was alive in 1908, then your verdict should be for the defendant."—Approved: Samberg v. Knights of Modern Maccabees, 158 Mich. 568, 123 N. W. 25.

§ 3975. Suicide does not Raise Presumption of Insanity.

"The court instructs the jury that, if you believe, from the evidence, that said W— took his own life, that fact alone does not raise a presumption, and is not of itself evidence that he was insane at the time of committing said act; but the jury may weigh such act and the circumstances attending it, so far as disclosed by the evidence, in connection with all the evidence in the case bearing on that question, in determining his mental condition at the time of the act of self-destruction."—Approved: Grand Lodge I. O. M. A. v. Wieting, 168 Ill. 408, aff'g 68 Ill. App. 125, 48 N. E. 59, 61 Am. St. Rep. 123.

§ 3976. Burden of Proof to Show Suicide.

(a) "The burden of proof is upon the defendant to establish by a fair preponderance of the evidence that the cause of death was suicide. * * * As applied to the facts in this case, it devolved upon the defendant to satisfy you by a preponderance of the evidence that the cause of death was suicide. It does not devolve upon the plaintiff to prove a negative—that is, to prove that it was not suicide—but the burden of proving it is on the defendant."—Approved: Rohloff v. Aid Ass'n, 130 Wis. 61, 109 N. W. 989.

(b) "One of the defenses in this case is that the deceased, Capitola Blanche C—, committed suicide, and you are instructed that this is an affirmative defense set up by defendant, and the burden is upon the defendant to establish same to your satisfaction by a preponderance of the testimony. When a person is found dead from unexplainable causes, the presumption is that his death was natural or accidental, if nothing appears to the contrary. Self-destruction is contrary to the general conduct of mankind. The plaintiff is therefore entitled to recover, unless the evidence introduced has overcome this presumption, and satisfied you that death was voluntary. The presumption of law is, in the absence of any evidence as to the cause of death, that it happened from natural causes, and that such death did not arise from self-destruction; and in this case, if there was no proof as to the cause or manner of death of Mrs. C—, or if the

evidence as to whether her death was caused by accident or natural causes, and not by her own hands, was evenly balanced, you would find in favor of this presumption. But this is only a disputable presumption, and if, from all the evidence in the case, you find by the preponderance thereof that she came to her death by her own hands, whether she was sane or insane, you must find for defendant."—Approved: Cox v. Royal Tribe of Joseph, 42 Or. 365, 71 Pac. 73.

§ 3977. Sanity Required to Commit Suicide.

"The court instructs the jury that suicide, or self-destruction, as these terms are to be understood in the law, implies that the act was deliberately done by a person capable, in law, of forming a legal intention to do the act. And if you find, from the evidence in this case, that the said W— was insane at the time he took his life, and even though he intended that the result of his act should be death, yet if his reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature, consequences, and effects of the act he was about to commit, or if he was impelled thereto by an insane impulse, which he had not the power to resist, then his act was not suicide, in the legal sense of these terms, and you should find the issue in favor of the plaintiff, so far as that issue is concerned."—Approved: Grand Lodge I. O. M. A. v. Wieting, 168 Ill. 408, aff'g 68 Ill. App. 125, 61 Am. St. Rep. 123, 48 N. E. 59.

§ 3978. Intemperate Use of Liquor Means Addicted to Excessive Use.

"The jury are instructed that the assured, Charles Martin S—, was not intemperate in the use of alcoholic liquors or beverages within the meaning of the word 'intemperate' as used in the benefit certificate and by-laws of the defendant society, even though you believe, from the evidence in this case, that he drank alcoholic liquors or beverages to excess upon exceptional occasions, unless you further believe from a preponderance of the testimony in this case that said assured was addicted to periodical and excessive indulgences in the use of alcoholic liquors or beverages which became habitual."—Approved: Schon v. Modern Woodmen of America, 51 Wash. 482, 99 Pac. 25.

§ 3979. Misrepresentation in Application as to being so Addicted.

"The court instructs the jury that, unless you believe, from a preponderance of the evidence, that plaintiff's husband, at the time the policy sued on, was issued was in the habit of using intoxicating liquors to some extent, that then upon the question of the policy having been obtained by false representations, you will find for the plaintiff; and the court instructs the jury that a habit means more than a rational or incidental use."—Approved: Grand Lodge A. O. U. W. v. Belcham, 145 Ill. 308, 33 N. E. 886.

§ 3979a. Or as to Insured not Consulting a Physician.

"The court instructs the jury that if they shall find and believe from the evidence that Dr. J. W. Williams at any time within seven years

next before the 25th day of June, 1906, met James Thomas Winn on the streets of Sturgeon, Mo., or at any other place, and that at that time the said James Thomas Winn consulted said Dr. Williams with regard to the health of the said Thomas Winn, and that said Dr. Williams, at that time, gave to the said Winn some calomel tablets, for the use of said Winn as a treatment for any personal ailment, if any, of said Winn, and that said Williams was then and there a practicing physician, then your finding will be for the defendant, and in this connection you are instructed that it is not material whether or not the said treatment, if you shall find the same actually occurred, was at the office of said Dr. Williams or not."—Approved: Winn v. Modern Woodmen of A. (Mo. App.), 137 S. W. 292, 294.

§ 3980. Death as Result of Duel is Death by Violation of Law.

"The court instructs the jury to find for plaintiff the sum of $750, unless you believe from the evidence that the death of Joel Q. W— was the result of a duel entered into between himself and J. W. S—, and that said W— voluntarily entered into and engaged in said duel with said S—, or unless you believe from the evidence that the proximate cause of the death of said W— was in consequence of the violation, or attempted violation, of the laws of this commonwealth, in taking or attempting to take the life of J. W. S—, or of inflicting great bodily harm upon him, or of provoking said S— to attack him by hostile words or demonstrations. Then, and in any of such events, the law is for the defendant, and you could so find.

"The court instructs the jury that if, at the time W— and S— engaged in the combat which resulted in shooting each other, the decedent, W—, was in danger of losing his life or of suffering great bodily harm at the hands of S—, or he had reasonable grounds for believing, and did in good faith believe, that his life was in danger, or in danger of suffering great bodily harm at the hands of S—, and that said W— used no more force than was necessary, or seemed to him to be necessary, in the use of a reasonable discretion, to rid himself of the danger to him, which was real, or to him appeared to be real, or reasonably apparent, then the law is for the plaintiff, and you will so find, although you may believe that the death of Joel Q. W— was the result of his attempt to kill S—, unless you should further find from the evidence that the decedent, W—, began the difficulty which led up to the shooting, and was the active proximate cause of the attack upon himself by S—, in which latter event the law is for the defendant, and you should so find, although you may believe that at the time W— shot S— he acted in self-defense, as laid down in the first part of this instruction."—Approved: Woodmen of the World v. Walters, 124 Ky. 663, 99 S. W. 930.

§ 3981. Burden on Company to Show Insurance Forfeited.

"The court also instructs the jury that the certificate of membership which was filed with the petition in this cause, and has been read in evidence by the plaintiff, is proof that McM— was in good standing

with the order at the time when said certificate was issued, and that the law presumes that such good standing continued thereafter; and the burden of proof is upon the defendant to show to the satisfaction of the jury that at the time of his death the said McM— had lost his good standing in the order. If the jury are satisfied from the evidence that it had not been the practice of the finance keeper of A. T— to exact prompt payments of assessments when due; that he and said T— had allowed assessments to remain unpaid several days or weeks after they became due, and then accepted payment of the same, without requiring McM— to submit a physician's certificate; and if the jury also from the evidence, believe and find that the deputy supreme commander of the defendant order for the state of Nebraska at the time knew of this practice of said finance keeper of said T—, and made no objection thereto,—then these are facts from which the jury may find that the defendant waived literal compliance with the conditions as to punctual payment of assessments and furnishing such certificate.

"The court instructs the jury that the mere fact that the finance keeper of A. T— had received any prior assessment from the deceased after the time when, under defendant's laws, it was due, or after the deceased stood suspended, without a physician's certificate of good health, if you find the finance keeper did so receive any assessment, did not bind the defendant to a course of conduct or practice or custom, so as to make it compulsory on the finance keeper of A. T— or defendant to receive assessment No. 92 without a physician's certificate of good health at the time it was mailed to said finance keeper."—Approved: McMahon v. Supreme T. K. Maccabees, 151 Mo. 522, 52 S. W. 384.

§ 3982. Custom and Course of Dealing as to Payment of Assessments.

"If you believe from a preponderance of the evidence, that the defendant, by and through the officers of Fulton Council 78, by the adoption of a custom or course of conduct, led and induced said Marinda W— honestly to believe that the assessments owing by her from time to time would be received after the time specified in said constitution and by-laws, and that by reason of such custom or course of conduct, if any, she was led to neglect or fail to make the June payment, 1906, until July 11, 1906, then the defendant is estopped from asserting a forfeiture by reason of her failure to make such payment at an earlier date. If you believe from a preponderance of the evidence that the defendant by and through the local officers of said council at Fulton, by the adoption of a custom of course of conduct, led said Marinda W— honestly to believe that the assessments owing by her from time to time would be received after the time specified in the constitution and by-laws, and that the secretary of said Fulton council at the time she paid said assessment for June, 1906, on July 11, 1906, knew that she was sick, and with that knowledge accepted said payment and sent the payment in to the defendant, and that

the defendant retained the same, and never tendered the same back to the plaintiff or to said Marinda W—, then the defendant is estopped to declare or assert a forfeiture on said certificate, and your verdict should be for the plaintiff."—Approved: Triple Tie Ben. Ass'n v. Wood, 79 Kan. 812, 98 Pac. 219.

§ 3983. Application to Grand Lodge Condition Precedent to Suit for Benefits.

"The constitution of the defendant society provides that a member making a claim for indemnity on account of total disability shall present his proof of such disability, and that the question of his right to receive payment shall be referred to a board of the officers of the grand lodge, and further provides, if such claims are disallowed by the board, the claimant may appeal to the grand lodge in session. This provision does not deprive the plaintiff of his right to sue the claim in a court of law. But it was his duty before beginning such suit to first lay his claim before the proper officers or board of the defendant, and give it opportunity to pay without further litigation; and, if he failed to show that he made such proofs before commencing this suit, he cannot recover."—Approved: Lillie v. Brotherhood of Railway Trainmen, 114 Iowa, 252, 86 N. W. 279.

§ 3984. Incapacity for Manual Labor Defined.

"The term 'manual labor,' in its ordinary and usual meaning and acceptation, means labor performed by and with the hands or hand, and it implies the ability for such sustained exercise and use of the hands or hand at labor as will enable a person thereby to earn or assist in earning a livelihood. Being able to temporarily use the hands or hand at and in some kind of labor, but without the ability to sustain such ordinary exercise and use of the hands at some useful labor whereby money may be earned to substantially assist in earning a livelihood at some kind of manual labor does not constitute the ability to perform manual labor as it must be understood was contemplated by the parties to the indemnity contract sued upon and relied on in this action."—Approved: Grand Lodge B. L. F. v. Orrell, 206 Ill. 208, 69 N. E. 68.

§ 3985. Expulsion on Charges Forfeiting Insurance.

"The court instructs the jury that if they find the facts stated in the defendant's first prayer, which is made a part of this, and shall further find that charges were made against said R—, as stated in the record of said defendant read in evidence to the jury, and that a committee was appointed to investigate said charges, and that proceedings were thereupon had, in accordance with the constitution and by-laws of said defendant, and that said R— was found guilty of said charges, and the said R— was expelled from said defendant, and said R— had notice of such charges and proceedings, and of his expulsion, and shall further find that the constitution and by-laws of said society provide for, and authorized said R— to appeal from said decision to the ———, and that R— did not appeal, then the plaintiff is not en-

titled to recover in this action."—Approved: Osceola Tribe No. 11 of the Improved Order of Red Men v. Rost, 15 Md. 295.

§ 3986. Death as Result of Engaging in Unlawful Combat.

"You are further instructed that, if you believe from a preponderance of the evidence in this case that J. T. McC— unlawfully and without justification, and in violation of the law of the state of Texas, made an assault to murder on Dr. J. H. K—, and that in the course of said difficulty, said K— shot said McC— while he was so violating the law, and that said McC— afterwards died from said wounds so received, then you will find for the defendant."—Approved: Woodmen of the World v. McCoslin (Tex. Civ. App.), 126 S. W. 894.

§ 3987. Death as Result of Attempted Self Defense.

"And you are further instructed that, unless you find that said J. T. McC— acted in violation of law in making the assault on Dr. J. H. K—, if you find he made any such assault, or if you believe from the evidence in the case that said McC— was acting in his necessary self-defense—that is, the necessary defense of his person against what appeared to him to be an unlawful assault by Dr. K— upon his person—then you are instructed that if he died from a wound received in a difficulty, this does not preclude the recovery as hereinbefore instructed; and, if you so find, you will find for the plaintiffs, as hereinbefore instructed."—Approved: Woodmen of the World v. McCoslin (Tex. Civ. App.), 126 S. W. 894.

§ 3987a. Acceptance of Check for Assessments which Check Later Proved Worthless.

"You are instructed that if you believe from the evidence that Miss P— as the Secretary of the Ft. Worth Lodge of the defendant association delivered the certificate sued on in this case to S. M. L— for the deceased, George L—, and delivered at the same time the receipt for all the dues, which were required to be paid by the deceased, George L—, and accepted in payment of the same, and agreed to accept in payment of the same a check drawn by the Ft. Worth Creamery Company on the State National Bank of Ft. Worth, Tex., and you furthermore believe from the evidence that said receipt so delivered at said time was intended and agreed to cover the April dues, and you furthermore believe from the evidence that the May dues to said association which were due by the deceased, George L—, were paid to the said Miss P— as secretary of said local lodge, and received by her as such secretary at the date testified to by her, and that she gave the receipt offered in evidence for such dues covering the May assessment or premium, and you further believe from the evidence that between the date of the delivery and receipt by Miss P— of the first check given by the Ft. Worth Creamery Company in March, 1909, and the date of the receipt by her of the May dues the defendant gave to the deceased George L—, no notice of the nonpayment of said first check, or no reasonable opportunity to pay the amount of said dues as might have been included in said

Ft. Worth Creamery Company check, and made no demand upon the said George L— for the payment of the dues and assessments which were included in the check of the Ft. Worth Creamery Company so given in March, 1909, you will find a verdict for the plaintiff and for the amount of the said certificate sued upon with interest at the rate of 6 per cent. per annum from the 1st day of October, 1909. And, if you do not so find from the evidence, you will find for the defendant United Benevolent Association."—Approved: Supreme Lodge United Ben. Ass'n v. Lawson (Tex. Civ. App.), 133 S. W. 907.

D. Accident Insurance.

§ 3988. Injury Presumed Accidental Rather than Intentional.
3989. The Specific Nature of the Accident not Necessary to be Shown in Case of Death.
3990. Presumption is Against Suicide.
3991. Assured with Rheumatism has Burden to Show Disability Wholly from Accident.
3991a. Surrounding Circumstances on Issue of Cause of Death.
3991b. Autopsy as Evidence as to Cause of Death.
3992. Homicide Caused by Living in Fornication is in Consequence of Unlawful Act.
3993. Classification of Applicant—Construction by Parties.
3994. Overdue Premium Notes—Waiver of Forfeiture.
3995. Source of Injury—Sole Cause.
3996. Injury from Unnecessary Exposure to Danger.
3997. Other Cause Coupled with Cause Insured Against.
3998. Construing "Disease" by the rule Ejusdem Generis.
3999. Cause of Death Independent of all other Causes.
4000. The Sufficiency of Proofs a Question for the Court.

§ 3988. Injury Presumed Accidental Rather than Intentional.

"The court instructs you that where a man suffers injuries which might have been caused by accident or might have been intentionally inflicted upon himself, and there is no preponderating evidence as to the cause of such injuries, the presumption is that they occurred by accident."—Approved: Wilkinson v. Aetna Life Ins. Co., 240 Ill. 205, 88 N. E. 550.

§ 3989. The Specific Nature of the Accident not Necessary to be Shown in Case of Death.

"The jury are instructed that, in order for the plaintiff to recover, it is not necessary that she should show by direct evidence that the particular and specific cause of the death of W—, provided you believe from the evidence and the facts and circumstances in evidence that his death was produced either by drowning or by a fatal wound in the head, or by a combination of both of these causes, and provided you further find that W. did not commit suicide and was not insane at the

time of his death."—Approved: Fidelity & Cas. Co. v. Weise, 80 Ill. App. 499.

§ 3990. Presumption Against Suicide.

(a) "If plaintiff had shown by the fair weight of the evidence that the assured came to his death as the result of a pistol shot held in his own hand, or in the hands of another, then the law will presume that the shot was accidental, and that it was not inflicted with murderous or suicidal intent. And under such circumstances the burden will be upon the defendant to overcome this presumption, and to show that the death was not caused by accidental means."—Approved: Jones v. United States Mut. Acc. Ass'n of New York, 92 Iowa, 652, 61 N. W. 485.

(b) "The court further charges you that the complainant is entitled to a presumption that his wife did not commit suicide, and that his wife was not murdered by him or any one else. Each of these presumptions may be overcome by facts and circumstances which establish the contrary; but the court instructs you that they stand until they are overcome by the preponderance of the evidence, sufficient for that purpose."—Approved: Fisher v. Travelers Ins. Co. (Tenn.), 138 S. W. 316, 330. It was said the word "establish" was subject to some criticism, but in connection with remainder of sentence its use was harmless.

§ 3991. Assured with Rheumatism has Burden to Show Disability Wholly from Accident.

"The defendant, answering, denies that plaintiff was injured, saying, however, that if he was injured, as stated, and if he was for a term of 52 weeks immediately, wholly and continuously disabled, as claimed by him, that said disability was not caused solely by said accident, independent of all other causes, and says that said disability, if any existed, was caused by disease not produced or caused by said accident, namely, the disease of rheumatism. You are instructed that the burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability of which he complained was not caused by rheumatism, but was caused solely by said accident, independent of all other causes."—Approved: Kenny v. Bankers' Accident Ins. Co., 136 Iowa, 140, 113 N. W. 566.

§ 3991a. Surrounding Circumstances on Issue of Cause of Death.

"If you find that there is evidence in the case tending to show discord between Dr. and Mrs. F—, or bad treatment of Mrs. F— by F—, or immoral conduct of F—, or that he forged the will purporting to be the will of Lula A. F—, or was guilty of other wrong conduct, you can consider said evidence as a part of the circumstances surrounding and preceding the death of Mrs. F—, in determining the cause of her death; but if you conclude, from the preponderance of the evidence, that the injury received on the street car, directly and independently of all other causes, through external, violent, and accidental means, resulted in and caused her death, then you should not allow any prejudice against the complainant, F—, by reason of evidence reflecting on his character, to affect your verdict. If you believe from the proof that his character is bad, you may consider this as bearing on the probability

or improbability of bad conduct on his part, as bearing on the question whether he was impelled by good or bad motives; but, if he has made out his case by a preponderance of the proof, he is entitled to recover, no matter how bad you may believe his character to be."—Approved: Fisher v. Travelers Ins. Co. (Tenn.), 138 S. W. 316, 326.

§ 3991b. Autopsy as Evidence as to Cause of Death.

"The court further charges you that the purpose of an autopsy is to ascertain the exact cause of death, and that a chemical analysis is for the purpose of ascertaining whether or not there was any poisonous substance in the stomach of the said Lula A. Fisher; so that, if you find that the body of Lula A. Fisher was exhumed in five or six days after its burial, and an autopsy thereon made by competent physicians and that a chemical analysis was afterwards made of the contents of the stomach by competent physicians and chemists, and no morphine was found in the contents of said stomach, then the court charges you that you may consider these facts in determining whether or not Lula A. Fisher came to her death by morphine poisoning, accidental or otherwise, or came to her death as the result solely of the accident."—Approved: Fisher v. Travelers' Ins. Co. (Tenn.), 138 S. W. 316, 327.

§ 3992. Homicide Caused by Living in Fornication is in Consequence of Unlawful Act.

"If the jury finds that deceased, B—, and the woman were living together in a state of fornication, and that B— was killed in consequence of and while that relation continued, there can be no recovery under the policy, because the insurance does not extend to or cover injuries received while engaged in or in consequence of any unlawful act."—Approved: Accident Ins. Co. v. Bennett, 90 Tenn. 256, 16 S. W. 723.

§ 3993. Classification of Applicant—Construction by Parties.

"The court instructs the jury that if you believe from the evidence in the case that S— went to the agent of the defendant and informed him of his business, and that he was a shipper of cattle, and as such shipper accompanied his cattle in transit, and that he wanted insurance to cover said business, and that the local agent communicated all of said facts to the general agent of defendant, and that, with full knowledge of all the facts, said defendant issued the policy in suit, and informed plaintiff that said policy covered his said business and the risks incident thereto, and that thereupon said S— paid the premium demanded by the defendant, then the court instructs the jury that, having insured the plaintiff as a shipper of live stock, defendant insured him against accidents which would or might result in the doing of anything incident to said business; and if you find from the evidence in this case that said S— did inform said defendant of his business, and that he did accompany his stock to market, and you further believe that at the time of the injury S— was doing that which was incident to or a part of the business of shipping stock to market, and that said S— was doing such things only as an ordinary, prudent man would have done under like circumstances,

and while so acting was, without fault on his part, injured, then defendant company is liable, and you will find for the plaintiff. If, however, you believe from the evidence that at the time of the injury said S— was voluntarily exposing himself to unnecessary danger, then you will find for the defendant."—Approved: Travelers' Ins. Co. v. Snowden, 60 Neb. 263, 83 N. W. 66.

§ 3994. Overdue Premium Notes—Waiver of Forfeiture.

"When either of the notes which became due prior to November 16, 1903, matured and plaintiff failed to pay the same, the defendant had the option to treat said policy as forfeited and of no further force or effect, or to extend the time for the payment of said notes and treat the policy as still in force. If it elected to pursue this latter course, it thereby waived its right to treat the policy as forfeited by reason of such nonpayment. If prior to the 16th day of November, 1903, the defendant elected to treat said policy as canceled, then the plaintiff would have no claim against the defendant on account of either of the aforesaid accidents, but, if at the time of the accident, which occurred on the 16th of November, 1903, the defendant had waived its right to treat said policy as canceled on account of the nonpayment of the notes maturing prior to that date, then it would be liable to plaintiff for and on account of all injuries sustained by him in both of said accidents, because under the uncontroverted testimony, if plaintiff was entitled to recover anything on account of the accident occurring November 16th, he was entitled to more than enough to fully pay off and discharge all three of his said unpaid notes, and the defendant would have the right and it would have been its duty to so apply enough of the money, if any, so accruing to plaintiff on account of the first accident. Consequently the question of defendant's liability or not depends upon whether it had or had not waived its right to treat said policy as canceled at the time of the accident of November 16, 1903. The acts and declarations, if any, of James A. R—, who was the defendant's manager of its Southwestern Department, are to be considered as the acts and declarations of the defendant in respect to an extention, if any, of the time of payment of any of the aforesaid notes. If you find from the testimony before you that prior to the 16th day of November, 1903, the defendant had elected to forego its right to treat said policy as canceled on account of plaintiff's failure to pay at maturity his said notes which fell due on October 1, and November 1, 1903, then and in that event the plaintiff is entitled to a verdict; but, if you fail so to find, then the defendant is entitled to a verdict."—Approved: North American Accident Ins. Co. v. Bowen (Tex. Civ. App.), 102 S. W. 163 (not reported in state reports).

§ 3995. Source of Injury—Sole Cause.

(a) "The court instructs the jury that unless they believe from all the evidence that the plaintiff received personal bodily injuries on or about November 8, 1907, through external, violent, and purely accidental causes, resulting in the loss of the entire sight of his left eye within 90 days from the date of the accident, if any, and the said

personal injury, if any, was the sole cause of the irrecoverable loss of the entire sight of his left eye, independent of all other causes, you will find for the plaintiff, in the sum of three hundred and five dollars ($305.00)."—Approved: Travelers' Ins. Co. v. McInerney (Ky.), 119 S. W. 171.

(b) "The court instructs the jury that if they believe from all the evidence that the plaintiff, Morgan D. McI—, received personal injuries at the time and place by the proof described through external, violent, and accidental means, and if you further believe that within 90 days after said injuries were received, if any, the entire sight of the plaintiff's left eye was irrecoverably lost, and if you further believe that the irrecoverable loss of the entire sight of plaintiff's said eye, if the said sight is so lost, was caused by said injuries, if any, directly and independently of all other causes, then the law is for the plaintiff, and the jury will find for him in the sum of $2,000, with interest thereon at the rate of 6 per cent. per annum from the 20th day of March, 1908."—Approved: Travelers' Ins. Co. v. McInerney (Ky.), 119 S. W. 171.

§ 3996. Injury from Unnecessary Exposure to Danger.

"The court instructs the jury, that if they believe from the evidence in this case, that the plaintiff suffered the injury in question through violent, external and accidental means, which were not the result of any unnecessary exposure to dangers on his part, then you will find the issues for the plaintiff; but if you should believe from the evidence that said injury was the result of an unnecessary exposure of himself to danger (not in any attempt to save human life), then your verdict should be for the defendant."—Approved: Travelers' Preferred Acc. Ass'n v. Stone, 50 Ill. App. 222.

§ 3997. Other Cause Coupled with Cause Insured Against.

"The court instructs the jury that, if they shall believe from the evidence that within one year from May 3, 1906, to wit, on or about July 18, 1906, Alex L. S— did sustain personal bodily injury which was effected, directly and independently of all other causes, through external, violent, and purely accidental means, and which resulted at once in total and continuous disability to engage in any labor or occupation, and if the jury shall further believe from the evidence that the death of said Alex S— resulted necessarily and solely from said injury, within 90 days thereafter, to wit, on or about August 18, 1906, then the law is for the plaintiff, and the jury should so find.

"But unless the jury should believe from the evidence that within one year from May 3, 1906, to wit, on or about July 18, 1906, Alex L. S— did sustain personal bodily injury which was effected directly and independently of all other causes, through external, violent, and purely accidental means, and which resulted at once in total and continuous disability to engage in any labor or occupation, and unless the jury shall further believe from the evidence that the death of said Alex L. S— resulted necessarily and solely from said injury within 90 days thereafter, to wit, on or about August 18, 1906, the law is for the de-

fendant, and the jury should so find; or if the jury shall believe from the evidence that the decedent, Alex L. S—, came to his death from any other cause not proximately brought about by personal injuries received from purely accidental causes, or if they shall believe from the evidence that any other cause, coupled or conjoined with accidental personal injuries received, if any, caused his death, and that the accidental injury, if any, received by him was not the sole cause of his death, independent of all other causes, if any, then the law is for the defendant, and the jury should so find.

"If Herman H. M—'s fall was caused by disease, plaintiff cannot recedent, Alex L. S—, while riding a horse on the 18th day of July, 1906, was because of the restiveness or behavior of said horse, and to avoid being thrown by him, compelled to make extraordinary exertion to control him, and that by reason of such exertion so compelled, or of the movements of the horse, and independent of all other causes, if any, a blood vessel in the brain of said Alex L. S— was ruptured, and that the injury so inflicted necessarily and solely caused his death within 90 days thereafter, the law is for the plaintiff, and the jury should so find, although the jury may believe from the evidence that the blood vessel in the brain of Alex L. S— had been weakened by prior disease.

"But if the jury shall believe from the evidence that said Alex L. S— was, on July 18th, 1906, suffering from disease which tended to harden or weaken the blood vessels in his brain, and that such disease, if any, caused or actively or efficiently co-operated with any accidental injury to said S— in causing a rupture in a blood vessel or vessels in his brain, and that his death resulted from such co-operating causes, the law is for the defendant, and the jury should so find."—Approved: Continental Casualty Co. v. Semple (Ky.), 112 S. W. 1122 (not reported in state reports).

§ 3998. Construing "Disease" by the rule Ejusdem Generis.

"If Herman H. M— fall was caused by disease, plaintiff cannot recover; but the question naturally arises, what is a 'disease' within the meaning of the contract in suit? The ordinary definition of the word is: 'Any derangement of the functions or alteration of the structure of the animal organs.' This, as you will see, would include the slightest and most temporary ailment. But this is not its meaning as used in this policy. The policy or contract in suit singles out some particular diseases, as vertigo or fits, and exempts the company from liability for accidents caused thereby; and in such cases, as I have told you in the last instruction, the company will be relieved from liability, even if the attack was sudden, unusual, and of a transient nature; but if you don't find either of these two specially mentioned maladies to have been the cause of such accident, but are required to see whether such cause existed under the general head of 'disease,' then you must accept this word as meaning some ailment or disorder of somewhat established or settled character, some physical disturbance to which M— was subject, and of which the attack that caused his fall was in some meas-

ure a recurrence. A mere temporary disorder, that was new or unusual with him, arising from some sudden and unexpected derangement of the system, though it produced or caused unconsciousness, would not be a 'disease,' within the meaning of this contract, and would not exempt the defendant company from liability in this action. Here, again, you are limited to circumstantial evidence upon which you are to base your finding."—Approved: Meyer v. Fidelity & Casualty Co., 96 Iowa, 378, 65 N. W. 328.

§ 3999. Cause of Death Independent of all Other Causes.

"The court instructs the jury that if they believe from the evidence that the decedent, W. B. H— came to his death from any other cause not proximately brought about by personal injuries received from purely accidental causes, or if they believe from the evidence that any other cause, coupled or conjoined with accidental personal injuries received, caused his death, and that the accidental personal injury, if any, received by him, was not the sole cause of his death, independent of all other causes, then the law is for the defendant, and the jury should so find."—Approved: Continental Casualty Co. v. Hunt (Ky.), 90 S. W. 1056 (not reported in state reports).

§ 4000. The Sufficiency of Proofs a Question for the Court.

"One of the conditions of the policy is that 'immediate notice of any accidental injury or accidental death, for which claim is to be made under this contract, shall be given in writing to the secretary of the company at ———, with full particulars of the accident and injury, and unless affirmative and positive proof of death or injury, and that the same resulted from bodily injuries covered by this contract, shall be furnished to the company within six months of the happening of such accident, in case of such injuries resulting fatally, then all claims based thereon shall be forfeited to the company,' and I instruct you that preliminary proofs of claims are conditions precedent; that what constitutes them is determined by the contract, and the proofs being in writing, their sufficiency is for the court and those made by the plaintiff in this case are in substantial compliance with the requirements and conditions of the policy."—Approved: Braymer v. Commercial Mut. Acc. Co., 199 Pa. 259, 260, 48 Atl. 972.

E. Marine Insurance.

§ 4001. Barratry as a Defense—Acts of Defined.
4002. Partial and Total Loss Defined and Distinguished.
4003. Goods Damaged from Inherent Infirmity.
4004. Abandonment Where Cost of Repairs Exceeded Policy.
4005. Abandonment Because of Apparent Impossibility to Save.

§ 4001. Barratry as a Defense—Acts of Defined.

"The second defense is a barratry, which may be said to comprehend not only every species of fraud and knavery committed by the master or pilot, with the intention of benefiting himself at the expense of the

owners of the boat, but every willful act on his part of known illegality, whereby the owners are in fact injured. It consists of some fraudulent act intended to injure them, or of a willful violation of known positive law, in the navigation or management of the vessel, from which the loss resulted. [The court here read the rules and the act of Congress as recited in the statement of this case, and continued]: These rules are intended to avoid collisions between boats ascending and descending the river, and they prescribe the course to be pursued by the pilots. They are made to be observed, and are binding as law upon the pilots, subject, however, to any emergencies by which it may become necessary to depart from them, to escape or avoid immediate danger from collision or other perils. It is claimed that the pilot willfully violated these rules of navigation, established under a law of Congress, by failing to give the signals required by the rules, and by omitting to stop when the boats had come within a distance of eight hundred yards. These rules are in evidence, and the pilots are bound to obey them, unless some emergency in the course of navigation occurs, justifying a departure from them, to avoid a collision or other danger. The rules require that, when the boats have approached within one mile, the pilot of the ascending boat shall sound the whistle to notify the pilot of the descending boat on which side to pass; and that, if the signals are not answered and understood by the time boats have approached to the distance of eight hundred yards, he shall stop his boat until the signals are corrected and understood. Now, if the pilot of the America, on approaching the United States, when they had approached within the mile, knew or believed that they had come within the mile, and chose to omit to give the signal required by the rule; or if, when he knew or believed that they had approached within the eight hundred yards, without satisfactory signals, he did not stop, although he knew that the rules required that he should stop, but chose to risk the violation of the rule, and the result of such violation of the rule was the loss, that would constitute such misconduct of the pilot as to prevent a recovery, though he did not actually intend an injury to the owners. He is not at liberty to prefer his own judgment to the rule required by law, unless there be some emergency requiring a departure from the rule. But he must deliberately, or voluntarily and knowingly violate the rule, in order to constitute such misconduct as to prevent a recovery. The rules are made to be observed by pilots; they are intended for the safety of the public and for the protection of the owners. Whether they are the best that can be made or not, while in force they must be observed, and a willful disregard of them is misconduct; and if a loss is caused thereby to the owners, it is a loss by barratry, which is excepted from this policy. But, in establishing this defense, the burden of the proof is on the defendants. They must make it appear, by a fair preponderance of evidence, that the pilot of the America did violate the rules knowingly, and that the loss was the consequence. * * * Mere error of fact or of law is not sufficient to establish a defense on this ground. The pilot must know his duty, and decline to do it. If he supposed that the distance was a mile when he gave the first signal, and intended to comply

with the rule by the signal which he gave, the fact that he may have been mistaken in his estimate of the distance is not misconduct which is a defense. So, if when the boats approached to the distance of eight hundred yards, the pilot of the America knew it, or believed it, and knew that the signals had not been answered or properly understood, and yet failed to stop or back his boat according to the law, that would be such misconduct as would be a defense against a suit for a loss caused by it. But if, by reason of the darkness of the night, or other causes not under his control, he was mistaken as to the fact of their approach to the distance of eight hundred yards, until they had approached much nearer, such mistake would not be misconduct to defeat a recovery. * * * The pilot is not to set up his judgment against the rules, unless there arises an emergency in which he should honestly believe that it was necessary to depart from the rule to avoid a collision or avoid danger. But if he, in good faith, endeavored to comply with the rules of navigation and to avoid a collision, though he may have erred in his estimate of distances, and though he may have been mistaken as to the interpretation of the rules, he cannot be held to be guilty of such misconduct as to constitute a defense. * * * You will limit your inquiry on this subject to the conduct of the pilot in charge of the America, as the only barratry which can defeat this suit must be of the officers or crew of the boat, for the loss of which this suit is brought."—Approved: Germania Ins. Co. v. Sherlock, 25 Oh. St. 33, 47, 48, 49.

§ 4002. Partial and Total Loss Defined and Distinguished.

"The question which has been contested as to the main point in this case is, whether the amount of this loss is to be ascertained by the rules applying to what is denominated a total loss, or by the rules applying to a partial loss. A total loss may be actual or constructive. A constructive total loss is where the loss is not actually total, but is so great as to justify the insured in abandoning the subject of insurance or what remains of it to the insurers, and claiming a total loss. It is usual for insured parties in cases of loss, whether actual or only constructively total by abandonment, to surrender what remains of the boat to the underwriters. This is a convenient way of making certain what in many cases would otherwise be uncertain. The surrender, by abandonment of the wreck or salvage, is so convenient, and so generally adopted in such cases, that the question of an actual total loss without an abandonment arises comparatively seldom. In the present case there has been no abandonment or sale of the part saved from the boat, but it has been used in rebuilding a new boat, or in repairing the old one; and one question—perhaps I ought to say the question, for the jury to determine is, which of these two things has been done. Has a new boat been built, or an old one repaired? As there was no abandonment of the property saved, no mere constructive total loss can be claimed. But, if there was an actual total loss, the recovery may be as for a total loss without any abandonment, crediting the expenses with the value of what was saved."—Approved: Globe Ins. Co. v. Sherlock, 25 Oh. St. 50, 65, 66.

§ 4003. Goods Damaged from Inherent Infirmity.

"The court instructs the jury that the plaintiffs under the pleadings in this case cannot recover, if the jury shall find from the testimony that the ———— shipped by the plaintiffs to their consignees in ———— were damaged or destroyed from ———— caused by their inherent infirmity."—Approved: Providence & Washington Ins. Co. v. Adler, 65 Md. 162.

§ 4004. Abandonment Where Cost of Repairs Exceeded the Policy.

"The court instructs the jury that if the injury to the boat was such that her repairs would cost more than half her value when repaired at the port of repair, then the assured had the right to abandon; and in estimating the expense of repairs, the jury should take into consideration the amount paid by the insurance companies for raising the boat and bringing her to ———— if, fairly expended; that it was not necessary that the expense of repairs should amount to half the sum named in the policy as the agreed value of the boat, but it was sufficient if equal to half of her value in fact when repaired."—Approved: Fulton Ins. Co. v. Goodman, 32 Ala. 108.

§ 4005. Abandonment Because of Apparent Impossibility to Save.

"The court instructs the jury that although it was the duty of the master and crew to labor for the recovery of the vessel, they were not bound to do impossibilities; and that, if it appeared to practical men that the vessel could not be saved, they would be justified in abandoning her, and were not bound to wait for the decision of the underwriter on the offer to abandon."—Approved: Fulton Ins. Co. v. Goodman, 32 Ala. 108.

F. Indemnity Insurance.

§ 4006. Condition as to Extent of Assured's Pay-roll—Accident to Employee.
4007. Fidelity of Employees—Periodical Examination of Books—Early Detection of Irregularities.
4008. Same—Contributory Negligence— Failure to Notify.
4009. Same—Renewal—Mistaken Statements in Application.

§ 4006. Condition as to Extent of Assured's Pay-roll—Accident to Employee.

"The court instructs the jury that by the terms of the policy sued on herein, if the pay-roll of the plaintiff exceeded the estimated sum of $30,000 at any time after the issuing of the said policy, then the said policy became void and of no effect, and they should find for the defendant; unless they shall believe from the evidence that when the said policy was written the plaintiff explained to the agents of the defendant the way in which it did business with its agents, and that it was then agreed that when the plaintiff ascertained that its pay-roll exceeded the sum of $30,000 in the usual course of business between the plaintiff and its agents the plaintiff should pay and the defendant should accept

an additional premium to cover the said increase, and that the plaintiff did pay an additional premium according to the terms of said agreement, if such there was, within a reasonable time after it ascertained in the usual course of business at the time, and its agents, the increase in the pay-roll. If such is the fact, then the law is for the plaintiff, and the jury should so find. But if there was not any agreement between the plaintiff and the agent of defendant who made the contract sued on that the plaintiff should pay and the defendant would accept an additional premium when it was ascertained by plaintiff as mentioned in instruction No. 1 that its pay-roll exceeded the sum of $30,000, the law is for the defendant, unless they shall believe from the evidence that when the plaintiff paid the additional $100 premium the defendant accepted it with a knowledge of all the facts affecting its liability."—Approved: Fidelity & Casualty Co. v. Southern Ry. Co. (Ky.), 101 S. W. 900 (not reported in state reports).

§ 4007. Fidelity of Employee—Monthly Examination of Books—Early Detection of Irregularities.

"This being a special defense that the defendant sets up, it is for the defendant, the surety company, to establish, by a preponderance of the evidence, to your satisfaction that these defenses that they claim exist. If it is so established to your satisfaction, you should not find a verdict for the plaintiff, but you should find a verdict for the defendant, the surety company. In that connection I will charge you it was the duty of the Union Bank & Trust Company to have made, by its auditor or other competent person, a monthly examination of the books and accounts of the bank kept under the supervision of McD—, to determine if he was discharging his duty honestly; and if you find such investigation and examination of the books by a reasonably prudent person (the bank's auditor or other person) would have disclosed irregularities, which would have led to the early detection of any irregularities on McD—'s part, and if you find such examinations were not made, then I charge you that such failure on the part of the Union Bank & Trust Coompany relieves the defendant from liability, and the plaintiff cannot recover in this action."—Approved: Title Guaranty & Surety Co. v. Nichols, 12 Ariz. 405, 100 Pac. 825.

§ 4008. Same—Contributory Negligence—Failure to Notify.

"Unless you believe from the evidence that after the plaintiff, its officers and employees superior in authority to D—, obtained information sufficient to satisfy them, or any of them, that D— had been guilty of such fraudulent or dishonest acts during the period covered by the bond as would likely involve the defendant company in liability, within a reasonable time, considering all the facts and circumstances proven, gave the defendant notice thereof, then the law is for the defendant, and you should so find."—Approved: Fidelity & Guaranty Co. v. Western Bank (Ky.), 94 S. W. 3 (not reported in state reports).

§ 4009. Same—Renewal—Mistaken Statements in Application.

"In this case, if the bank, in making its application for the bond or for its renewals did so honestly in good faith, and without any notice or any

knowledge of any dishonesty or irregularity on the part of McD—, and after the examination had of the books and accounts of the cashier, then I charge you that the defendant, the surety company in this case, will not be relieved from liability on its bond because such application may have contained statements in regard to the correctness of such accounts which may have been, in fact, untrue, but were not known to the bank to be untrue after making such examinations of such accounts honestly and in good faith."—Approved: Title Guaranty & Surety Co. v. Nichols, 12 Ariz. 405, 100 Pac. 825.

CHAPTER CVIII.

INTOXICATING LIQUORS, SALE OF—CIVIL LIABILITY.

§ 4010. No Liability for Intoxication where Sale is Lawful.
4011. Habitual Drunkard—Drowning as Consequence of Intoxication—Each Seller Liable for Entire Recovery.
4012. Sale to Habitual Drunkard—Reason to Believe Otherwise—Good Faith.
4013. Liability for Sale Rests on its Contributing to Drunkenness.
4014. Notice Forbidding and Revocation—Duress by Husband.
4015. Sufficiency of Notice.
4016. Same—Sales Between Notice and its Revocation.
4017. Permission by Wife for Occasional Sale no Bar to Action.
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4021. Sale to Habitual Drunkard—Buying from Others than Those Sued no Defense.
4022. Intoxicated Person—One Plainly under Influence of Liquor.
4023. And not One Slightly under Such Influence.
4024. Liability if Intoxication, Directly or Indirectly, Contributed to Produce Death.
4025. If Death Produced by Other Intervening Cause—No Recovery.
4026. Sale to Minor—Intoxication Causing Damage to Mother—Exemplary Damages.
4027. Damage to Sister from Death of Brothers.
4028. Sale to Minor—Consent of Parent.
4029. Sale to Husband—Right of Action by Wife and Children.
4030. Wife Barred of Her Action by Participating in His Drinking.
4031. No Recovery for Mortification or Mental Suffering in Action for Death.
4032. Intoxication Preventing Transaction of Ordinary Business.

§ 4010. No Liability for Intoxication where Sale is Lawful.

"If you should find from the evidence that the sale or delivery of liquor to Mr. P— by defendant caused him to be drunk or intoxicated, and, as the result of such intoxication, he injured the plaintiff, even then she cannot recover unless you find such sale to have been unlawful, and in violation of law."—Approved: Peacock v. Oakes, 85 Mich. 578, 48 N. W. 1082.

§ 4011. Habitual Drunkard—Drowning as Consequence of Intoxication—Each Seller Liable for Entire Recovery.

"If you find that any intoxicating liquor was sold or furnished by any one or more of these three principal defendants, B—, B—, or

McC—, or by any of their respective servants, agents, or employees, and by that I mean any one who tended bar for them, to George C. W— on June 19th at a time when he was a person in the habit of getting intoxicated, or at a time when he was in fact intoxicated, or when either or both these conditions existed, then I charge you that such sales would be unlawful, and it would make no difference whether the liquor dealer or his agent, or either of them, knew that W— was in the habit of getting intoxicated or that he was in fact intoxicated, the sale would be an unlawful sale whether they knew these things or not. If you find that such unlawful sale as I have just been speaking about was made, and further find that W— drank the liquors so furnished and that this liquor caused or contributed to his intoxication, if you find he became intoxicated, then the plaintiff would be entitled to recover, provided she has shown that she suffered some damages by reason of such intoxication. * * * If any one of these saloon-keepers made an unlawful sale, one of the kinds of unlawful sales I have mentioned, either when he was intoxicated or when he was a man in the habit of getting intoxicated, to W—, on the 19th of June, then that of itself would entitle the plaintiff to recover something for that, provided she has shown any damages by reason of it. That would be independent of the matter of his death entirely, because she has a count in her declaration charging an unlawful sale and that she suffered some damages, but I charge you in that connection that she could not recover any damages in that case by reason of loss of support—that is, if you find for that only, and do not find upon the other things I am going to submit to you in regard to his death. If you stop there, and simply find a sale, but do not find that his death was the result of a sale, in that case you could not find any damages because of loss of support, for that would not be the cause of the loss of her support, but if you find that she suffered any humiliation by reason of seeing him intoxicated on that day, if you find he was intoxicated by reason of these unlawful sales, then she might recover some damages for that. Those damages would necessarily be very small, but it would be a matter for you to consider, but in that case recovery could only be had in case of an unlawful sale and intoxication caused or contributed to by reason of that unlawful sale.

"I further charge you, gentlemen of the jury, that in case you find that George C. W— came to his death by reason of his having been furnished intoxicating liquors by Henry L. McC—, George R. B—, and William A. B—, and all of them, and that they all furnished him intoxicating liquors on June 19, 1906, either while he was in the habit of becoming intoxicated, or while he was intoxicated, you will pay no attention to the question as to which, if either, of said saloonkeepers furnished him the most of such intoxicating liquor, and I charge you in that connection that if the liquor furnished by any of said saloonkeepers contributed in any degree to the damage of plaintiff she would be entitled to recover against that saloonkeeper and his bondsmen, the same as though he alone had furnished the liquor to George C. W—. The law does not attempt in such cases to apportion

the damage according to the amount of liquor each saloonkeeper sold, if any, and even though W— might have procured some of the liquor he had, if any, from persons other than the three saloonkeepers sued in this action, yet the persons sued would be responsible for the whole injury, if any injury was suffered by plaintiff, if the liquor sold by them or either of them contributed in any degree to the intoxication of George C. W—. That, of course, you must take in connection with the rest of my charge, providing she has shown damages resulting from it. * * * If you find that W— died from heart disease or because death overtook him suddenly from any cause not connected with his intoxication, then in such case plaintiff cannot recover, but if you find by reason of such intoxication, if you find he was intoxicated, and this intoxication was caused or contributed to by liquors furnished by these principal defendants or any of them, that his death is due to the fact that he was intoxicated, and that it resulted from the fact that he was intoxicated, then such principal defendant or defendants who so furnished such intoxicating liquors to George C. W—, and their bondsmen, are liable in this action, in that case, gentlemen the same rule would apply that I explained to you a few moments ago, if they furnished some of the liquors, whoever furnished some of the liquors that contributed to make up his intoxication would be liable even though other of the liquors that made up the same intoxication were furnished by third parties.

"Evidence has been given here tending to show that W— and B— had, before W— had drunk any liquor on this occasion, arranged to go fishing in Maple river contrary to law on the night in question, and that they were breaking the law when W—'s death occurred. It was unlawful to fish in the manner that the evidence tends to show that they were fishing in Maple river at the time in question. In other words, it was unlawful on June 19th and 20th to fish with a net in Maple river, and if you find that W—'s death was caused solely because of the fact that they were fishing in the river with a net at the time of his death, and that the furnishing of this liquor had nothing to do with causing his death, then plaintiff cannot recover, but in order to find that his death was caused solely by his fishing in the river you must find that his death occurred independent of the result of intoxication brought about by the furnishing of this liquor, if such intoxication was brought about and such liquor was furnished. The bare fact that he was fishing in the river, even though this was contrary to law, would not prevent plaintiff from recovering, providing you find that what really caused his death was the intoxication, if you find such intoxication, or the results thereof, it would not be necessary for you to find that he was intoxicated to the extent at the time of his death that he was earlier in the night, providing you find he was intoxicated at all. If you find that he was intoxicated at all at the time of his death or find that he was suffering from the results of intoxication, so that he was in a feeble or helpless condition, did not have the full use of himself, if he was unable to save himself as a result of that intoxication, when otherwise he would have saved himself

but for such intoxication or the effects thereof, then you would be at liberty to find that his death was the result of such intoxication, but notwithstanding the fact that you may find that he was intoxicated on the night in question, if you should find that that intoxication had so far worn off at the time of his death that it did not cause the death in question; then the plaintiff could not recover. In other words, the intoxication in question must have been the efficient cause of his death." —Approved: Weatherbee v. Byam, 160 Mich. 600, 125 N. W. 686.

§ 4012. Sale to Habitual Drunkard—Reason to Believe Otherwise—Good Faith.

"If you find from the evidence that, at the time charged in plaintiff's petition, the husband of plaintiff, the said Herman F—, was an habitual drunkard, and that while he was such habitual drunkard, and after the third day of February, 1906, and within the time charged in plaintiff's petition, the defendant, Henry B—, did sell or give, or permit to be sold or given, to the said Herman F—, at the defendant's place of business in Weimar, Colorado county, any spirituous, vineous or malt liquor, or medicated bitters capable of producing intoxication, you will find for the plaintiff $500 for each separate time that the said defendant so sold or gave, or permitted to be sold or given, any of such intoxicants to the said F—, unless you further find from the evidence that, when he sold or gave, or permitted to be sold or given, such intoxicants to the said F—, the sale or gift was made in good faith, with the belief that said F— was not an habitual drunkard, and there was good reason for such belief, then upon this branch of the case you will find for the defendants. As the times alleged in the plaintiff's petition, alleging sales, gifts, etc., to F—, as an habitual drunkard, and such sales, gifts, etc., after service of notice not to sell, are identical, if you find for the plaintiff under the charge thus far given you, then you need not consider the following paragraph, but if you find for the defendants, under the charge thus far given, then you will consider the next succeeding paragraph."—Approved: Birkman v. Fahrenthold, 52 Tex. Civ. App. 335, 114 S. W. 428.

§ 4013. Liability for Sale Rests on its Contributing to Drunkenness.

"There has been something said in this case about the amount of liquor sold by the defendant. Now, the question is not so much as to the amount, but did what he did sell him contribute to the drunkenness of the deceased? - Or, in other words, did the liquor which the defendant T— sold him contribute to the intoxication of Mr. M—on the 30th of June? If it did not, if he sold him a drink in the forepart of the day, and that did not in any way contribute to the intoxication of Mr. M—, then, of course, the defendants would not be liable; but, if the liquor Mr. Tinker sold him upon that day in any way contributed to the intoxication of Mr. M—, it makes no difference how many others sold."—Approved: Merrill v. Tinkler, 160 Mich. 575, 125 N. W. 717.

§ 4014. Notice Forbidding and Revocation—Duress by Husband.

"If you find from the evidence that, after the notice not to sell was served upon the defendant B—, and after the 3d day of February, 1906, and within the time charged in plaintiff's petition, the said B— sold or gave, or permitted to be sold or given, to the said Herman F— any of said intoxicants, then you will find for the plaintiff the sum of $500 for each separate time the said B— sold or gave, or permitted to be sold or given, to the said F— any such intoxicant at B—'s place of business at Weimar, as charged in plaintiff's petition. But if you find that after the notice not to sell, such notice was revoked by the plaintiff, and B— was informed of such revocation, then you are instructed that, unless you find that sales or gifts were made, or permitted to be sold or given, of such intoxicants by the said B— to the said F— between the time of the service of the notice not to sell and the time the said B— received notice of the revocation thereof, you will find for the defendants on this branch of the case, regardless of whether such revocation was made by the plaintiff under duress on the part of the husband or not."—Approved: Birkman v. Fahrenthold, 52 Tex. Civ. App. 335, 114 S. W. 428.

§ 4015. Sufficiency of Notice.

"The court instructs the jury that the question of the sufficiency of this notice is partly a question of law and partly a question of fact. I think a notice in any given form of words might be legally sufficient under some circumstances, and with the existence on the part of the defendant of certain knowledge of facts, which under other circumstances and with ignorance of those facts might not be. It seems to me, in connection with this notice, that the plaintiff must satisfy you that, at the time the notice was given, the defendant knew, or he then reasonably ought to have known, that the person whose name was signed to the notice in signing and giving the notice was acting as the daughter of ——— (the party to whom sale was made). It is not necessary, as a matter of law, that he should have had personal acquaintance with her."—Approved: Sackett v. Ruder, 152 Mass. 397.

§ 4016. Same—Sales between Notice and its Revocation.

"If you fail to find that the said F— was an habitual drunkard, as charged at the time of the alleged sales or gifts of intoxicants, you will find for the defendants on this branch of the case; or if you find that he was then an habitual drunkard, but that such sales or gifts were made in good faith, with the belief that the said F— was not an habitual drunkard, and that there was good reason for such belief, you will find for the defendants on this branch of the case. And so, if you also fail to find that sales or gifts of intoxicants were made to the said F— between the dates of the service of the notice not to sell and the revocation thereof (if there was such revocation), you will find for the defendants."—Approved: Birkman v. Fahrenthold, 52 Tex. Civ. App. 335, 114 S. W. 428.

§ 4017. Permission by Wife for Occasional Sale—No Bar to Action.

"Although you may believe from the evidence that the plaintiff wrote the defendant G— that she did not object to his selling her husband intoxicating liquors occasionally, such fact would not bar her action, but if such fact is proven by a preponderance of the evidence, it may be considered by the jury, together with the other evidence in the case, in estimating the damages of the plaintiff, if the jury believe, from the evidence, the plaintiff is entitled to recover damages."—Approved: Earp v. Lilly, 217 Ill. 582, 120 Ill. App. 123, 75 N. E. 552.

§ 4018. Sale to Habitual Drunkard—Burden Shifted to Defendant to Show Excuse.

"While the burden of proof is upon the plaintiff to establish her case by a preponderance of the evidence, yet if this has been done in accordance with the allegations of her petition, where the defendants rely upon affirmative matter as defense, then the burden is upon defendants to establish such defense by a preponderance of the evidence. Thus, if the plaintiff has established, by a preponderance of the evidence, that sales or gifts of intoxicants were made to the said F— as alleged, and that when such sales or gifts were made the said F— was an habitual drunkard, then the burden would be upon defendants to show that, when such sales or gifts were made, they were made in good faith, with the belief that F— was not an habitual drunkard, and there was good reason for such belief. And so, if such sales or gifts were made, as alleged, to the said F— after notice was served upon B— not to sell to him, then the burden is upon the defendants to show, by a preponderance of the evidence, that at the time of such sales or gifts the notice not to sell had been revoked, and that such revocation had been made known to B—."—Approved: Birkman v. Fahrenthold, 52 Tex. Civ. App. 335, 114 S. W. 428.

§ 4019. Same—All Sellers Jointly Liable.

"If, from the evidence, you find that plaintiff's husband bought and drank intoxicating liquors at various places, and from various persons, on the twenty-ninth day of January, 1877, and that he on the twenty--ninth day of January, 1877, became drunk, and that such drunkenness continued until his death, on the thirtieth day of January, and that on said thirtieth day of January he died as the effects of such drunkenness, then all of these defendants are jointly liable."—Approved: Roose v. Perkins, 9 Neb. 304, 2 N. W. 715.

§ 4021. Same—Buying Liquor from Others than those Sued no Defense.

"The court instructs the jury that this is a civil action of the plaintiffs against the defendants jointly for damages which the plaintiffs claim to have sustained as the result of drinking intoxicating liquors which plaintiffs claim to have been sold to and drunk by John B—, the husband of Frederika B—, and the father of ——— B— et al., which liquors plaintiffs claim were sold by said defendants,

"If from the evidence, you find that the said John B— bought and drank intoxicating liquors at various places, and from various persons, including all of the defendants, on the thirteenth day of October, 1881, and that he, on that day, became drunken from the combined effect of such liquor, and that on that day he died, or was killed, as the consequence or effect of such intoxicating, then all of these defendants are jointly liable.

"The jury are further instructed that though they may believe from the evidence that the deceased had bought or taken liquor at places other than the saloons of the defendants, still this fact would constitute no defense to this action, provided the jury believe from the evidence that the deceased obtained intoxicating liquor at the saloons of the defendants which contributed to his intoxication, and that his death resulted as a consequence of such intoxication.

"The court instructs the jury that if, from the evidence, they believe that on the day of the death of said John B— he became intoxicated, and that by reason of such intoxication he came to his death, it shall only be necessary, in order to hold the defendants liable, to prove that they sold intoxicating liquors to the said John B— at a time when the drinking of such liquor so sold (if any) tended to produce such intoxication, or that contributed to such intoxication.

"The court further instructs the jury that in this case it is not necessary on the part of the plaintiffs to prove that the defendants sold all the liquor to the said John B that may have produced his intoxication, if he was intoxicated. It is sufficient if it is proved that they sold him intoxicating liquor that contributed to such intoxication, and that such intoxication resulted in his death."—Approved: Kerkow v. Bauer, 15 Neb. 150, 18 N. W. 27.

§ 4022. Intoxicated Person—One Plainly under the Influence of Liquor.

"I want to say a word to you in reference to what may be deemed an 'intoxicated person,' within the meaning of the statute. When it is apparent that a person is under the influence of liquor, or when his manner is unusual or abnormal, and his inebriated condition is reflected in his walk or conversation, when his ordinary judgment and common sense are disturbed, or his usual will power is temporarily suspended, when these or similar symptoms result from the use of liquors, and are manifest, then, within the meaning of the statute, the person is intoxicated, and any one who makes a sale of liquor to such person violates the law of the state. It is not necessary that the person should be so-called 'dead drunk,' or hopelessly intoxicated; it is enough that his senses are obviously destroyed or distracted by the use of intoxicating liquors."—Approved: Lafler v. Fisher, 121 Mich. 60, 79 N. W. 934.

§ 4023. And not One Slightly under such Influence.

"The court further instructs you that it is not sufficient, in order to hold the defendant liable in this case, that the deceased, merely

felt the liquor which he had been drinking, or that he was slightly under the influence of liquor, or that he was feeling good merely, but that it is absolutely essential, before there can be any recovery, for you to believe, from all the evidence, that the deceased was intoxicated. And if you further believe from all the evidence that the deceased was not intoxicated, and that when he left defendant's place of business on the evening in question he was perfectly able to take care of himself and did not thereafter become intoxicated from liquors obtained from the defendant, then you must find the defendant not guilty."—Approved: Shorb v. Webber, 89 Ill. App. 474, aff'd 188 Ill. 126, 58 N. E. 949.

§ 4024. Liability if Intoxication Directly or Indirectly Contributed to Produce Death.

"The court instructs the jury that it is not necessary, in order to warrant a recovery in this case, that the intoxication of F. J. S—, deceased, by means of intoxicating liquors sold or given away by any of the defendants herein to him, be the direct, natural, and proximate cause of the death of said E. J. S—; but if the jury shall find that the use of intoxicating liquors directly or indirectly contributed towards or assisted in producing the death of said E. J. S—, and that all or any part of the intoxicating liquors so used by the said E. J. S— were sold or given away to him by defendants, or any of them, then your verdict shall be in favor of the plaintiffs, and against the defendants, or such of them as were guilty of such wrongful act."—Approved: Schiek v. Sanders, 53 Neb. 664, 74 N. W. 39.

§ 4025. If Death Produced by other Intervening Cause no Recovery.

"Even though you may believe from the evidence that the deceased procured intoxicating liquor from the defendant, A—, and that he became intoxicated therefrom, still, if you further believe from the facts and circumstances in evidence in this case that he came to his death by reason of the willful or criminal act of some person or persons unknown, which act was not provoked by said deceased, and that such willful or criminal act, and not his intoxication, was the effective cause of his death, then you should find the defendant not guilty."—Approved: Triggs v. McIntyre, 215 Ill. 369, aff'g 115 Ill. App. 257, 74 N. E. 400.

§ 4026. Sale to Minor—Intoxication Causing Damage to Mother—Exemplary Damages.

"The court instructs the jury that if they believe, from the preponderance of the evidence, that the plaintiff is the mother of James Henry McM—, that he is a minor, and that the defendant, by himself or his clerk, or any one acting under his authority, unlawfully sold to the said James Henry McM— on the 25th of May, 1895, at the defendant's place of business, at Weston, in this county, intoxicating liquors, and that the said intoxicating liquors, in whole or in part, caused the intoxication of the said James Henry McM—, and that by reason of such intoxication the plaintiff was injured, in person

or means of support, in manner and form as in the declaration alleged, then the jury should find for the plaintiff, and assess in her favor such damages as the jury should find from the evidence she has sustained by reason of such intoxication, and also exemplary damages, but not exceeding altogether ten thousand dollars."—Approved: McMaster v. Dyer, 44 W. Va. 644, 29 S. E. 1016.

§ 4027. Damage to Sister from Death of Brothers.

"If, under the evidence, you find that the claimant is entitled to a verdict, she will be entitled to recover such actual damages as by the evidence it appears she is suffering by reason of the death and loss of her brothers, resulting, if it did, in her loss of support, and no other damages whatever. In estimating these damages you should consider simply the amount of loss of her means of support, and award to the claimant such sum as you find will fairly compensate for her loss in that regard from the time of their death and for such length of time thereafter as you may find her expectancy of life to be, taking into consideration the amount these boys would earn during her expectancy, and their expectancy, and have furnished, under the proofs in this case, considering the chances of the boys' death and possible loss of work, and everything else relating thereto."—Approved: Bennett v. Miller's Estate, 160 Mich. 309, 125 N. W. 2.

§ 4028. Sale to Minor—Consent of Parent.

"The defendants in this case plead as a defense that M. J. W—, plaintiff and father of the minor, Robert W—, consented to the doing of the acts complained of, and, if you find and believe from the evidence that M. J. W—, father of Robert W—, did consent to the doing of the acts complained of, then you will find for the defendants; and in determining whether or not the father had consented to the doing of the acts complained of, you will take into consideration all the evidence introduced before you, and any just conclusions deducible therefrom."—Approved: Price v. Wakeham, 48 Tex. Civ. App. 339, 107 S. W. 132.

§ 4029. Sale to Husband—Right of Action by Wife and Children.

(a) "You are instructed that as the wife and children of the said Martin K— the plaintiffs are legally entitled to support from him, and that under the laws of this state, if, by reason of intoxication or intemperance in the use of intoxicating liquor on the part of the said Martin K—, the plaintiffs have been injured in their means of support to the extent of such injury, to be ascertained from the evidence, they are entitled to compensation in damages from the person or persons who sold or gave to him the intoxicating liquors which in whole or in part caused such intoxication or caused or fostered such intemperance."—Approved: Gorey v. Kelley, 64 Neb. 605, 90 N. W. 554.

(b) "If, from the evidence in this case, you find that defendant sold plaintiff's husband intoxicating liquors known as whisky, within

the time stated in the petition, and that the same caused or contributed to his intoxication, habitual or otherwise, and that, by reason thereof, plaintiff was injured in her means of support, then the defendant would be liable for the actual damages sustained by plaintiff in her means of support which were caused by such intoxication, and for exemplary damages as well."—Approved: Fox v. Wunderlich, 64 Iowa, 187, 20 N. W. 7.

§ 4030. Wife Barred of her Action by Participating in his Drinking.

"The court instructs the jury that it is claimed that the plaintiff was accustomed to purchase intoxicating liquors of the defendant and of others, and to take it to their home. If this be so, it becomes important to inquire for what purpose she bought and used such liquors. If it was bought and taken to the house for medical purposes only, and was in good faith prepared and used as a medicine for existing physical ailments, such purchase and use would be lawful and innocent, and ought not to operate to the prejudice of the plaintiff. If, however, it was not bought for such purpose, but was purchased and intended and used as a beverage for herself and the said ———, her husband, the case assumes a different aspect. If the said ———, her husband, was in the habit of getting intoxicated, and the plaintiff, knowing this habit, voluntarily drank intoxicating liquors with the said ———, her husband, at the bar of the defendant, and voluntarily bought of defendant intoxicating liquors to be taken to their home and to be drunk by herself and the said ———, her husband, as a beverage, this would not only be encouraging the said ———, her husband, in his intemperate habits, but would be an apparent sanctioning on her part of the sales of liquor by the defendant to the said ———, her husband. This law is intended to furnish redress and compensation to innocent sufferers, and not to those who have, by their acts and conduct, voluntarily and knowingly encouraged and contributed to bring about a state or condition in another who, while in such state or condition, does the wrongs of which they complain. If the plaintiff and the said ———, her husband, voluntarily drank at the bar of the defendant, and if the plaintiff voluntarily bought liquor of defendant to be drunk by her and the said ———, her husband, she would not be placed in the attitude of an innocent sufferer, and as such entitled to the redress which the statute designs."—Approved: Kearney v. Fitzgerald, 43 Iowa, 580.

§ 4031. No Recovery for Mortification or Mental Suffering in Action for Death.

"The jury are instructed that in this case (action for death of husband from intoxication) the measure of damages is the injury, if any, shown by the proof to the person or property of the plaintiff, or her means of support, and the jury have no right in determining the damages, if any, in this case, to take into consideration any mortification to the plaintiff's feelings or mental suffering by her."—Approved: Brantigam v. While, 73 Ill. 561, 563.

§ 4032. **Intoxication Preventing Transaction of Ordinary Business.**

"The court instructs the jury that if you believe that the plaintiff had been for the last ten years the wife of ———; that for several years previous to the commencement of this suit he was habitually intoxicated; that within two years before the commencement of this action the defendant sold or gave to him intoxicating liquor, and thereby caused his intoxication in whole or in part; that by reason of said intoxication the said ——— was rendered incapable of performing and transacting his ordinary business; that the plaintiff was dependent upon him for support; that in consequence of said intoxication she has been injured in means of support, then you will return a verdict for the plaintiff for such damages as from the evidence you may believe she has sustained in consequence thereof not exceeding $———, the amount set out in the complaint."—Approved: Jockers v. Borgman, 29 Kan. 109.

CHAPTER CIX.

LANDLORD AND TENANT.

§ 4033. Holding Over by Tenant—Relation Implied.
4034. Landlord Assuming to Repair Must Leave Premises Reasonably Safe.
4035. Landlord bound only by Contract to make Repairs.
4036. Failure of Landlord to make Repairs does not Abate from Rent.
4037. Now where Premises become Untenantable from Fire.
4038. Landlord's Liability as to Part of Premises Remaining under his Control.
4039. Eviction by Landlord taking Possession of Material Part of Premises.
4040. Eviction not Effected by Leaks from use of Premises by Other Tenants.
4041. Unintentional Interference with Possession may not Amount to Eviction.
4042. Landlord Responsible to Renter for Dangerous Premises.
4044. Where Condition of Premises Fraudulently Concealed, Tenant may Abandon.
4045. Premises Leased for one Purpose and used for another—Re-entry by Landlord.
4048. Liability of Tenant for Injury to Third Person.
4049. Landlord Participating in Use of Premises for Illegal Purposes.

§ 4033. Holding Over by Tenant —Relation Implied.

"The jury are instructed that if they believe from the testimony that the defendants, after the close of the three-years' lease, induced the plaintiff to believe that the defendants desired to keep or would keep the premises in question for another year, then they should find for plaintiff in the amount sued for."—Approved: Abeel v. McDonnell, 39 Tex. Civ. App. 453, 87 S. W. 1066.

§ 4034. Landlord Assuming to Repair must Leave Premises Reasonably Safe.

"Ordinarily a landlord is under no obligation to repair premises unless he has contracted so to do, but where a landlord assumes to repair premises he must make such repairs in a reasonably careful and safe way so as to render such place reasonably safe for the occupants or persons lawfully upon said premises. Especially is this true when said repairs are concealed and hidden from view."—Approved: Carlon v. City Sav. Bank, 85 Neb. 659, 124 N. W. 91.

§ 4035. Landlord Bound Only by Contract to Make Repairs.

"You are instructed that as a matter of law that a landlord is not bound to make any repairs or improvement upon rented premises unless he contracts or agrees to at the time of the making of the lease contract to make such repairs or improvements, and unless you believe from a preponderance of the evidence that at the time of the making of the contract that J. E. B— did agree to make the repairs and improvements necessary upon the rented premises, then you will find against the defendant S— upon his cross-bill and counter-claim."—Approved: Blackwell v. Speer (Tex. Civ. App.), 98 S. W. 903 (not reported in state reports).

§ 4036. Failure of Landlord to make Repairs does not Abate from Rent.

"The court instructs the jury that, if you believe from the evidence that any wrongful act of the plaintiff or omission to perform anything, required of her by her lease, was such as tended merely to diminish the beneficial enjoyment of the premises leased by the defendant, he was still bound for the rent if he continued to occupy the same, and that, if the defendant did not abandon the leased premises, his obligation to pay the rent therefor remained, but that he might show, as a matter of defense, in what manner such beneficial enjoyment of the premises was diminished by such act or omission to act of the plaintiff."—Approved: Rubens v. Hill, 213 Ill. 523, 72 N. E. 1127.

§ 4037. Nor Where Premises Become Untenantable from Fire.

"The court instructs the jury as matter of law that where a lease is made of a portion of a building, and such portion is damaged by fire, and the premises rented are rendered untenantable, but the premises are not totally destroyed, but are capable of repair, those facts will not relieve the tenant from his liability to pay rent, unless the lease so provides. And if you believe, from the evidence, in this case, that the premises leased by the plaintiff to the defendant in this case were rendered untenantable by fire, but were not totally destroyed, and were capable of repair, then that fact did not relieve the tenant from its liability to pay rent, as provided by the lease."—Approved: Humiston, K. & Co. v. Wheeler, 175 Ill. 514, aff'g. 70 Ill. App. 349, 51 N. E. 893.

§ 4038. Landlord's Liability as to Part of Premises Remaining under his Control.

"The proximate cause of the falling of said cornice and fire wall was the pulling of a wire attached to it, and if, when said wire was so attached to it, said tenants had possession of said cornice and fire wall under a lease or leases from defendant, and were still so in possession at the time of the accident, then defendant is guilty of no negligence, and you will find for the defendant. If, upon the other hand, you find, that the accident was so caused, and that the defendant had leased to tenants rooms in said building, but that said cornice and fire wall were not in the possession nor under the control of said tenants at the time

of the accident, and if you further find that the defendant knew, or, by the use of reasonable care and prudence, could have known, that it was so attached to said cornice and fire wall, and that it would naturally produce accident and injury to those passing along the street, then the allowing it to remain so attached would be negligence on defendant's part."—Approved: O'Connor v. Andrews, 81 Tex. 28, 35, 16 S. W. 628.

§ 4039. Eviction by Landlord Taking Possession of Material Part of Premises.

"If the jury believe from the evidence that the defendant was tenant from year to year, and was entitled to the possession of said premises in question from May 1st, 1860, to May 1st, 1861, and that against defendant's consent and in the absence of any understanding or agreement permitting it, the plaintiff railroad company, wrongfully took possession of part of said lots for their railroad track, and continued to hold and use the same until May 1, 1861, and evicted defendant therefrom, then such eviction by the railroad company, works an extinguishment of all rent for said premises from the time of its occurrence, notwithstanding the defendant continued to occupy the residue of said lots until May 1, 1861; but if it was the understanding that the railroad might put their track across the lots in the event of their electing to do so and defendant held under that understanding, then putting down the track would not amount to an eviction."—Approved: Price v. Pittsburg F. W. & C. R. Co., 34 Ill. 13, 17.

§ 4040. Eviction not Effected by Leaks from Use of Premises by Other Tenants.

"If the leaks of which the defendant complains were caused by the use which the tenants made of the platform, and the defendant knew of the condition of the platform and of the structures thereon, and if the tenants made such use of the platform before the lease was accepted by him, then the defendant has no cause of complaint and there was no eviction."—Approved: Voss v. Sylvester, 203 Mass. 233, 89 N. E. 241.

§ 4041. Unintentional Interference with Possession may not Amount to Eviction.

"Defendant claims the plaintiff cannot recover because during the term covered by the plaintiff's claim defendant was evicted of part of the premises. An eviction consists in taking from the tenant some part of the demised premises of which he was in possession, and an eviction of a tenant from a part of the premises demised will relieve him from obligation to pay any rent under the lease. The defendant claims that the eviction consists in erecting a fence, shutting off a part of the land from his occupation. If you find that the fence which shut off the triangular pieces of land was erected in good faith by Q—, with the knowledge of defendant, both parties supposing at the time that it was on the true line, and that as soon as he discovered the error he offered to remove it, and was prevented by the defendant, you will be authorized to find that this act did not amount to such an eviction as would defeat plaintiff's action. If you find that the defendant was, by

the erection of the fence, deprived of the beneficial use of the demised premises, or any part thereof, you will deduct from the plaintiff's claim in this action such sum as the rental value of the premises fenced off bears to the rental value of the whole estate demised."—Approved: Mirick v. Hoppin, 118 Mass. 582, 586.

§ 4042. Landlord's Responsibility to Renter for Dangerous Premises.

"If the plaintiff entered the corridor or hallway in question, on the invitation of the defendant, it became the duty of the defendant to use reasonable care and diligence, the care of an ordinarily prudent person, under the circumstances, to guard the plaintiff against injuries from any danger that existed in the corridor, or hallway. It became the duty of the plaintiff to use reasonable care and diligence to guard himself from injury, and from any danger that he knew of, or had reasonable ground to expect, and it was the duty of the defendant to use the care of an ordinarily prudent person, under the circumstances, to guard the plaintiff against injuries from any danger that existed in the corridor or hallway, when those dangers were within the knowledge of the defendant, or had existed for a sufficient length of time to make want of knowledge on the part of the defendant improbable. Just what constitutes care and diligence that an ordinarily prudent person would exercise depends entirely upon the circumstances of the case. Under certain circumstances, an ordinarily prudent person would exercise a very high degree of care, while, under other circumstances, an ordinarily prudent person would exercise a lesser degree of care, so it is for you to say under all the circumstances in this case, considering the amount of light that there was in this hallway, or corridor, at the time the plaintiff entered it, and all the other circumstances as you find them, just how high a degree of care an ordinarily prudent person would exercise. If you find from the evidence, that the defendant, in the care and operation of the elevator in question, exercised that reasonable care which an ordinarily prudent person would exercise under similar circumstances, then defendant was not guilty of negligence, and your verdict will be for defendant."—Approved: Pascieszny v. Boydell Bros. White Lead & Color Co., 146 Mich. 223, 109 N. W. 417.

§ 4044. Where Condition of Premises Fraudulently Concealed, Tenant May Abandon.

"If the jury find from the evidence that the basement had, before the execution of the lease, been a wet cellar, and the plaintiff knew this fact, but fraudulently concealed it from defendant at the time of making the contract, and that the basement afterwards became wet, and its condition injurious to the health of defendant and its agents,—in other words, a nuisance,—and that defendant, through reasonable fears of injury to health, abandoned the premises on that account, then defendant would not be liable for rent, and the jury should answer the issue, 'No.' But if the jury should not find from the evidence that the basement had been a wet cellar before, or that plaintiff had

knowledge of it and concealed it from the defendant, or if they should not believe that the condition of the basement became a nuisance, or that defendant left the premises through reasonable fears of injury to health, but on some other account, then they should answer the issue, 'Yes,' and, in that event, should find what amount is due."—Approved: Gaither v. Hascall-Richards S. G. Co., 121 N. C. 384, 28 S. E. 546.

§ 4045. Premises Leased for one Purpose and Used for Another—Reentry by Landlord.

"The court instructs the jury that the lease introduced in evidence gave the plaintiff the possession of the store in question, 'to be occupied for a grocery store and for no other purpose whatever' and that the plaintiff had no right to use the premises for any other purpose, or for the purpose of a store room. And if the jury believe from the evidence that before the time it is claimed the defendant entered the store rented to the plaintiff, as charged in the declaration, the plaintiff had ceased to occupy the premises as a grocery store and was not occupying the same or intending to occupy the same as a grocery store after the time the plaintiff so ceased to occupy them, then the defendant had the right to enter said store and take possession thereof."—Approved: White v. Naerup, 57 Ill. App. 114.

§ 4048. Liability of Tenant for Injury to Third Person.

"The court instructs the jury that if they find that the defendants entered into possession of the building in question under the lease in evidence, and made such alterations as they thought fit in order to adapt it to their purpose under the authority given in the lease, and afterwards stored a large quantity of heavy goods therein, and that owing to the excessive quantity of said goods, if they shall find such quantity was excessive, or the manner in which they were stored by the defendants, a large part of the building was caused to fall down, then the plaintiffs are entitled to recover."—Approved: Machen v. Hooper, 73 Md. 356, 21 Atl. 67.

§ 4049. Landlord Participating in Use of Premises for Illegal Purpose.

"If plaintiff has thus proved said facts, then you should allow him the full amount claimed in his petition, unless the defendant has shown by a preponderance of the evidence one or the other of his defenses, namely, either that said lease was terminated by mutual agreement and all rent due paid, or that plaintiff participated in some degree, however slight, in the wrongful purpose and intent that said premises should be used as a gambling room. But if defendant has thus proved either of said defenses, then plaintiff cannot, under the law, recover anything, for the law will not assist a landlord in collecting his rent for premises used for such purpose, when it is made to appear that the landlord participated in some degree, however slight, in the wrongful purpose and intent that the property should be so used. Mere indifference on his part as to the intended use of the property is not sufficient. But, if the lessor in any way aids the

lessee in his unlawful design, such participation will render the contract void. His relations to the unlawful purpose must be in some degree active, rather than merely passive or indifferent. If he does any act in aid of the unlawful purpose, however slight, it is sufficient participation on his part to defeat recovery. But, until there is some degree of connivance shown, a contract will not be avoided."—Approved: Silvers v. Floyd (Iowa), 131 N. W. 652.

CHAPTER CX.

MALPRACTICE.

§ 4050. Beginning of relation of Physician and Patient.
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4061. Failure to use X-Ray Machine as Evidence of Negligence.
4062. Unauthorized Autopsy upon the Dead Body of a Relative.
4063. Agent or Servant—Care and Skill Required.

§ 4050. Beginning of Relation of Physician and Patient.

"The court instructs you that the fact that a physician responds to a call for his professional services does not necessarily constitute an employment, unless some act is done or advice given by the physician which indicates an intention on his part to enter upon the employment. He may absolutely refuse this employment, if he sees fit. But when any act is done, or advice given, that may reasonably be construed into indicating an active entering upon the employment, then the liability of the physician attaches, and he may be held responsible for his negligence or lack of skill, as you are elsewhere herein instructed."—Approved: Miller v. Dumon, 24 Wash. 648, 64 Pac. 804.

§ 4051. Skill Required under Implied Contract.

"If the jury believe, from all the evidence in the case, that the plaintiff, having broken his leg, employed the defendant as his physician and surgeon, to set and attend to the same, and that the defendant, holding himself out as a physician and surgeon, undertook and entered upon such employment, and for a considerable time had charge of the same, then the plaintiff was entitled to receive the care, attention and skill of an ordinarily skilled physician and surgeon."—Approved: Kendall v. Brown, 86 Ill. 387, 388.

§ 4052. Ordinary Skill Implied by Law—When.

"The court instructs the jury that one who holds himself out to the public as a physician and surgeon, the law implies a promise and duty on his part that he will use reasonable skill and intelligence in the treatment and of the care of those who may employ him. There-

fore, if you believe from the evidence that plaintiff employed defendant to set and heal the dislocation of plaintiff's shoulder, and that defendant negligently, carelessly and unskillfully treated and managed said dislocation, and that said dislocation was not set, placed or reduced, and through such negligence plaintiff's shoulder has become permanently injured, lamed and disfigured then you will find for the plaintiff in a sum not to exceed —— dollars.

"The court instructs the jury that the only question in this case for your determination is whether the defendant, when called to see plaintiff on that — day of ———— properly reduced and treated the dislocated shoulder of plaintiff, and gave her proper and necessary directions and instructions for the care of the same. If he did, then he cannot be held liable for any injury resulting from any redislocation of said shoulder that may have afterwards occurred; on the other hand, if, when called to see plaintiff on said date, he failed to reduce and properly treat said dislocated shoulder and give proper and necessary directions for the care of the same, or failed to exercise such care and skill as is used by the average members of his profession under like conditions and circumstances, in attempting to so reduce and treat said dislocation, then you will find the issues for plaintiffs according to the rule given in instruction number one." —Approved: Wheeler v. Bowles, 163 Mo. 398, 63 S. W. 675.

§ 4053. Bound to Exercise Skill of Average Physician in the Locality.

"Physicians and surgeons are required to use ordinary skill and diligence, only the average of that possessed by the profession as a body, and not by the thoroughly educated only, having regard to the improvements and advanced state of the profession at the time of the treatment."—Approved: Peck v. Hutchinson, 88 Iowa, 320, 55 N. W. 511.

§ 4054. Degree of Skill Required.

"The implied contract of the defendant when he assumed charge of the treatment of plaintiff's injuries was that he possessed and would employ in the treatment of the case such reasonable skill and diligence as were ordinarily exercised in his profession at and in localities similar to that in which he practiced, by the members as a body; that is, the average of the reasonable skill and diligence ordinarily exercised by the profession at the time and in places similar to Grinnell. Regard is to be had, in determining this ordinary skill and diligence, to the improvements and advanced state of the profession at the time the case was treated."—Approved: Decatur v. Simpson, 115 Iowa, 348, 88 N. W. 839.

§ 4056. Skill Required of Specialist.

(a) "A physician or surgeon making a specialty of the practice of surgery is not bound to use any greater skill, care or diligence in the treatment of the case than a specialist in the same general locality in which said physician or surgeon resides and practices his profession."—Approved: Beadle v. Paine, 46 Ore. 424, 80 P. 903.

(b) "The care and skill that a surgeon would use in the practice of his profession should be proportionate to the character of the injury he treats, within the limits of ordinary skill and knowledge and in the light of the advanced state of the science at the time of treatment; and, if, under the evidence in this case, under the rule of law as I have given the same to you, it should appear by a preponderance of evidence that the defendants, undertaking the care and treatment of the plaintiff's arm, did not give him the ordinary skill and knowledge which is possessed by the average of the profession making a specialty of surgery, then plaintiff would be entitled to some damages at your hands, in case you should find that he has suffered any damage traceable to the fact of the neglect or unskillful treatment on the part of the defendants in the treatment of his arm."—Approved: Beadle v. Paine, 46 Ore. 424, 429, 80 Pac. 903.

§ 4057. Not Liable for Want of Success or Errors of Judgment.

"The court instructs the jury that in determining this case they are to consider that the defendant did not warrant a cure; but his contract, as implied in law, was that he possessed that reasonable degree of learning, skill and experience which is ordinarily possessed by others of his profession; that he would use reasonable and ordinary care and diligence in the treatment of the case; and that he would use his best judgment in all matters of doubt as to the proper course of treatment. The defendant is not responsible in damages for want of success, unless it is shown from the evidence to result from the want of ordinary skill and learning, and such as is ordinarily possessed by others of his profession acting under like circumstances, or from want of ordinary care and attention.

"The employment of the defendant by plaintiff was not for extraordinary diligence and care, and defendant cannot be made responsible in damages for errors in judgment, or mere mistakes in matters of doubt or uncertainty, provided he exercised and used in the treatment of the plaintiff such reasonable skill and diligence as is ordinarily exercised and used in the practice of the profession of defendant by those who practice under like conditions."—Approved: Wheeler v. Bowles, 163 Mo. 398, 63 S. W. 675.

§ 4058. Not Liable for Subsequent Injuries.

"If the shoulder joint of the plaintiff slipped out of place, (that is, was redislocated), after being properly set and treated by defendant, when called upon to treat her for dislocation of the shoulder, as charged, and the patient dismissed, then the plaintiff cannot recover herein, and the verdict must be for defendant."—Wheeler v. Bowles, 163 Mo. 398, 63 S. W. 675.

§ 4059. Mere Proof of Ordinary Skill Constitutes no Defense.

"The court instructs the jury that the terms 'careless' and 'negligent' as used in these instructions, do not imply lack of skill or capacity, but simply a disregard of ordinary prudence, and, although you may believe the defendant, B—, to have possessed all the qualifica-

tions necessary to a competent and skillful physician and surgeon, yet, if it has been proven that he was careless and negligent in reducing the dislocation of plaintiff's shoulder, and that through such carelessness and negligence plaintiff's shoulder has been permanently injured, lamed, and disfigured, then the mere fact that the defendant may have been competent and skillful constitutes no defense to this action."—Approved: Wheeler v. Bowles, 163 Mo. 398, 63 S. W. 675.

§ 4060. Contributory Negligence of Patient Barring Recovery.

"If you shall find that the defendant directed the plaintiff to observe absolute rest, as a part of the treatment to said foot, and that direction was such as a surgeon or physician of ordinary skill would adopt or sanction, and the plaintiff negligently failed to observe such direction, or purposely disobeyed the same, and that such neglect or disobedience approximately contributed to the injuries of which he complains, he can not recover in this action, though he may prove that the defendant's negligence and want of skill also contributed to the injury."—Approved: Geiselman v. Scott, 25 Ohio St. 86, 87.

§ 4061. Failure to Use X Ray Machine as Evidence of Negligence.

"I instruct you that it was not negligence of the defendants, or lack of proper skill on their part, for them not to have an X ray machine, or for them not to use the same in the treatment of plaintiff's arm, unless such machine was usually employed by physicians and surgeons in the same general locality in which the defendants were practicing their profession or in similar localities."—Approved: Beadle v. Paine, 46 Ore. 424, 428, 80 Pac. 903.

§ 4062. Unauthorized Autopsy upon the Dead Body of a Relative.

"The jury should find for the plaintiff, unless the jury believe from the evidence that the defendants C— and D—, in making the autopsy upon the body of Alice R—, did so for the sole purpose in good faith of ascertaining the cause of the death of said R—, in order that they, or one of them, might be able to correctly give a certificate stating the cause of the death of said R— for the purpose of obtaining a permit for the burial of the body of said R—; and the jury should also find for the plaintiff, unless they believe from the evidence that said autopsy was properly and decently performed with due regard to the sex of said R—, and without making any unnecessary incisions into, or mutilation of, the body of said R—. If the jury find for the plaintiff, they should find against the defendants C— and D—. If they find against said two defendants, they should also find against the defendant M—, provided the jury further believe from the evidence that said M—, after having custody of the body of said R—, consented that an autopsy might be made upon said body, and voluntarily gave to said C— or D—, or both of them, permission to make said autopsy. If the jury believe, from the evidence, that the defendants C— and D—, in making the autopsy upon the body of Alice R—, made said autopsy decently, with due regard to the sex of said R—, making no unnecessary incisions into or mutilation of the body, and that said

autopsy was made in good faith for the purpose of ascertaining the cause of the death of said R—, in order that such a certificate might be given as would procure a permit for the burial of the body of said R—, the jury should find for the defendants. The jury should find for the defendant M—, no matter whatever fact may be proved in this case, unless the jury believe from the evidence that, after M— had the custody of the body of Alice R—, he voluntarily consented to the making of an autopsy upon said body. If the jury find for the plaintiff, they should find for her in such sum in damages, not exceeding $5,000, as will fairly compensate her for any suffering caused her by reason of the fact that the body of Alice R— had been dissected or mutilated. If the jury find for the plaintiff, they may find against all of the defendants, or they may find against C— and D—, and find for M—, as the facts in this case, under the law given in these instructions, may warrant them."—Approved: Meyers v. Clarke, 122 Ky. 866, 90 S. W. 1049.

§ 4063. Agent or Servant—Care and Skill Required.

"The court instructs the jury that if you shall believe from the evidence that K— was the agent, servant or employe of defendants, and that, as such agent, servant or employe, said K— rendered treatment to plaintiff, then it was his duty to treat her with ordinary care and skill; and if you shall believe from the evidence that while he was treating her, as the agent, servant or employe of defendants, he violently bruised, bent, twisted or wrenched plaintiff's back or spine, and that such treatment was improper, and not such as an ordinary, careful and skillful man would have given the plaintiff under the circumstances, you will find that defendants' treatment of the plaintiff by said K—, as their agent, servant and employe, was careless, negligent and unskillful.

"The court instructs the jury that if you shall believe from the evidence that K—, as the agent, servant and employe of the defendants, did carelessly, negligently and unskillfully treat plaintiff, as defined in the previous instructions and that by such treatment he did hurt, bruise and injure plaintiff in and upon her back, spine, or pelvic organs, your verdict must be for the plaintiff."—Approved: Longan v. Weltmer, 180 Mo. 322, 79 S. W. 655, 64 L. R. A. 969.

CHAPTER CXI.

MASTER AND SERVANT—CONTRACT RELATION.

§ 4065. Wrongful Discharge—Reasonable Diligence to Obtain Other Employment.
4066. Wrongful Discharge—Servant Engaging in Business—Earnings Deducted.
4067. Changing Employment is Breach Amounting to Wrongful Discharge.
4068. Wrongful Discharge—Servant to Prove Faithful Performance of Duty.
4069. If Good Cause for Discharge Existed and is Afterwards Discovered, it is a Defense.

§ 4065. Wrongful Discharge—Reasonable Diligence to Obtain Other Employment.

"If you find that plaintiff was discharged from his said employment, consider the second matter already indicated. That matter is this: After plaintiff's discharge, if discharged, did plaintiff use reasonable diligence to secure employment at said place? The burden is upon plaintiff to show that he did. If, then, upon considering this matter, you find and believe from the evidence that plaintiff did use reasonable diligence to secure employment and failed, then you may allow him on account of this against defendants $5 for each day that he remains at said Nome after said discharge and failed to find employment. You will observe that there will remain some time from the time plaintiff left Cape Nome to go to Seattle, to the end of said three months, to wit, September 24, 1900. Now, as to that time, if you find and believe from the evidence that no employment could then have been had by the use of reasonable diligence at said Cape Nome by plaintiff up to said September 24, 1900, then you may allow him on account of such time the sum of $5 per day for each day thereof. The total amount, if anything, allowed by you for plaintiff, shall not exceed the sum of 20 days, at five dollars per day, with interest on the amount so allowed by you, if anything.

" 'Reasonable diligence,' as used in these instructions, as meant by them, is such diligence as a man of ordinary care and prudence, desiring work, would make, under the circumstances surrounding plaintiff at said place, to get it. In other words, the reasonable diligence that plaintiff should have made at said place to obtain employment is such care or diligence as such a man at such a place, desiring work, would ordinarily and reasonably make to get it. As to what such

effort or diligence is in this case, you are to determine from the facts and circumstances surrounding the matter at the time in question."—Approved: Gillespie v. Ashford, 125 Iowa, 729, 101 N. W. 649.

§ 4066. Wrongful Discharge—Servant Engaging in Business—Earnings Deducted.

"It does not appear from the evidence that, after the plaintiff's business relations with defendant were severed, plaintiff sought employment at the hands of any third person. However, the plaintiff admits and testifies that he could have obtained employment as a bookkeeper, at a salary of $75 per month. Therefore, if you find the plaintiff was wrongfully discharged, you will take from the amount which he was to receive under the contract at $250 per month, from the 14th day of February, 1904, to the 8th day of September, 1904, the sum of $75 per month for said time, and add to this remainder the sum of $138, which was due the plaintiff at the time their business relations ceased, unless you find for the plaintiff under the following paragraph of this charge. The testimony shows that, after the business relations between plaintiff and defendant were severed, plaintiff engaged in business on his own account, and if you find from the evidence taht the plaintiff was wrongfully discharged from defendant's employment, and further find that the reasonable value of his services to himself in his business was in excess of $75 per month for the period of time between the 14th day of February, 1904, and the 8th day of September, 1904, then the measure of your finding should be the contract price of $250 per month from the 14th day of February, 1904, to the 8th day of September, 1904, less the reasonable value of his services to himself in his business, with interest at 6 per cent. per annum from the 8th day of February, 1904, and to this amount add $138. The value of plaintiff's services to himself need not be limited to profits which he might have received during the time that elapsed between the 14th day of February and the 8th day of September, 1904, but you may consider all the circumstances and facts in evidence before you, in order to determine what was the reasonable value of plaintiff's services to his business that were rendered prior to September 8, 1904."—Approved: Wolf Cigar Stores Co. v. Kramer, 50 Tex. Civ. App. 411, 109 S. W. 990.

§ 4067. Changing Employment is Breach Amounting to Wrongful Discharge.

"If you find from the evidence that plaintiff was ordered to assume a position with duties materially different or inferior from those for which he had contracted, and if you further find that he refused to do so, and that, because of such refusal, the keys of store No. 4 were demanded of him, and he surrendered the keys, then you are instructed that plaintiff was wrongfully discharged, and you will find for the plaintiff."—Approved: Wolf Cigar Stores Co. v. Kramer, 50 Tex. Civ. App. 411, 109 S. W. 990.

§ 4068. Wrongful Discharge—Servant to Prove Faithful Permormance of Duty.

"The court instructs the jury that if they shall believe from the evidence that the defendant before the institution of this suit made the contract shown in evidence by which it employed the plaintiff, and that by the terms of said contract, the plaintiff was to act as ———— for the term of ———— from the —— of ————, 19—, at a salary of ————, and that plaintiff entered into the discharge of his duties as prescribed in the contract and did faithfully and efficiently perform the duties of his position and give his entire time and attention thereto and that plaintiff offered to serve the defendant in the position which he was to fulfill under the contract for the prescribed term, but defendant refused to allow the plaintiff so to do and discharged him from his services before the expiration of the prescribed term, then the verdict of the jury must be for plaintiff."—Approved: Equitable Endowment Ass'n v. Fisher, 71 Md. 430.

§ 4069. If Good Cause for Discharge Existed and is Afterwards Discovered, it is a Defense.

"The court instructs the jury that although a good cause for the discharge of the servant existed at the time of his discharge, and was not known to the master at the time, nevertheless he may avail himself of this cause as a defense to this action."—Approved: Crescent Horse-Shoe & Iron Co. v. Eynon, 95 Va. 151.

CHAPTER CXII.

MECHANICS' LIENS.

§ 4070. Specific Purpose of Material Furnished.
4071. No Lien Except for Material Actually Going into Building.
4071a. Materials and Labor Furnished on Percentage.
4072. Unless Furnished on Representation of Owner that they were to be so used.
4073. Material Sold to Contractor Going into Building.
4074. Possession under Contract to Purchase—Right to Create Lien.
4075. Contiguous Fractional Parts of Lots Constituting One Body of Land.
4076. Assignee Entitled to Enforce Subcontractor's Lien.
4077. Completion and Acceptance of Work Fixes Time for Filing Lien.
4078. Extra Work and Extra Material Embraced in Lienable Claim.
4079. Abandonment by Contractor not at Expense of Owner in Favor of Subcontractors.
4080. Facts Creating and Perfecting Lien under Missouri Statute.

§ 4070. Specific Purpose of Material Furnished.

"Unless the defendants B— & G— were contractors under B— either for the erection or for the furnishing of materials for the erection of the buildings in question, and, as such contractors, subcontracted with said T— to obtain the brick in question for the specific purpose of being used in the erection of the houses in question, the plaintiff cannot recover against B—."—Approved: Hause v. Thompson, 36 Mo. 450.

§ 4071. No Lien Except for Materials Actually Going into Building.

"The petitioner is not entitled to any lien for materials furnished by him which were not actually incorporated in the building; he is not entitled to claim a lien for that portion of any materials furnished by him which was wasted, otherwise than as would be probably incident to the preparation of the materials for the construction of the house, and through being wrought into the house, or which were thrown away or rejected as useless or needless in erecting the building; and the burden of proof is on the petitioner to show, first, that the materials were furnished by him as alleged in his petition, and secondly, that such materials, so furnished by him, were substantially actually used in the construction of the house, and thirdly, for what sum, if any, the petitioner ought to maintain a lien."—Approved: Buck v. Hall, 170 Mass. 419, 49 N. E. 658.

§ 4071a. Materials and Labor Furnished on Percentage.

"The court instructs the jury that if they find from the evidence that plaintiff and defendant entered into a contract whereby plaintiff was to do the plumbing, mentioned in the petition, in the building and on the premises known as ———, and if they further find that plaintiff was to procure both the materials and labor required upon said plumbing job and that said labor and materials were to be furnished at the cost thereof; that in addition to said cost of materials and labor the plaintiff was to receive ——— per cent. on the amount of said costs to remunerate it for its services in superintending and managing said work; then you will compute the actual cost of the materials and work which you may find from the evidence were used in said work and in installing the same in and upon said premises, and after the amount is thus determined you will add thereto ——— per cent. of said cost of materials and labor, and after allowing all credits, if any, to which defendant is entitled, render your verdict for the amount thus found due not exceeding the sum sued for."—Approved: Schoen Plumbing Co. v. Hugunin (Mo. App.), 135 S. W. 967.

§ 4072. Unless Furnished on Representation of Owner that they were to be so Used.

"Gentlemen of the jury: This is a lien, a mechanic's lien, filed against two properties and subsequently apportioned, with both suits tried here as one.

"The law gives a claim to a man who furnishes material or who does work upon the credit of a building against that building for that which he has furnished or that which he has done. The plaintiff's contention is here that the defendant personally contracted with him for the delivery of such articles as she wanted to be used in the construction of these two houses, and that he subsequently gave to her, or gave to her son, the articles which are embraced in the lien. If that is so, he is entitled to claim against the property, and having filed his claim, he is entitled to a verdict here for the total amount of his claim, with interest from the various deliveries."—Approved: Coverdill v. Heath, 12 Pa. Super. Ct. 15.

§ 4073. Material Sold to Contractor Going Into Building.

(a) "The court further declares the law to be, that if the court believes from the evidence that plaintiff furnished material upon the building erected by said C— on the land described in the plaintiff's lien and petition, and under a contract with said C—, and that said material entered into and became a part of said building, and that thereafter plaintiff complied with all the statutory requirements for establishing a mechanic's lien, then plaintiff is entitled to such a lien on said building."—Approved: Sawyer-Austin L. Co. v. Clark, 172 Mo. 592, 73 S. W. 137.

(b) "If the Court, sitting as a jury, believes from the evidence that Henry L. B— was the owner of the premises described in plaintiff's petition, and that he contracted with R. F. B—, or B— & G—, to

furnish brick; that said B— contracted with defendant B. A. T— to furnish brick under the arrangement made by B—, or B— & G—, with B—; that said B. A. T— purchased the amount of brick sued for from plaintiff, and had it delivered by plaintiff at said premises described in the petition, and the same were used in erecting said buildings, and that said plaintiff was never paid for said brick so delivered, then said plaintiff is entitled not only to a general judgment against said B. A. T—, but also to a special one against the said buildings, even although it may appear that said defendants B— (or B— & G—) and B. A. T— were paid in full for the material so delivered by B—, the owner; it, of course, appearing that notice of lien had been duly served, and lien duly filed in time, and suit brought within ninety days after filing the lien."—Approved: Hause v. Thompson, 36 Mo. 450.

§ 4074. Possession Under Contract to Purchase—Right to Create Lien.

"The court declares the law to be that if the court believe from the evidence that defendant C— was in possession of the land under and by virtue of a contract to purchase the same from defendant Fisher, the owner, and while in possession thereof began the erection of a building thereon, then said C— had an interest in said land as owner, within the purview of the Missouri statutes and could subject said building and his interest in the land to a mechanic's lien."—Approved: Sawyer & Austin L. Co. v. Clark, 172 Mo. 588, 73 S. W. 137.

§ 4075. Contiguous Fractional Parts of Lots Constituting One Body of Land.

"The court declares the law to be, that if the court believes from the evidence that defendant F—, being the owner of lots 18 and 19 in block 11 of Evans Place in city block 3732 of the city of St. Louis, entered into a contract of sale with defendant C— whereby he agreed to sell to him the eastern twenty-five feet of said lot 19 and the western one foot nine and one-half inches of lot 18, and in pursuance of said agreement said C— entered upon and took possession of said piece of land, and began the erection of improvements thereon, then said lot of land is one complete and entire lot, as regards defendants F— and C—, and all those claiming through or under them."—Approved: Sawyer-Austin L. Co. v. Clark, 172 Mo. 592, 73 S. W. 137.

§ 4076. Assignee Entitled to Enforce Subcontractor's Lien.

"The court instructs the jury that if you believe from the evidence that Daniel D— and Jerome D— were co-partners, doing business as D— Bros., and that they furnished the materials and performed the work and labor for laying 1,089,362 brick in the wall mentioned in the lien account read in evidence, under the contract with defendant H—, and that said D— Bros., or either of them, acting for the firm, assigned for value to plaintiff their right in and to said account, then you are instructed that you will find for the plaintiff, and against defendant H—, and assess plaintiff's damages at such

sum as you may believe from the evidence to be a fair, reasonable value for said material and work and labor, not exceeding $12,800, less such payments as you may find were made by defendant H—, or any one for him, to said D— Bros., or plaintiff, on account of said materials and work and labor, together with interest from April 22, 1896, at 6 per cent. per annum."—Approved: Ittner v. Hughes, 154 Mo. 55, 55 S. W. 267.

§ 4077. Completion and Acceptance of Work Fixes Time for Filing Lien.

"The court instructs the jury that if they believe from the evidence that in November, 1896, the General Fire Extinguisher Company was engaged in doing work upon the sprinkler system described in the evidence, and that at the time said work was being done the contract work and material thereof had not been fully completed, or accepted by the parties in the contracts as completed, and that it was understood and agreed between the General Fire Extinguisher Company, the Farmers' Elevator Company and Schwartz Brothers Commission Company, that said work was being done by the General Fire Extinguisher Company, under and for the purpose of fully complying with and completing its said written contracts with Schwartz Brothers Commission Company, which have been admitted in evidence, then the court instructs the jury that they must not find that the work under said contracts was completed at an earlier date."—Approved: Fire Extinguisher Co. v. Schwartz Bros. Com. Co., 165 Mo. 171, 65 S. S. 318.

§ 4078. Extra Work and Extra Material Embraced in Lienable Claim.

"The jury are instructed that if H— made any alterations or changes and thereby did extra work and furnished extra material, in the building and construction of the house, the defendant would be liable to H— for the reasonable value of said extra work and material in addition to the contract price for said building."—Approved: Williamson v. Smith & Co. (Tex. Civ. App.), 79 S. W. 51 (not reported in state reports).

§ 4079. Abandonment by Contractor not at Expense of Owner in Favor of Subcontractors.

"The jury are further instructed that the mechanic's lien law is not intended to compel an owner to pay more than the original contract price for constructing a building. If, therefore, the jury find from the evidence that on the 3d day of October, A. D. 1872, William A. C—, the defendant, had rightly paid the sum of $8,300, on an original contract for constructing the building 159 Fifth avenue, Chicago, and that the original contract price for constructing said building was $13,300; that the original contractors abandoned their contract on said building on the third day of October, 1872, and that, after said abandonment by the original contractors, the defendant was compelled to finish said building, and that in finishing the same in the manner provided for in the original contract, he has actually, and

reasonably, and rightfully paid out more than $5,000 over and above the amount previously paid on the original contract, then in this action the plaintiffs are not entitled to recover."—Approved: Biggs v. Clapp, 74 Ill. 335.

§ 4080. Facts Creating and Perfecting Lien Under Missouri Statute.

"And if you further believe from the evidence that defendant Blackmer & Post Pipe Company was the owner of the premises described in the lien read in evidence, and that it contracted with said H— to erect the building, boiler house, and smoke stack, including the brick work mentioned in said lien, and that said D— Bros. under contract with said H—, furnished the materials and performed the work and labor for laying 1,089,362 brick in the wall, set forth in the lien account for said building, boiler house and smoke stack, and that said materials and said work and labor actually entered into the construction of the same and were furnished and performed at the times mentioned in said lien account, and that the prices charged therefor in said account are reasonable; and if you further believe that said D— Bros., or either of them, acting for said firm, within four months after the accruing of said account, filed in the office of the circuit court of the city of St. Louis, Missouri, a just and true account of the demand due them, after all just credits had been given, together with the names of the owner and contractor, and a true description of the property sought to be charged with the lien, all verified by affidavit, and that more than ten days prior to the filing of said lien, said D— Bros., or either of them, acting for said firm, gave notice in writing to the Blackmer & Post Pipe Company for their demands, the amount due and from whom due, and of their intention to file a lien for the same under the mechanic's lien law, and that this suit was begun within ninety days after the lien read in evidence was filed; and if you further believe that said D— Bros., or either of them, acting for said firm, after giving the said notice, and after filing said lien and account, for value received, assigned said lien and account to the plaintiff,—then the court instructs you that the plaintiff is entitled to a mechanic's lien upon the premises described in the lien, for such a sum, if any, as you may find from the evidence to be due him in the case; that is to say, for such a sum as you may find from the evidence in the case to be due from defendant H— on account of said materials and work and labor so furnished and done by D— Bros., as set forth in the lien account."—Approved: Ittner v. Hughes, 154 Mo. 55, 55 S. W. 267.

CHAPTER CXIII.

MINING CLAIMS.

§ 4081. What Constitutes Quartz Mining Claim.
4082. Lead, Vein and Lode Defined with Reference to Placer Claim.
4083. Trespass by Entering on Ledge with Apex in Adjoining Location.
4084. Right of Locater to Follow Ledge on its Dip Beyond Side Lines.
4085. Title to Mining Claim Incomplete Until Proper Location.
4086. Marking Boundaries with Posts at Nearest Practicable Points.
4087. "Known Vein" Defined.
4088. Subsequent Location Overlapping a Prior One.

§ 4081. What Constitutes Quartz Mining Claim.

"To constitute a quartz mining claim, certain things are absolutely necessary: First, that a vein or lode of rock in place bearing minerals exists within the boundary lines of the mining claim; second, that the person purporting to locate the said claim has discovered this vein or lode before the location can be made."—Approved: La Grande Inv. Co. v. Shaw, 44 Ore. 416, 72 Pac. 795.

§ 4082. Lead, Vein and Lode Defined with Reference to Placer Claim.

"The court instructs the jury that a vein, as the same is understood and defined by law, is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. In this definition the elements are a body of mineral or mineral-bearing rock and the boundaries. With either of these well established, very slight evidence can be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lead, whatever the boundaries may be. In the existence of such a body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lead. Such boundaries constitute a fissure, and, if in such fissure ore is found, although at considerable intervals, and in small quantities, it is called a vein or lode. The jury is instructed, however, that not every vein or lode within the exterior limits of a placer claim is excepted from a placer patent unless the application is made for such vein or lode when the patent for the placer is applied for; but only such a vein or lode as comes within the definition of a known vein or lode as the same is defined in these instructions."—Approved: Noyes v. Clifford, 37 Mont. 138, 94 Pac. 842.

§ 4083. Trespass by Entering on Ledge With Apex in Adjoining Location.

"If you find from the evidence that the defendant entered upon a ledge having its apex within the exterior boundaries of plaintiff's location, and extracted ore therefrom between the planes drawn vertically downward through the end lines of said location, the right of the plaintiff to recover damages for such acts would not be affected by proof merely that the place from which such ore was extracted could be reached by going continuously through ledge matter from a ledge having its apex within the exterior boundaries of a prior location belonging to the defendant. In order that such proof should avail the defendant, it must further appear that such passage from the apex of defendant's ledge is made continuously downward on the dip of that ledge; and, if any portion of such passage must necessarily be made either upward or laterally along the strike, then the plaintiff's right to recover is not affected."—Approved: Southern Nevada Gold & Silver Min. Co. v. Holmes Min. Co., 27 Nev. 107, 73 Pac. 759.

§ 4084. Right of Locator to Follow Ledge in its Dip Beyond Side Lines.

"The right of the owner of a mining location to follow a ledge beyond his side lines is limited to the right to follow the ledge downward—that is, on its dip; and he has not the right to follow it laterally, or along its strike. If, therefore, a ledge so bends or curves in its course or strike that vertical planes drawn through the end lines of that location will include a portion of the dip of the ledge which cannot be reached from that location without following laterally or along its strike, then the owner of the location has not the right to enter upon that portion of the ledge, or to extract any ore therefrom."—Approved: Southern Nevada Gold & Silver Min. Co. v. Holmes Min. Co., 27 Nev. 107, 73 Pac. 759.

§ 4085. Title to Mining Claim Incomplete Until Proper Location.

"The court instructs the jury that the existence of a mining location as contemplated by the United States law (that is, discovery of a mineral-bearing lode in place, and the marking and staking upon the ground of the claim) for the claims described in the contract herein and to be conveyed by such deed as is provided for, is a condition precedent for plaintiff's rights to recover the contract price. And if you find that the plaintiff did not have all the claims so properly located at the time of the making of the contract and the execution of the deed, then plaintiff is not entitled to recover."—Approved: La Grande Inv. Co. v. Shaw, 44 Ore. 416, 72 Pac. 795.

"If the jury finds from the evidence that there is, within the lines of the General T— No. 3, the apex of the ledge, which leaves that location by crossing its easterly side line, and which enters the Chief of the Hlll by crossing its westerly end line, and which thereafter continues easterly on its course or strike within the side lines of the latter location, and that the course of that ledge is so bent or curved that its dip within the Chief of the Hills makes a large angle with its dip within the General T— No. 3, so that a portion of the dip included within ver-

tical planes drawn downward through the end lines of each of said locations cannot be reached from the General T— No. 3 without following the ledge laterally or along its strike, then the defendant, as the owner of the latter location, had not and has not the right to enter upon or extract ore from that portion of said ledge."—Approved: Southern Nevada Gold & Silver Min. Co. v. Holmes Min. Co., 27 Nev. 107, 73 Pac. 759.

§ 4086. Marking Boundaries with Posts at Nearest Practicable Points.

"Where in marking the surface boundaries of a claim, any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked to designate the proper place.

"Upon that point the court instructs you that unless you find from the evidence that the souhwest corner of the Tecumseh claim fell upon precipitous ground, and within the lines of the rails of the Florence & Cripple Creek Railroad, or so near to one or the other of them that the erection thereof would be interfered with by the passage of trains, and was for that reason impracticable, then you are instructed that it was the duty of the plaintiff to set his post at such corner. If, upon the other hand, you should believe that the proper place of such stake was within the lines of the rails of said road, then you are instructed that, under the statute, such witness corner shall be set at the nearest practicable point. Whether this was done, you are to determine from the evidence in the case; and unless you should believe, in that event, that the said witness corner was set substantially at the nearest practicable point, the marking of said claim would be invalid.

"In this connection the court instructs you that if you believe from the evidence that the southwest corner of the Tecumseh lode fell right on the roadbed of the Florence & Cripple Creek Railroad, and that such point was precipitous ground, where the proper placing of such corner was impracticable, and that plaintiff placed such corner stone at the nearest practicable point, suitably marked to designate the proper place, then such corner was sufficient and valid."—Approved: Beals v. Cone, 27 Colo. 473, 62 Pac. 948.

§ 4087. "Known Vein" Defined.

"A known vein, within the meaning of the term as used in these instructions, is a vein known to exist at the time of the application which has been clearly ascertained, and is of such an extent and value as to render the land more valuable on that account and to justify its exploitation, and extraction of the mineral therefrom. This does not necessarily mean that the vein must show mineral values to such extent as would make the working of the same a profitable pursuit at the place where it is exposed; nor is it necessary that the values contained shall be such as to demonstrate or prove that there exists a shoot or body of ore within the vein which it will pay to develop and extract. The phrase, 'of such value as to justify the exploitation of the vein and extraction of the mineral therefrom,' is intended to mean, and does

mean, that the vein is of such a character as would justify an ordinary person who was seeking in good faith to develop a mine in developing and working upon the said vein. In considering, however, the question as to whether or not any vein is a known vein, within the meaning of the term, it is proper, and you should take into consideration the amount of ore, the facility of working and reaching it, as well as the product per ton which might or could be obtained therefrom, at the time of the application for patent."—Approved: Noyes v. Clifford, 37 Mont. 138, 94 Pac. 842.

§ 4088. Subsequent Location Overlapping a Prior One.

"The court instructs the jury that where two mining companies take up adjoining claims, and the one last taken up overlaps the other, and neither company is working that portion of the claim which overlaps the other, but are working in different portions of their respective claims, the fact that the locators of the last claim located have been in possession of their claim for five years, does not divest the owners of the first claim of the right to their claim to the extent of the original boundaries, and such a possession by the locators of the last claim located is not adverse to the possession of those who located the first claim."—Approved: Maine Boys' Tunnel Co. v. Boston Tunnel Co., 37 Cal. 40.

CHAPTER CXIV.

NEGLIGENCE—PERSONAL INJURIES.

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§ 4089. Ordinary Care Defined.

(a) "Ordinary care as used in these instructions is such care as an ordinarily prudent person would ordinarily use under the same or similar circumstances; and negligence is the failure to use such care." Approved: Eilerman v. Farmer (Ky.), 118 S. W. 289.

(b) "Ordinary care as used in these instructions is that degree of care that ordinarily prudent persons would usually exercise if surrounded by the same or similar circumstances to those proven in this case.

"Negligence is the failure to exercise ordinary care."—Approved: Cross v. Illinois Cent. R. Co. (Ky.), 110 S. W. 290 (not reported in state reports).

(c) "The court instructs the jury that by 'ordinary care,' the law means such a degree of care, under the circumstances and in the situation in which the plaintiff was placed at the time, so far as that may be shown by the evidence, if it is so shown, as an ordinarily prudent or careful person would exercise under like or similar circumstances." Approved: Chicago City Ry. Co. v. Ryan, 225 Ill. 287, 80 N. E. 116.

(d) "By ordinary care is meant that care which a person of common prudence takes of his own concerns, or that degree of care which men of common prudence exercise about their own affairs, in the age and country in which they live. In determining what would be ordinary care in a particular case, reference must be had to the actual state of society, the business habits, and general usages peculiar to the time and country. What is done by men of ordinary prudence in any particular country, in respect to things of a like nature, whether it be more or less, in point of diligence, than what is exacted in another country, becomes, in fact, the general measure of diligence."—Approved: Derosia v. Winona, etc., R. Co., 18 Minn. 133.

§ 4090. Neligence Negatively Defined as the Want of Ordinary Care.

(a) "Now, 'negligence,' as the term may be applied in this case, gentlemen, it may be stated, is another term for 'want of ordinary

care.' At every turn of this case, gentlemen, you will be confronted with the question was this act, was that act, whether of the plaintiff or defendant, such as an ordinarily prudent man would not have done? Or was this omission or that omission to act an omission that could not be predicated of a man acting prudently in the circumstances of the case? Now, then, ordinary care is the care which may be reasonably expected of a man in the given circumstances. It is not always the same degree of care. A reasonable man, in some situations, will exercise extraordinary care, and he should do it; and it is yet ordinary care in reference to the circumstances or exigencies of the case. We sometimes say—and well enough—that, the greater the danger, the greater the necessity for the care. That is a practical consideration for you to take into account with reference to these claims on the one side and the other, as to the situation there, and the occasion demanded for extraordinary attention and care."—Approved: Nesbit v. Crosby, 74 Conn. 554, 51 Atl. 550.

(b) "Negligence is the failure to use ordinary care. Ordinary care is such care as an ordinarily prudent person would ordinarily use under the same or similar circumstances to those proven in this case."—Approved: Sharp v. Layne (Ky.), 117 S. W. 292.

(c) "The jury are further instructed that negligence is the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable man would not do."—Approved: Perryman v. Chicago City R. Co., 242 Ill. 269, 89 N. E. 980.

(d) "Negligence, as a law term, means the want of ordinary care; that is, the want of such care as an ordinarily prudent person would have exercised under the same or similar circumstances."—Approved: Texas & N. O. R. Co. v. Jackson, 51 Tex. Civ. App. 646, 113 S. W. 628.

§ 4091. Same Defined is Want of Reasonable Care Under Given Circumstances.

(a) "One definition of the word 'negligence' is this: Negligence consists in a want of that reasonable care which should be exercised by a person of ordinary prudence, under all the existing circumstances, in view of probable injury. Negligence is the failure to observe, for the protection of another's interest, such care, precaution and vigilance as the circumstances justly demand, and a want of which causes injury. Ordinary care as used in these cases has relation to the situation and condition of the parties, and varies according to the exigencies which require diligence and attention. The question of diligence or negligence in these cases always depends upon the circumstances peculiar to each particular case."—Approved: Smith v. Detroit United Ry., 155 Mich. 466, 119 N. W. 641.

(b) "Negligence is the absence of such care, prudence, and attention as, under the circumstances, duty requires should be given or exercised. It is the omission to do something which a reasonable man, guided by the considerations which ordinarily regulate the conduct of human affairs, would do, in the circumstances shown, or it is the doing of something which such prudent and reasonable man would not do,

in the circumstances."—Approved: Omaha St. Ry. Co. v. Loehneisen, 40 Neb. 37, 58 N. W. 535.

§ 4092. Same—Failure to Exercise Same Care as Prudent Person in His Own Affairs.

(a) "Negligence is a failure to exercise that degree of care and diligence that an ordinarily prudent person would have exercised in his own affairs under like or similar circumstances."—Approved: German Ins. Co. v. Chicago & N. W. Ry. Co., 128 Iowa, 386, 104 N. W. 361.

(b) "Negligence is the failure to exercise such care as is ordinarily exercised by careful and prudent persons under the same or similar circumstances in the same or similar business."—Approved: Louisville & N. R. Co. v. Carter (Ky.), 112 S. W. 904 (not reported in state reports).

§ 4093. Same—Omitting or Doing what Reasonable Man Ordinarily Would or Would Not Do.

(a) "The jury are further instructed that negligence is the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable man would not do."—Approved: Perryman v. Chicago City Ry. Co., 242 Ill. 269, 89 N. E. 980.

(b) "The court defined negligence to the jury as 'the want or omission of reasonable care and diligence, the failure to do something which a reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs, under the circumstances would do, or the doing of something which such person under such circumstances, would not do.' "—Approved: Martin v. Des Moines Edison Light Co., 131 Iowa, 724, 106 N. W. 359.

§ 4094. Same—Does not Import Absolute Freedom from Neglect.

"The law does not require the plaintiff in an action for personal injuries to be absolutely free from any neglect whatever in order to recover, for such a requirement would impose upon him the duty of exercising extraordinary care and prudence, which is not the standard by which his neglect is measured. All the law required of the plaintiff is the exercise of ordinary care under the circumstances surrounding him, and this he may do although he may be guilty of some slight neglect in the broadest sense of that term."—Approved: McCormick v. Seattle Electric Co., 49 Wash. 652, 96 Pac. 220.

§ 4095. Gross Negligence—Failure to use Care of Careless Persons.

" 'Gross negligence,' as used in the instructions, means the failure to use such care as careless and inattentive persons usually exercise under circumstances similar to those under investigation."—Approved: Illinois Cent. Ry. Co. v. Cane's Adm'x (Ky.), 90 S. W. 1061 (not reported in state reports).

§ 4096. Accident—Occurrence not Caused by Want of Ordinary Care.

(a) "In order to recover, the plaintiff must prove to your satisfaction that the act causing the injury complained of was one that, in the

exercise of reasonable care and foresight, the defendant ought to have anticipated and foreseen. If, therefore, you find from the evidence that the accident and resulting injury complained of was one which, in the exercise of reasonable care at the time of the accident, defendant could not have reasonably foreseen, then it belongs to that class of occurrences which in law are known as 'accidental,' and for which no liability exists."—Approved: Parry Mfg. Co. v. Eaton, 41 Ind. App. 81, 83 N. E. 510.

(b) "You are instructed that an accident is such an unavoidable casualty as acts without anybody being to blame for it; that is, without anybody being guilty of negligence in doing or permitting to be done, or any omitting to do, the particular things that caused such casualty." Approved: Briscoe v. Metropolitan, 222 Mo. 104, 120 S. W. 1162.

(c) "The court instructs the jury that, if they should believe from the evidence that Norman C— was injured as a mere accident, they must find for the defendant, and this although they may believe Norman C— was also free from fault."—Approved: Atlantic C. L. R. Co. v. Caple, 110 Va. 514, 66 S. E. 855.

§ 4097. Burden of Proof on Party Affirming Negligence.

(a) "The burden of proving negligence rests upon the party alleging it, and, where a party charges negligence on the part of another as a cause of action, she must prove the negligence by a preponderance of evidence; and in this case, if the jury find that the weight of evidence is in favor of the defendant, or that it is equally balanced, then the plaintiff cannot recover, and the jury should find the issues for the defendant."—Approved: Struble v. Village of De Witt, 81 Neb. 504, 116 N. W. 154.

(b) "You are instructed that the burden of proof is upon the plaintiff to prove his issue by a preponderance of the evidence, and if he fails to discharge such burden as to all, or any, of the elements charged to you in the next preceding paragraph, your verdict will be for the defendant."—Approved: Missouri Valley Bridge & Iron Co. v. Ballard, 53 Tex. Civ. App. 110, 116 S. W. 93.

(c) "The burden of proof is on the plaintiff to show by a preponderance of the evidence, by which is meant the greater weight and degree of credible testimony, the facts which will entitle him to recover. A like burden is on defendant to establish its plea of contributory negligence of plaintiff."—Approved: Houston & T. C. R. Co. v. Johnson (Tex. Civ. App.), 118 S. W. 1150.

§ 4098. Burden on Party Affirming Negligence as Proximate Cause of Injury.

(a) "Before the plaintiff is entitled to recover in this case, she must establish by a fair preponderance of the evidence: First, that she received the injuries, or some part thereof, as alleged in her complaint; second, that the carelessness and negligence of the defendant company, its agents or servants, were the direct and proximate cause of such injury."—Approved: Indianapolis Traction & Terminal Co. v. Miller, 43 Ind. App. 717, 88 N. E. 526.

(b) "In an action for injuries alleged to have been caused through the negligence of the defendant, it is sufficient for the plaintiff to show, in the first instance, that the injury resulted from the negligence of the defendant, and need not show a want of contributory negligence in himself."—Approved: Wistrom v. Redlick Bros., 6 Cal. App. 671, 92 Pac. 1048.

(c) "It is not sufficient to entitle the plaintiff to recover in this case, to show a negligent breach of duty on the part of the defendant, but it devolves upon the plaintiff to show further, that such breach of duty was the proximate or immediate or real cause of the injury to the plaintiff's property; that in no case can a recovery be had for a negligent breach of duty, unless the evidence shows that such negligent breach of duty was the proximate or immediate cause of the injury occurring."—Approved: Combs v. Baltimore & Ohio Southwestern Ry. Co., 147 Ill. App. 105.

(d) "Unless it appears from the evidence that the defendant was negligent in the running and management of its train in one or more of the ways complained of, as before explained, then the plaintiff cannot recover; but, if such negligence is shown by the evidence, then it must also appear from the evidence that such negligence on the part of defendant caused the death of W. H. S—. That is, it must appear from the evidence that but for such negligence the accident and consequent death of W. H. S— would not have occurred. If it appears from the evidence that the defendant company was negligent in some one or more of the particulars complained of, as in failure to ring the bell or blow the whistle on approaching the crossing, still, if it appears from the evidence that, by reason of the team driven by S— being unmanageable, the giving of said signals, or the placing of a flagman at said crossing, would not have prevented the injury, then it cannot be said that the failure of the defendant to give said signals, or to station said flagman at the crossing, caused the injury."—Approved: Pratt v. Chicago, R. I. & P. Ry. Co., 107 Iowa, 287, 77 N. W. 1064.

§ 4099. And all to be Shown by a Preponderance of Evidence.

"It must also appear from the evidence that the plaintiff did not in any way contribute to the happening of the accident in question by any negligence on his part; that is, by his own want of ordinary care. The plaintiff, on his part, was under obligation to use ordinary care to prevent injury when passing over any sidewalk; and if he failed so to do, and his failure in any way contributed to the happening of the accident in question, then he cannot recover herein. The evidence shows without dispute that he was blind, and this fact should be considered by you in determining what ordinary care on his part would require when he was attempting to pass over one of the sidewalks of this city."—Approved: Hill v. City of Glenwood, 124 Iowa, 479, 100 N. W. 522.

§ 4100. And the Extent Thereof.

"In order to recover in this action, the burden is on the plaintiff to prove by a preponderance of the evidence that on or about the 3d day

of July, 1906, he was injured by reason of the carelessness or negligence of the defendant, and that said carelessness or negligence consisted of some one or more of the acts or omissions on the part of the defendant alleged in the complaint as negligence; and, second, the extent of such injury, if you find that he was injured, and the amount of the damages resulting therefrom, if any."—Approved: Grow v. Utah Light & Ry. Co. (Utah), 106 Pac. 514.

§ 4102. Proximate Cause as Negligence Defined.

(a) "Negligence is the proximate cause of an injury only when such injury is the natural and probable result of it, and in the light of attending circumstances ought to have been foreseen by a person of ordinary intelligence and prudence."—Approved: Banderob v. Wisconsin Cent. Ry. Co., 133 Wis. 249, 113 N. W. 738.

(b) "By proximate cause is meant a cause which operating in natural and ordinary sequence, unbroken by any new cause, produces the event, and without which such event would not have happened. If you believe from the evidence that plaintiff or his wife has suffered or is suffering from any physical pain, injury, or disability, and if you believe that defendant and his wife were exposed to cold while on defendant's cars and that defendant was negligent, then plaintiff would be entitled to recover only for such pain, injury, or disability as was proximately caused by such exposures, if any, and if any of such pain, injury, or physical disability was proximately caused in any other way than by such exposure on defendant's cars, for such injury, pain, or disability so caused the plaintiff cannot recover and you will so find." Approved: St. Louis Southwestern Ry. Co. v. Haney (Tex. Civ. App.), 94 S. W. 386 (not reported in state reports).

(c) "By proximate cause, as used herein means a direct cause, without which the injuries would not have occurred."—Approved: Houston & T. C. R. Co. v. Beard, 42 Tex. Civ. App. 427, 93 S. W. 532.

(d) "By proximate cause is meant an efficient cause without which the injury would not have happened, and from which danger of injury might reasonably have been anticipated as a natural and probable consequence."—Approved: Texas & N. O. R. Co. v. Jackson, 51 Tex. Civ. App. 646, 113 S. W. 628.

(e) "A proximate cause is such as operates to produce particular consequences without the intervention of any independent unforeseen cause without which the injuries would not have occurred, and the act complained of must be such as a reasonably prudent person would have foreseen was likely to result in injury to another."—Approved: St. Louis Southwestern Ry. Co. v. Bryant, 46 Tex. Civ. App. 601, 103 S. W. 237.

§ 4103. Same—Not Affected by Plaintiff's Negligence Merely Remote.

"You are instructed that if you find that the defendant was guilty of negligence, which negligence was the proximate cause of the injury, the plaintiff will be entitled to recover, even though plaintiff may have been guilty of negligence, if the negligence of the plaintiff was only

a remote cause, or a mere condition of the accident."—Approved: Short v. City of Spokane, 41 Wash. 257, 83 Pac. 183.

§ 4104. Nor When Combined with Accidental Cause for Which Plaintiff is not Responsible.

"The jury are instructed that if the plaintiff was in the exercise of ordinary care and prudence, and the injury is attributable to the negligence of the defendant, combined with some accidental cause, to which the plaintiff has not negligently contributed, the defendant is liable."—Approved: Louisiana & A. Ry. Co. v. Ratcliffe, 88 Ark. 524, 115 S. W. 396.

§ 4105. Negligence in Not Caring for Oneself Proximate Cause of Death.

"You are instructed in this case that although you may find and believe from the evidence in this case that one K— was a co-worker of the said Lewis D— and performed the act as alleged in plaintiff's petition in unloading the tie and produced the injury of the wounded hand, and believe that his act was negligence, or that the road bed of the defendant at the point where the injury is alleged to have occurred was in an uneven and bad condition, and that in moving said train over said track at the time and at the point where said injury happened was negligence, still, if you further find and believe that after the said occurrence the said Lewis D—, or the plaintiff C. H. D—, failed to use ordinary care as to said bruised and wounded hand, if you believe the same was in such condition, and that the said Lewis D— neglected the said hand in such condition and failed to exercise ordinary care to provide timely or suitable medicine or medical attention, and to such an extent as in either event, or by a combination of the same, was the proximate cause of his death, then you are instructed to find for the defendant, and so say by your verdict. And in this connection you are further charged that in order for the plaintiff to recover you must find and believe that the negligence of the defendant, if you find that it existed, was the proximate cause of the death of the said Lewis D—, that is, the death was the natural and probable consequence of such negligence, and, if you fail to find from the evidence that such negligence was such cause, you will find for the defendant, and the burden is upon the plaintiff for such issue."—Approved: Dye v. Chicago R. I. & G. Co. (Tex. Civ. App.), 127 S. W. 893.

§ 4106. Nor When Injury is Hastened by Independent Cause.

(a) "The jury are instructed that if they believe from the evidence that the death of John L. McD— was directly caused by being thrown against the stove on defendant's car, then your verdict should be for the plaintiff, notwithstanding that you may further believe from the evidence that he had suffered from lumbago or rheumatism, provided that the jury further find that said McD— would not have died at the time, under the circumstances and in the manner he did die, had it not been for being thrown against said stove, if you find he was so thrown."—Approved: MacDonald v. Metropolitan Street Ry. Co., 219 Mo. 468, 118 S. W. 78.

(b) "If you find that the company was negligent, and deceased was injured by such negligence, then did the injury cause his death, or did he die of some disease? If he died of the injury,—and by that is meant the injury produced the death, or produced a disease which resulted in death, or so weakened the powers of deceased as to render him unable to resist a disease of which he might otherwise have recovered, or with which he might have lived an indefinite time,—the plaintiff should recover. But, if deceased already had a fatal disease from which there was no hope of recovery, and his death was inevitable from that disease in a short time, and the injury was slight, and of such a character as to simply aggravate the disease, and he died of the disease, and not of the injury, then plaintiff cannot recover at all, for this is a suit for the death of deceased. But, if the death was hastened or occurred sooner by reason of the injury than it otherwise would, then the injury was the cause of the death."—Approved: Louisville & N. R. Co. v. Northington, 91 Tenn. 56, 17 S. W. 880.

§ 4107. But Measure of Injury May be Confined to Aggravation.

"If you believe from the evidence that the plaintiff, J. K. H—, was prior to August 29, 1902, or has been since said date, suffering from or been afflicted with Bright's disease, and if you further believe from the evidence that plaintiff has since August 29, 1902, suffered, or is now suffering, or will hereafter suffer, any pain or disability, and if you further believe from the evidence that such pain or disability, if any, is or has been or will be proximately caused by Bright's disease, then for such pain or disability so caused the plaintiff is not entitled to recover in this suit, and you will so find. Proximate cause, as that term is used in this charge, means such cause as acting in a natural and ordinary sequence, unbroken by any new cause, produces the result."—Approved: St. Louis Southwestern Ry. Co. v. Hall (Tex. Civ. App.), 92 S. W. 1079 (not reported in state reports).

§ 4108. Or to Original Damage Where there is Aggravation from Subsequent Cause.

"If you should believe from the evidence that the plaintiff received a bruise or abrasion caused by a collision between two of the defendant's trains while plaintiff was a passenger upon one of such trains, but the plaintiff has failed to establish by a preponderance of the evidence to your satisfaction that the injuries which he is now suffering from are the direct result of such bruise, without any intervening cause brought about by his own want of reasonable care and attention, your verdict should only assess such damages as you may think just and proper for the bruise or abrasion received by the plaintiff while upon the train, and should exclude all other damages based upon or resulting from any injury that plaintiff may now have."—Approved: Murphy v. Southern Pac. Co. (Nev.), 101 Pac. 322.

§ 4109. Accident Not Proximate Cause Unless it Should Have Been Foreseen.

"The jury is instructed that negligence is not the proximate cause of an accident unless under all circumstances the accident might have

been reasonably foreseen by a man exercising reasonable and ordinary care. It is not enough to prove that the accident is the natural consequence of some negligence. It must also have been the probable consequence of the special act of negligence alleged as defined in the instructions, and before you can find a verdict for the plaintiff herein, you must find from the evidence that there was a hole in the carpet in the balcony of the Auditorium Theatre, and that the defendants in the exercise of reasonable and ordinary care should have foreseen that such hole, if any existed, would in all probability cause an injury similar to that which is claimed to have happened on the 15th day of April, 1899."—Approved: Nephler v. Woodward 200 Mo. 197, 98 S. W. 488.

§ 4110. Act of God Merely Concurring is Not Proximate Cause.

"The jury are instructed that, while the defendant was not bound to provide against the effects of a storm which it could not reasonably anticipate, yet if they believe, from the evidence, that the bridge over Rose branch was not reasonably safe on account of its being a pile bridge, or because some of the piling had become rotten and decayed, or because there was not sufficient earth or dirt around said piling, and that the fall of the bridge was caused by its defective condition in any of the particulars aforesaid, and not by reason of the extraordinary force of the storm, then the fact that the bridge fell during said storm will not prevent a recovery in this case."—Approved: Copeland v. Wabash R. Co., 175 Mo. 650, 75 S. W. 106.

§ 4111. Proximate Cause May Arise out of Single or Concurring Negligence.

(a) "If you find that the injury was the result of the concurring negligence of two parties, and would not have occurred in the absence of either, you are charged that the negligence of both parties was the proximate cause of the injury, and defendant is not excused because of the other concurring act of negligence."—Approved: Southwestern Telegraph & Telephone Co. v. Bruce, 89 Ark. 581, 117 S. W. 564.

(b) "If the jury shall believe from the evidence and under the foregoing instructions that the collision between the train and the street car was brought about by the concurrent or combined negligence of all the defendants, the jury should find against all of them; but, if the jury shall believe from the evidence that the collision was brought about solely by the negligence, if any, of the employes of the Illinois Central Railway Company and the Louisville, Henderson & St. Louis Railway Company, their verdict should be against those companies only, or, if the jury shall believe from the evidence that the collision was brought about solely by the negligence, if any, of the agents of the Louisville Railway Company, their verdict should be against that company only."—Approved: Louisville, H. & St. L. Ry. Co. v. Kessee, (Ky.), 103 S. W. 261 (not reported in state reports).

§ 4112. Negligence Not Presumed from Mere Occurrence Causing Injury.

"In order for the plaintiff, a pedestrian, to be entitled to recover against the defendant, the plaintiff must show, by preponderance of

evidence outside of the mere proof of the fact that a collision occurred, that such collision was due to the negligence of defendant; and, if the plaintiff has failed to show by preponderance of evidence satisfactory to your mind that the accident or collision in which the plaintiff received her injuries was caused by the negligence of the defendant, then the plaintiff is not entitled to recover against the defendant, and your verdict must be in favor of the defendant."—Approved: Sauer v. Eagle Brewing Co., 3 Cal. App. 127, 84 Pac. 425.

§ 4113. Negligence Per se—Failure to Give Signals in Running Train.

(a) "The court instructs the jury that it was the duty of defendant's employes in charge of its locomotive and train to ring the bell on the engine at Mulberry street and keep the bell ringing until the engine crossed Warren street. And if the jury believe from the evidence that defendant's said employes did not so ring said bell and by reason thereof Freeborn G. H—, while in the exercise of such care as ought reasonably to have been expected from one of his age and capacity, was struck and killed by the said engine, then the jury must find for the plaintiffs on the first count of the petition."—Approved: Holmes v. Missouri Pac. Ry. Co., 207 Mo. 149, 105 S. W. 624.

(b) "If the bell is not rung or the whistle sounded at least 500 yards from the place where the public highway crosses the railroad, and is not kept ringing or whistling until the engine shall have passed such highway, then the failure to give the signals in this prescribed way is negligence in itself; and, if a person is injured at such crossing; and it appearing that such signals were not given, 'and nothing else appearing in the testimony', it is presumed that the injury is the result of the failure to give the statutory signals."—Approved: Lee v. Northwestern R. Co., 84 S. C. 125, 65 S. E. 1031.

(c) "Now the law requires a railroad train when it comes to a public crossing or traveled place or street where the highway or traveled place crosses the railroad, or where the public has a right to cross, it requires then when within 500 yards of such street, highway, or traveled place to ring a bell or blow a whistle, and keep that up continuously within 500 yards of the crossing and be continued until the engine passes over it, and, if any one is injured at a public crossing by the failure of the railroad company, its agents, or servants to ring the bell or blow the whistle until the engine has passed over the crossing, the law says that that is negligence per se, but that only applies to a traveled place, a public highway, or street where it crosses the railroad, or at a place where the public has crossed and recrossed and used for passage notoriously and adversely for a period of twenty years, and, if they have used it in that way for that length of time, they have acquired a right to cross there."—Approved: Goodwin v. Atlantic Coast Line R. Co., 82 S. C. 321, 64 S. E. 242.

(d) "While I have instructed you as to the duty and care of the plaintiff in approaching the railroad crossing on Main street where he was injured, it was the duty of said defendant to give timely warning of the approach of its locomotive and train of cars on said track to the plaintiff while approaching said street crossing, and this the de-

fendant was bound to do, whether or not there was a statute or ordinance requiring signals to be given at said street crossing, and any failure to exercise this care required on the part of said defendant at said street crossing, if shown to exist in this case, was negligence on the part of said defendant."—Approved: Pittsburgh, C., C. & St. L. Ry. Co. v. Lynch, 43 Ind. App. 177, 87 N. E. 40.

(e) "The law requires the persons in charge of a train, when approaching a street crossing, to ring the bell to warn persons lawfully at or near its crossing of the approach of the train; and, when a train is operated along a public street in the city, where other streets cross at short intervals, I take it to be the duty of the persons in charge of the train to ring the bell continuously while the train is in motion, and that the omission of this duty would constitute negligence."—Approved: Mitchell v. Union Terminal Ry. Co., 122 Iowa, 237, 97 N. W. 1112.

§ 4114. Same—Failure to Observe Speed Laws and Ordinances.

(a) "The violation of any statutory or valid municipal regulation established for the purpose of protecting persons or property from injury is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. Thus, the violation of the statutes or ordinances regulating the speed of vehicles, horses, trains, or street cars is such a breach of duty as may be made the foundation of an action by any person belonging to the class intended to be protected by such regulation, provided he is specially injured thereby."—Approved: Omaha St. Ry. Co. v. Duvall, 40 Neb. 29, 58 N. W. 531.

(b) "The court instructs the jury that it is negligence on the part of a railroad company to run its trains through a city, incorporated town, or village at a rate of speed prohibited by law, and if a railroad company does so run its trains, and thereby injures or destroys the property of a person who is himself in the exercise of reasonable care and caution to avoid injury to such property, the company will be liable."—Approved: Chicago & Eastern Illinois Railroad Co. v. Crose, 214 Ill. 602, 73 N. E. 865.

(c) "With respect to the alleged negligence of defendant in operating its car at a high and excessive rate of speed, you are instructed that under the ordinances of the City of St. Louis, defendant had the right to operate its car at the place mentioned in the testimony at a rate of speed not exceeding ten miles per hour. Before, therefore, you can find against the defendant on account of the excessive speed, you must find either that defendant operated its car in excess of the speed of ten miles an hour, or at such a speed which, under the evidence and circumstances given in the testimony, amounted to negligence, and unless you so find, and also further find that such excessive or negligent speed was the cause of the death of plaintiffs' son, the plaintiffs are not entitled to recover on account of such speed."—Approved: Masterson v. St. Louis Transit Co., 204 Mo. 507, 103 S. W. 48.

(d) "The court instructs you that in an action brought to recover damages, either to the person or property, caused by running an auto-

mobile propelled by mechanical power in the public highway at a greater rate of speed than fifteen miles per hour, the plaintiff is deemed to have made out a prima facie case by showing the fact that he or she had been injured, and that the person running such automobile, either by himself or his agent, was at the time of the injury running the same at a speed in excess of fifteen miles per hour."—Approved: Ward v. Meredith, 220 Ill. 66, 77 N. E. 118.

(e) "The court instructs the jury that if they believe from the evidence that, at the time of the accident by which the plaintiff's intestate, E. B. F—, was injured as shown by the evidence, there was in force an ordinance of the city of Norfolk which provided that: 'It shall not be lawful for any person, or corporation, to operate or run any electric or trolley car or other vehicle propelled by electricity over or through any street crossing in the city of Norfolk, Virginia, without first reducing the rate of speed of said cars to not more than three miles per hour. And there shall be fixed to such cars a gong or other bell which shall be sounded continuously before reaching such crossing, and beginning at a distance of fifty feet from such crossing'—then the said E. B. F—, in approaching and crossing the defendant's track, had the right to assume that the servants of the defendant in charge of its car which was then approaching would obey the requirements of said ordinance in the running and operating said car. And if the jury believe from the evidence that, under all the circumstances by which said F— was surrounded, it would have been reasonably apparent to an ordinarily prudent person that he could cross the track without danger of a collision, he was not guilty of negligence in attempting to do so."—Approved: Norfolk & P. Traction Co. v. Forrest's Adm'x, 109 Va. 658, 64 S. E. 1034.

(f) "If you believe from the evidence that on December 19th, 1904, while plaintiff was riding in a buggy on Preston street, in the city of Houston, the buggy in which he was riding was run into by one being driven by the defendant, and consequence of which plaintiff was thrown from the buggy in which he was riding, and injured in some one or more of the particulars alleged by plaintiff, and if you further believe from the evidence that defendant F— in the manner in which he handled and drove his horse was not in the exercise of such care as a man of ordinary prudence would have exercised under the same or similar circumstances, and that but for defendant's failure to exercise such care the accident and injury to the plaintiff would not have happened, or if you believe from the evidence that defendant at the time of the collision of the two buggies in the manner in which he handled and drove his horse was in the exercise of such care as a man of ordinary prudence would have exercised under the same or similar circumstances, but should further believe from the evidence that defendant at said time was driving his horse at a speed in excess of six miles per hour, and that plaintiff's injuries, if any, were proximately caused by reason of the fact that the defendant was driving his horse at such rate of speed, then, in either event, you will let your verdict be for the plaintiff and assess his damages, if any, as hereinafter instructed, unless you find for defendant under other portions of this charge or under

special charge submitted by the court."—Approved: Foley v. Northrup, 47 Tex. Civ. App. 277, 105 S. W. 229.

(g) "It is admitted, gentlemen, that there is an ordinance of the city of Seattle which limits the rate of speed of street cars in the business or settled residential district to twelve miles an hour. I instruct you that if you find from the evidence that this accident or collision occurred in the business or settled residential district of the city of Seattle, and that at the time of the accident the street car was going at a greater rate than twelve miles per hour, then that would constitute negligence upon the part of the defendant."—Approved: Engelker v. Seattle Electric Co.: Schmidt v. Same, 50 Wash. 196, 96 Pac. 1039.

(h) "I further instruct you that it is the law of this state that the rate of speed of street cars within the corporate limits of towns and cities of this state must not be greater than eight miles per hour, and if you find from the evidence in this case that the car upon which the plaintiff was riding at the time of the accident to her was running at a greater rate of speed than eight miles per hour at the time she received said injuries, and solely by reason thereof, and without any fault on her part, the plaintiff was injured, then your verdict will be in favor of the plaintiff, for the violation, if any, of any statutory regulation established for the purpose of protecting persons or property from injury is of itself sufficient to prove such a breach of duty as will enable this plaintiff to maintain this action, if the other elements of actionable negligence concur as explained in these instructions. In other words, the violation of a statute of this state regulating the speed of street cars is such a breach of duty as may be made the foundation of an action by any person belonging to the class intended to be protected by such regulation, provided he is without fault on his part specially injured thereby."—Approved: James v. Oakland Traction Co., 10 Cal. App. 785, 103 Pac. 1082.

§ 4115. Same—Violating Ordinance as to Car Rails Above Level of Street.

(a) "Under the ordinances of the city of Ft. Worth, it is the duty of the street car company operating street cars in the city to keep and maintain the top of each rail of each track on a level at all points with the surface of the street; and, if you believe and find from the evidence that at the time of the alleged injury the rails of defendant's street car track at the place of the collision were not on a level with the surface of the street, but find that said rails were at that time and place higher than the level of the street, or if you believe from the evidence that at or just before the collision in question defendant's employees in charge of said street car moved the same along the street at a higher rate of speed than seven miles an hour; then in either of these instances the defendant would be guilty of negligence."—Approved: Ft. Worth & R. H. St. Ry. Co. v. Hawes, 48 Tex. Civ. App. 487, 107 S. W. 556.

(b) "The ordinance which has been referred to in the complaint, and which has been admitted in evidence, contains certain requirements and regulations as to the manner in which the defendant's tracks shall be kept and maintained by it. These requirements are valid regulations

imposed by the city of Spokane, and are imposed upon the defendant for the purpose of compelling the streets and highways to be kept in a safe condition for public travel, so far as the defendant's tracks are concerned; and if any person is, without negligence on his or her part, injured on account of the negligent failure of the defendant company to comply with the terms of said ordinance in respect of the condition of its tracks, then such person is entitled to recover from the defendant the damage so sustained, unless you should further find from the evidence that some sufficiently efficacious method be applied to keep the streets in safe condition for public travel."—Approved: Gray v. Washington Water Power Co., 30 Wash. 665, 71 Pac. 206.

§ 4116. Same—Violation of Ordinance as to Flagman Ahead of Train.

"The court charges the jury that if they believe from the evidence that there was an ordinance of the city of Mobile as is described in the complaint, and that the defendant company operated its train along the track of the Mobile & Birmingham Railroad Company under a lease from it, at the point where the said track crosses Water street at its intersection with Beauregard street, and if the jury further believe from the evidence that in doing so the said engine was run against the said Edward H. S—, so as to injure and kill him, and that said accident was the proximate result of negligence on the part of the engineer in charge of said engine in operating said engine across Water street without a flagman being stationed ahead of the train as required by the ordinance, they must find for the plaintiff, unless they further find from the evidence that Edward H. S— was himself guilty of contributory negligence."—Approved: Southern Ry. Co. v. Shelton, 136 Ala. 191, 34 South. 194.

§ 4117. Same—Violation of Ordinance in Leaving Excavation Unguarded.

"The jury are instructed that the ordinances of the city of Lincoln, on the eighteenth day of January, A. D. 1884, required a party digging an excavation into the sidewalk or street of the city of Lincoln to build and maintain, and at all times to keep the same unobstructed, a sidewalk of suitable materials, not less than four feet in width, in front of and around said excavation. If the jury find that the defendant failed and neglected to build a sidewalk and maintain a railing such as is provided by said city ordinance, and that on account of the failure and neglect of the defendant in this respect the plaintiff, without fault on his part, fell into said excavation, and was hurt and injured thereby, then you will return a verdict for the damages sustained by the plaintiff."—Approved: Stuart v. Havens, 17 Neb. 211, 22 N. W. 419.

§ 4118. Same—Violation of Rules where Party Injured Relies on Observance.

"If a rule exists covering the conduct of trains under the circumstances alleged in the complaint, the violation of such a rule under circumstances wherein it should be observed, and wherein those operating under the rule know that it should be observed and expect it to be observed, and without notice to them that it will be violated, is not due

care, but is negligence; and if such violation is the proximate cause of injury to one in whose favor there was a duty to observe the rule, and the person so injured was himself at the time exercising due care, then the person or company violating such rule would be liable for the injury so caused."—Approved: Cleveland, C., C. & St. L. Ry. Co. v. Gossett, 172 Ind. 525, 87 N. E. 723.

§ 4119. Imputed Negligence—Not to Passive Guest of Driver of Vehicle.

(a) "Where one is riding in a carriage, the passive guest of the driver, and without any authority to direct or control the conduct or movement of the driver, or without any reason to suspect his prudence or competency to drive in a careful and skillful manner, or without knowledge that the horse is wild or vicious and unmanageable and likely to run away, or do some other acts that would endanger or bring injury upon the person so riding as a guest under such circumstances, the negligence of the driver should not be imputed to the guest."—Approved: Cincinnati, L. & A. Electric St. R. Co. v. Cook, 44 Ind. App. 303, 88 N. E. 76.

(b) "No negligence of the son in driving and management of said horses and vehicle can be imputed to this plaintiff, if you shall find that she herself was free from any fault or negligence, and was merely the passive guest of the son, without any authority to direct or control the conduct or movements of her said son in the driving and management of her said horses."—Approved: Cincinnati, L. & A. Electric St. R. Co. v. Cook, 44 Ind. App. 303, 88 N. E. 76.

(c) "That even though you find that Gilbert G—, with whom the plaintiff was riding at the time of the accident, was guilty of negligence, and that such negligence contributed to plaintiff's injury, yet the plaintiff may recover, provided you do not find that she herself was guilty of negligence in remaining in the buggy and riding past the engine."—Approved: Ouverson v. City of Grafton, 5 N. D. 281, 65 N. W. 676.

(d) "The court instructs the jury that the plaintiff, H—, is not answerable or responsible in this case for any want or omission of care on the part of Ole P— in respect to looking or listening for an approaching car, or in respect of the management of the horse or buggy mentioned in the evidence, and, if you believe from the evidence that the plaintiff, H—, himself used ordinary care to avoid danger and injury, at and before the collision and up to the time when said plaintiff was injured, then you should find in favor of plaintiff, H—, on the issue of his alleged negligence."—Approved: Peterson v. St. Louis Transit Co., 199 Mo. 331, 97 S. W. 860.

§ 4120. Same—Not to Wife where Husband is Driver.

(a) "You are instructed that if you find that Nels I. N— was negligent, as explained in these instructions, his negligence cannot be charged or imputed to the plaintiff in this case, nor prevent a recovery by her, unless you also find from the evidence that, owing to the relations existing between them, Nels I. N— was, at the time of driving upon the culvert, acting for and on behalf of plaintiff, or at her instance, so that she would be responsible for his acts."—Approved: Nielsen v. Cedar County, 5 Neb. Unoff. 430, 98 N. W. 1090.

(b) "In determining whether or not the plaintiff in this case was guilty of contributory negligence, you shall consider her own acts and conduct, and all the other circumstances shown in evidence surrounding the accident and injury, if any, to the plaintiff. And, if you shall find from the preponderance of all the evidence that the plaintiff acted as a person of ordinary prudence under all the circumstances, you should find her free from contributory negligence, although you may find that her husband was guilty of negligence in the driving and management of his horse and vehicle. In other words, no negligence of the husband in the driving and management of said horse can be imputed to the plaintiff, if you find that she herself was free from any fault or negligence, and was merely the passive guest of her husband, without any authority to direct or control the conduct or movements of her said husband in the driving and management of said horse."—Approved: Indianapolis St. Ry. Co. v. Johnson, 163 Ind. 518, 72 N. E. 571.

§ 4121. If his Negligence Makes Accident Inevitable she cannot Recover Against Another.

(a) "In this case, gentlemen, the plaintiff is responsible only for such negligence, if any there was, that she was guilty of. She is not liable for any contributory negligence, if any there was, that may have been committed by her husband, who was the driver of the surrey. I will say, further, to you that if you believe from the evidence that the motorman discharged all of the duties of which I have spoken to you—that is, that he did keep a lookout ahead, did have his car under reasonable control, did sound the customary signals, and did exercise ordinary care to prevent injury to the vehicle in which the plaintiff was riding—but that the vehicle suddenly appeared upon the track that the street car was occupying, so close to the street car that the motorman could not avoid the accident by the exercise of ordinary care, then the law is for the defendant, and you should so find."—Approved: Louisville Ry. Co. v. McCarthy, 129 Ky. 814, 112 S. W. 925.

(b) "The burden of proof is upon the plaintiff, not only to show negligence and misconduct on the part of the defendant, but also ordinary care and diligence upon the part of her husband and herself at the time of receiving the injury. The plaintiff's husband was not bound, under the law, in driving his horse ahead of the defendant, to turn either to the right or left, to permit the defendant to pass, and the defendant had a right to rely upon the plaintiff's husband continuing straight ahead as he was driving, without turning to the right or left. I charge you, as a matter of law, further, that the defendant had a right to pass the carriage in which the plaintiff was riding, either to the right or left of him as he saw fit, so long as he used ordinary care and prudence in doing so; and the defendant had a legal right to travel upon any part of the highway he saw fit, unless he was to meet and pass another vehicle going in the opposite direction, in which case he must seasonably turn to the right of the middle of the traveled part of the road. The statute requiring teams

meeting and passing each other, when going in opposite directions, to turn out and give half the traveled roadbed to the passing team, does not apply in this case, and must not be considered by you in connection with this case at all. If, from the evidence in the case, you find the plaintiff's husband, upon hearing the approach of defendant's horses, suddenly turned to the left and brought the carriage in which plaintiff was riding immediately in front of the defendant's horses, as they were turned to the left in attempting to pass the carriage in which she was riding, and the collision followed, resulting in injury to the plaintiff, then plaintiff cannot recover, because, if there was injury resulting from the collision under such circumstances, the result of the negligence of the plaintiff's husband in such a case would be imputed to her, and would bar her recovery for any injury which she may have sustained, for the reason that the plaintiff in riding with her husband assumed the risk from lack of skill and want of care in driving; and if the plaintiff's husband, from lack of skill or want of care in any degree, however slight, contributed to the receiving of the injury for which plaintiff claims, she cannot recover."—Approved: Herbeck v. Germain, 144 Mich. 157, 107 N. W. 901.

§ 4122. Imputed Negligence not to Child for Carelessness of Mother.

(a) "The court instructs the jury that even if you believe, from the evidence, that the plaintiff's mother was guilty of negligence in permitting the plaintiff to go upon the street, or that his brother was guilty of negligence in not taking proper care of him while upon the street, still such negligence, if any, upon their part, cannot be charged against the plaintiff, and it is not a defense to this suit."—Approved: Perryman v. Chicago City Ry. Co., 242 Ill. 269, 89 N. E. 980.

(b) "The jury are further instructed that negligence is the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable man would not do." And the refusal of the twenty-third instruction offered on behalf of the appellant, which reads as follows: "If the jury believe, from the evidence, that plaintiff ran into the side of the car in question, and that said car did not strike or run against the plaintiff, but that the said plaintiff ran against and struck the side of the car, then the jury must find the defendant not guilty."—Approved: Perryman v. Chicago City R. Co., 242 Ill. 269, 89 N. E. 980.

§ 4123. Collision—Concurring Negligence of Driver and Another.

(a) "The court instructs the jury that the carriage and horses used by the plaintiff at the time of the accident belonged to a livery-stable keeper; and if they further believe from the evidence that the driver of the carriage was an employee of the livery-stable keeper, and that the plaintiff hired said carriage, horses, and driver from said livery-stable keeper, and exercised no control over the movements of said carriage or the handling of said horses, except to give the

driver his destination, then the jury are instructed that the driver was not the servant of the plaintiff, and although they may find from the evidence that the plaintiff's said injury was contributed to by the negligence or want of ordinary care of said driver, without any co-operation on the part of the plaintiff, yet the jury cannot impute such negligence of said driver to the plaintiff; and if they find that the injury was caused both by the negligence of defendant, as explained in the foregoing instructions and the negligence of said driver, they will yet, nevertheless, find for the plaintiff."—Approved: Sluder v. St. Louis Transit Co., 189 Mo, 107, 88 S. W. 648.

(b) "Even though the jury may believe, from the evidence, that the motorman upon the car upon which the plaintiff was riding at the time of his injury was guilty of negligence in the management of said car which directly contributed to cause the injury to plaintiff, yet such negligence of the motorman, if there was negligence, cannot be imputed to the plaintiff so as to prevent his recovery in this case if the circumstances hereinafter mentioned existed, and if the jury believe, from the evidence, under the instructions of the court, that they existed, and that the driver of the wagon of the defendant which collided with the street car was guilty of negligence in manner and form as alleged in the declaration or some count thereof, and that such negligence of the said driver directly and proximately concurred with the negligence of the said motorman to cause the injury to the plaintiff, and that the said injury would not have occurred but for the negligence of the said driver, and if the jury further believe, from the evidence, that the driver of the said wagon was in the employ of the defendant as its servant at the time and place in question and was acting within the scope of his employment at the said time and place, and if the jury further believe, from the evidence, under the instructions of the court, that plaintiff himself was in the exercise of reasonable care for his own safety, then it is the duty of the jury to find the issues for the plaintiff, notwithstanding the negligence of the motorman on the said street car."—Approved: Ford v. Hine Bros. Co., 237 Ill. 463, 86 N. E. 1051.

§ 4124. Concurring Negligences will not be Compared.

"The court instructs the jury that if you believe from the evidence that the plaintiff's intestate and defendant were both guilty of negligence, and that the negligence of both caused the death of the plaintiff's intestate, then your verdict must be for the defendant, even though you may believe from the evidence that the degree of negligence of the defendant was greater than that of the plaintiff."—Approved: Adamson's Adm'r v. Norfolk & P. Traction Co. (Va.), 69 S. E. 1055.

§ 4125. Duty to Children—Guarding Dangerous Places.

(a) "But if you find, from a preponderance of the evidence, that the turntable in question was a dangerous machine, and the defendants did know, or had reason to believe, under the circumstances of

the case, the children of the place would resort to the turntable to play, and that if they did they would or might be injured, then, if they took no means to keep the children away, and no means to prevent accident, this would be evidence of negligence, and would be answerable for damages caused thereby to the children of tender years, and who did not possess sufficient knowledge or understanding to know the danger or dangerous character of such turntable. However, the defendants are not insurers of the limbs of those, whether adults or children, who may resort to their grounds, and there are many injuries continually happening which involve no pecuniary liability to any one."—Approved: Chicago, B. & Q. R. Co. v. Krayenbuhl, 65 Neb. 889, 91 N. W. 880.

(b) "To maintain the action it must appear by the evidence that the turn-table, in the condition, situation, and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children; that if, in its construction and the manner in which it was left, it was not dangerous in its nature, the defendants were not liable for negligence; that they were further to consider whether, situated as it was, as the defendant's property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence."—Approved: A. & N. R. Co. v. Bailey, 11 Neb. 332, 9 N. W. 50.

(c) "The court instructs the jury that the defendant had the right to stack the iron building material where it was at the time plaintiff was injured, using ordinary care in so doing; but if it was so stacked as to be attractive or inviting to children to go upon it, and they did go upon it to play, and the defendant, or its agents or employees, knew that fact, it was the duty of the defendant to exercise ordinary care to prevent the said stack of material from being dangerous to children so using it; and if the jury shall believe from the evidence that the defendant, or its agents or employees, did not exercise that degree of care for the protection from injury of the children who so used the said stack, and that by reason of that failure the plaintiff received the injury of which he complains, then the law is for the plaintiff, and they should so find, unless they shall further believe from the evidence that the plaintiff was negligent, and thereby helped to cause or bring about his injuries, and but for which he would not have been injured, as defined in instruction No. 2."—Approved: Louisville Ry. Co. v. Esselman (Ky.), 93 S. W. 50 (not reported in state reports).

§ 4126. Same—Frightening so that they Fall Into Danger.

(a) "The court instructs the jury that, if you believe from the evidence that the plaintiff, Freda L—, was frightened by the discharge of steam from the defendant's engine on the main track in front of the cinder platform on which she was standing and that she was

caused thereby to retreat backward to the side track, and that her attention was on that account fixed upon said engine and so diverted as to cause her not to notice the empty freight car approaching her on said side track, you will take that fact into consideration in connection with her youth and inexperience in determining whether, under all the facts and circumstances, she was guilty of negligence causing her injuries."—Approved: Lange v. Missouri Pac. R. Co., 208 Mo. 458, 106 S. W. 660.

(b) "If the jury find from the evidence in this case that on the third day of June, 1903, the defendant was operating the railway and car mentioned in the evidence, and if the jury find from the evidence that on said day Twenty-Second street, at the places mentioned in the evidence, was an open public street within the City of St. Louis, and if the jury find from the evidence that on said day the plaintiff was on said Twenty-Second street north of Montgomery street near defendant's track, and that at said time the plaintiff was of tender years and without discretion to understand the peril of being struck by defendant's car, and if the jury find from the evidence that, as defendant's car approached the place where the plaintiff stood upon said street defendant's motorman stepped on the step of the front platform of said car and reached with his hand towards the plaintiff and frightened him, and if the jury find from the evidence that the plaintiff was thereby, and by reason of his want of discretion, caused to run in front of said car, and to be knocked down, dragged, and injured by said car, and if the jury find from the evidence that defendant's motorman did not exercise ordinary care in so reaching towards the plaintiff and causing him to be frightened, and that thereby the plaintiff was so caused to sustain said injuries, then the plaintiff is entitled to recover."—Approved: Wahl v. St. Louis Transit Co., 203 Mo. 261, 101 S. W. 1.

§ 4127. Same—Seeing Child On or Near Track.

"The court further instructs the jury that the parents of said child were not prohibited from allowing him to go out upon the grounds adjacent to their dwelling house, even though it were close to the track of defendant's railway, in company with his sister and other small children, to play and enjoy the fresh air and sunshine; but, in allowing them this freedom, the plaintiffs were only required to use the same care and precaution to prevent them from going into dangerous places and receiving injury or harm, as ordinarily prudent people similarly situated would exercise as to their own children, and would deem adequate for this purpose; and although the jury may find that the plaintiffs were imprudent or careless in this respect, yet if the jury further find that the servants and employes of the defendant, in charge of said train, had they been exercising care and watchfulness, under the circumstances, could have seen and recognized the fact that it was a child, and could have stopped the train and prevented the injury, their finding must be for the plaintiff."—Approved: Donahoe v. Wabash, etc., R. Co., 83 Mo. 543, 551.

§ 4128. View by Jury of Scene of Accident not of Itself Evidence.

"The jury has been taken out to view the scene of this accident twice,—the first time for the purpose of being able to understand the testimony, and the second time to witness certain experiments by agreement of both parties. I charge you that you are not to consider as evidence what you saw on the first view, but what you saw on the second view that was shown to you by the parties under their agreement you should take and consider as evidence in this case."—Approved: Schweinfurth v. Cleveland C. C. & St. L. Ry. Co., 60 Ohio St. 215, 54 N. E. 89.

CHAPTER CXV.

NEGLIGENCE.

A. Carriers of Passengers by Street Railways.
B. Injuries to Other Persons.

A. Carriers of Passengers by Street Railways.

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4171. Injury from Act of Carelessness by Passenger Carrier could not Anticipate.
4172. Explosion from Controller Box Causing Passenger to Jump from Car.
4173. So where Other Negligence Produces Apparent Peril.
4174. Inspection of Car as Rebutting Presumption of Negligence.

§ 4129. Passenger—Relation Begins with Boarding of Car.

"The court instructs the jury that to establish the relation of carrier and passenger the payment of fare is not always necessary; that, if the carrier permits the passenger to get upon the car without requiring payment in advance, the obligation of the passenger to pay will stand for the actual payment, for the purpose of giving effect to the contract to carry, with all its obligations and duties. Taking his place upon the car with the intention of being carried creates an implied agreement upon the part of the passenger to pay when called upon to do so by the carrier."—Approved: Petersen v. Elgin, A. & S. Traction Co., 238 Ill. 403, 87 N. E. 345.

§ 4130. Same—Stopping Car at Usual Place is Invitation to Become.

"The stopping of a street car being operated by a carrier of passengers at a point on a street or highway where such cars usually stop for the purpose of receiving passengers constitutes an invitation to those in waiting to take passage if they desire; and, if you find from a preponderance of the evidence in this case that the said College car named in plaintiff's complaint was so stopped at the intersection of Thirtieth and Washington streets in the city of Marion, that said point was a customary and usual stop for receiving passengers on said car, and was so known to the plaintiff, that plaintiff took passage on said car at said point while it was so standing with the intention of becoming a passenger thereon, and with the intention of paying the usual and customary fare charged passengers thereon, and that he was then and there ready, able, and willing to do so, that no fare, ticket, or other compensation was at any time demanded or requested

of the plaintiff, and no place provided in or about said car for the purpose of depositing such fare, ticket, or compensation, and that plaintiff at no time refused to pay his fare—then I charge you that he was while so riding on said car entitled to the exercise by the defendant, its servants, and employes of the highest degree of care to provide for his safety in being transported upon said car to his destination, and in being afforded proper means to alight from said car, and any neglect in the performance of such duty by reason of which he was injured, all as averred in the plaintiff's complaint, he would be entitled to recover unless his negligence contributed to the injuries complained of."—Approved: Indiana Union Traction Co. v. Smalley, 44 Ind. App. 172, 88 N. E. 867.

§ 4131. Same—Motorman Should Watch for one Intending to be.

"You are instructed that it is the duty of the motorman of a street car to keep a careful and constant lookout ahead of the car for the purpose of discovering any persons signaling the car to stop in order that such passenger may board it, and any person who signals the car to stop in time to enable the motorman to do so by the exercise of ordinary care has a right to a assume that such motorman is on the lookout for passengers, and will discover persons who so indicate their intention of becoming passengers, if the same could be done by the exercise of ordinary care on the part of the motorman."—Approved: Harkins v. Seattle Electric Co., 53 Wash. 184, 101 Pac. 836.

§ 4132. Same—Intending Must Place Himself where Ordinarily would be Seen.

"If the jury believe from the evidence that the plaintiff came up to the ———— car from the rear, and was not upon the car, but was in a position where the conductor, in the exercise of ordinary care in looking for intending passengers at the rear step of his car, would not ordinarily see plaintiff, and the conductor, in the exercise of ordinary care in looking for intending passengers at the rear step, did look there, and in so looking saw no intending passenger, and at once gave the signal to go ahead, and the car thereupon started, then there could be no recovery in this case, and your verdict will be for the defendant."—Approved: Gaffney v. St. Paul City Ry. Co., 81 Minn. 459, 84 N. W. 304.

§ 4133. Care—Highest Degree of Practicable.

"The defendant is not an insurer of the safety of its passengers in any and at all events. If its motormen exercised the highest degree of care to avoid the accident which is reasonably practicable under the circumstances and conditions existing at the time and place in question, the demands of the law are satisfied. By the term 'highest degree of care,' used in these instructions, is meant that degree of care which would be exercised under like circumstances by very careful, prudent, and experienced conductors and motormen generally."—Approved: Connell v. Seattle R. & S. Ry. Co., 47 Wash. 510, 92 Pac. 377.

(b) "The court instructs the jury that, if you believe from the evidence that the plaintiff was a passenger upon a train of defendant at the time she claims to have been injured, then having received plaintiffs upon board of such train, the due obligation of the defendant to plaintiff was to use the highest degree of care practicable among prudent, skillful, and experienced men in that same kind of business, to carry her safely, and a failure of the defendant (if you believe there was a failure) to use such highest degree of care would constitute negligence on its part, and defendant would be responsible for all injuries resulting to plaintiff, if any, from such negligence, if any. And if you believe from the evidence that there was a collision between two trains of defendant, on one of which plaintiff was a passenger (if you believe she was a passenger thereon), the presumption is that it was occasioned by some negligence of the defendant, and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish the fact that there was no negligence on its part, and that the injury, if any, was occasioned by inevitable accident, or by some cause which such highest degree of care could not have avoided."—Approved: Price v. Metropolitan St. Ry. Co., 220 Mo. 435, 119 S. W. 932.

(c) "It is the duty of a carrier of passengers to exercise the highest degree of care that can be reasonably expected of prudent men engaged in that line or business to carry its passengers safely, and a failure on the part of such carrier to use such care is negligence on its part. A passenger is required to use such care as would be used by an ordinarily prudent person under the same or similar circumstances, and the failure on the part of a passenger to use such care is negligence on his or her part."—Approved: Wellman v. Metropolitan St. Ry. Co., 219 Mo. 126, 118 S. W. 31.

(d) "You are instructed that a common carrier of passengers, through its servants in charge of its cars, is required to do all that human care, vigilance, and foresight can reasonably do to avoid injury to a passenger, having in view the character and mode of conveyance adopted and consistent with the practical operation of the road."—Approved: Sandy v. Lake Street Elevated R. Co., 235 Ill. 194, 85 N. E. 300.

(e) "You are further instructed that the defendant at the time of the alleged accident was the owner of and was operating an electric railway for the purpose of transporting passengers for hire, and was bound to exercise the highest degree of care, and skill, and benefits, practicable, consistent with the operation of said electric railway and the cars used in operation thereof, and taking into consideration the circumstances and conditions existing at that time and place in question, in order to prevent and avoid injury to the plaintiff, if you find that the plaintiffs were passengers upon the car as alleged in their complaint, and that the defendant is liable for the slightest negligence in its operation."—Approved: Mueller v. Washington Water Power Co., 56 Wash. 556, 106 Pac. 476.

(f) "A common carrier of passengers is required under the law to

exercise towards its passengers the highest degree of care and prudence practically consistent with the operation of its road in the carrying of persons and in letting them on and off its cars."—Approved: Bennett v. Seattle Electric Co., 56 Wash. 407, 105 Pac. 825.

§ 4134. But there is no Liability for Mere Accident without Fault.

"If you believe from the evidence that the injury to the plaintiff in this suit happened to him by mere accident, and without any fault on the part of defendant or its employes, then the plaintiff cannot recover in this action. The defendant is not an insurer of the safety of its passengers, and it is only liable when injuries are incurred without fault on the part of the person injured, and because of negligence on the part of the defendant."—Approved: Fitch v. Mason City & C. L. Traction Co., 124 Iowa, 665, 100 N. W. 618.

§ 4135. Collision—Presumption Against Carrier.

"The carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation, which might have been avoided by the exercise of such care. And if you find that while the plaintiff was being carried as a passenger by the defendant the Los Angeles Traction Company, the car upon which she was a passenger collided with a car operated by the Los Angeles Railway Company, and that she was thrown from said car and injured, then a presumption of negligence arises which throws upon the defendant the Los Angeles Traction Company the burden of showing that the injury was sustained without any negligence on its part, and in the absence of such evidence your verdict should be in favor of the plaintiff for such sum as will compensate her for the damages sustained."—Approved: Osgood v. Los Angeles Trac. Co., 137 Cal. 280, 70 Pac. 169.

§ 4136. Same with Railway Train Negligence in not Avoiding.

"If the jury find from the evidence in this case that on the 13th day of August, 1903, defendant St. Louis Transit Company was operating the street car mentioned in the evidence to carry passengers for hire, and if the jury find from the evidence that on said day the plaintiff was a passenger on said defendant's car going west on Chouteau avenue, a public street within the city of St. Louis; and if the jury believe from the evidence that whilst the plaintiff was such passenger on said car going west on Chouteau avenue in the city of St. Louis, said car was collided with by an engine of the defendant, Missouri Pacific Railway Company, at the crossing of its tracks on Chouteau avenue, and that thereby the plaintiff received the injuries mentioned in the evidence, and if the jury find from the evidence that defendant, St. Louis Transit Company, by its servants in charge of said car, and the machinery and appliances thereof, could by the exercise of the high degree of care of skillful and careful railroad employes under the same or similar circumstances, in the management of said car and maintenance of its machinery and appliances, have prevented said collision and plaintiff's injuries, then the defendant, St. Louis Transit

Company, is liable, and the verdict should be for the plaintiff against said defendants. And if the jury further find from the evidence that as the engine of defendant Missouri Pacific Railway Company mentioned in the evidence ran to and on said crossing, the bell on said engine was not rung eighty rods from said crossing and kept ringing until said engine crossed said street, and if the jury find from the evidence that such failure to ring said bell directly contributed to cause said collision and plaintiff's said injuries, and if the jury find from the evidence that the plaintiff was exercising ordinary care at the time of his injuries, then plaintiff is entitled to recover against both the St. Louis Transit Company and the Missouri Pacific Railway Company."—Approved: Beave v. St. Louis Transit Co., 212 Mo. 331, 111 S. W. 52.

§ 4137. Derailment Carries Presumption of Negligence.

"The jury are instructed that if you believe, and find from the evidence, that on or about the —— day of ————, defendant was operating a street railway, and engaged in the business of carrying passengers thereon for hire, that plaintiff was a passenger having taken passage upon one of defendant's cars on said road, and that while he was so a passenger being carried thereon upon defendant's road the said car was thrown from or left the track upon which it was running, and suddenly stopped, at or near the intersection of N. and M. streets, in K. C., Mo., and that plaintiff was then himself exercising ordinary care, and that he was by such stopping and derailment of the car thrown from said car and injured thereby—then the law presumes that such injury to plaintiff was caused by defendant's negligence, and such facts, if proved by a preponderance of the evidence, make out a presumptive case for the plaintiff, and you should find a verdict for the plaintiff, unless you further believe from the evidence that, notwithstanding this presumption, the defendant at the time of the happening of the injury in fact had then fully performed, or was then fully performing its duty as defined and stated in other instructions herein towards plaintiff as such passenger; or, that such injury to plaintiff, if any, did not occur because of any failure of the defendant in such respect."—Approved: Logan v. Met. St. Ry. Co., 183 Mo. 583, 82 S. W. 127.

§ 4138. Wrongful Ejection and Fatal Injury from Fall.

"If the jury further believe from the evidence that the defendant, St. Louis Transit Company, received the said John G— on said car on said 28th day of March, 1904, and if the jury further believe from the evidence that while the said John G— was on said car the defendant's conductor in charge of said car, whilst running, conducting, and mangaging said car as the agent, servant, and employe of the defendant, wrongfully and forcibly attempted to eject the plaintiff's said husband from said car, and that the plaintiff's said husband was thereby caused to fall from said car while said car was in rapid motion and did strike the street with great force and violence, and

that thereby the plaintiff's said husband sustained injuries from which he died on the 30th day of March, 1904, and if the jury further believe from the evidence that said acts of the defendant's said conductor, in attempting to eject the plaintiff's said husband from said car and causing him to fall therefrom, if the jury so find from the evidence, were done with criminal intent, then, the verdict of the jury must be in favor of the plaintiff."—Approved: Garrett v. St. Louis Transit Co., 219 Mo. 65, 118 S. W. 68.

§ 4139. High Rate of Speed on Defective Track.

"If the jury find from the evidence in this case that on the 7th day of May, 1902, the defendant was operating the railway and street car mentioned in the evidence for the purpose of carrying passengers for hire;

"And if the jury find from the evidence in this case that on said day the defendant by its servants in charge of its southbound car on Marcus avenue received the plaintiff as a passenger thereon, to be carried as such passenger to its destination on said car at Easton and Marcus avenues;

"And if the jury find from the evidence that as said car approached said destination the plaintiff walked to the front platform of said car for the purpose of alighting from said car when he reached said destination;

"And if the jury find from the evidence that whilst the plaintiff was on said front platform and before said car reached said destination said car sustained a violent and unusual shock by reason of the defendant's servants negligently running said car at a high and negligent rate of speed on the track which was defective as hereinafter stated, whereby the plaintiff's head was caused to be brought in contact with the pole near said track and that thereby the plaintiff was injured and fell from said car;

"And if the jury find from the evidence that defendant's track at said place was rough and uneven, and that the joints of the rails were worn and not broken or made even, and that thereby said car was caused to sustain said violent and unusual shock, and plaintiff to so come in contact with said post and sustain such injury;

"And if the jury find from the evidence that the defendant failed to exercise a very high degree of care in running its said car over said track in said condition, and if the plaintiff was exercising ordinary care at the time of his injury, then he is entitled to recover."—Approved: Wellmeyer v. St. Louis Transit Co., 198 Mo. 527, 95 S. W. 925.

§ 4140. Platform without Railing—Lurching of Car.

"You are instructed that if you believe from a preponderance of the evidence that the deceased, N. P. H—, was permitted to ride by the defendant upon the platform of defendant's car; that the defendant carelessly and negligently failed and neglected to provide and have on said car a gate, railing, or other protection around the platform

thereof, and that thereby said car was rendered an unsafe and dangerous conveyance, in that passengers on said platform were unprotected and liable to be thrown therefrom; and you further believe that defendant permitted said car to become overcrowded with passengers, and failed to provide said H— with a seat on said car, but permitted him to be crowded and jostled by other passengers likewise upon said platform; and if you further believe that said car ran into said curve at a high rate of speed, without warning or notice to said H—; that thereby said car was caused to lurch and jerk as it went around said curve, causing said H— to be thrown therefrom, and to receive injuries of which he died—then your verdict will be for plaintiff."—Approved: Halverson v. Seattle Electric Co., 35 Wash. 600, 77 Pac. 1058.

§ 4141. Obligation to Carry Safely—Negligence of Servants.

"If the plaintiff was a passenger upon one of the defendant's cars, as charged in the complaint, and defendant's obligation was to carry her safely and properly, and if the defendant intrusted this duty to the servants of the company, the law holds the defendant responsible for the manner in which they execute it. And it is the established law that a carrier is responsible for the negligence and wrongful conduct of its servants, suffered or done in the line of their employment, whereby a passenger is injured."—Approved: Terre Haute Traction & Light Co. v. Payne, 45 Ind. App. 132, 89 N. E. 413.

§ 4142. Boarding Car—Sudden Start Causing Injury.

(a) "If you believe from the evidence that at the time mentioned in the petition the defendant's car stopped at the corner of Fourth and Green streets for the purpose of allowing persons who proposed to become passengers to board the car, and that the plaintiff in this case, when the car had stopped, attempted to board it for the purpose of becoming a passenger, and that while she was in the act of boarding it the car was suddenly started in such a manner as to give her a wrench or jerk, and because of the sudden starting of the car she received the injuries of which she complains, and that she would not have been injured but for the sudden starting of the car, then the law is for the plaintiff, and you should so find."—Approved: Louisville Ry. Co. v. Pulliam (Ky.), 101 S. W. 295 (not reported in state reports).

(b) "If you believe from the evidence that plaintiff, while entering defendant's car, was injured by being thrown against one of the seats thereof, and that such injury was caused by the negligence of defendant's agents or employes in charge of said car in starting said car by a reckless or unnecessary and unusual jerk or lurch, you will find for plaintiff.

"Unless you believe that plaintiff, while entering defendant's car, was injured by being thrown against one of the seats thereof, and that such injury was caused by the negligence of defendant's agents or employes in charge of said car in starting said car by a reckless

or unusual and unnecessary jerk or lurch, you will find for defendant." —Approved: Lexington Ry. Co. v. Britton, 130 Ky. 676, 114 S. W. 295.

(c) "When a man signals a street car, at a place where such cars stop with or without signal to take on passengers, for the purpose of stopping it so he can board it and become a passenger, and the car stops or slows up as if intending to stop at that point in answer to the signal, and the man steps forward to the car, in plain view of those in charge of the operation of the car for the purpose of boarding the car, it then becomes the duty of those in charge of the car to ascertain and know whether or not he has safely boarded the car, or is in the act of boarding it, and it is negligence for them to suddenly start the car forward without warning, while he is in the act of boarding the car."—Approved: Nilson v. Oakland Traction Co., 10 Cal. App. 103, 101 Pac. 413.

(d) "The court instructs the jury that if you believe from the evidence that the defendant on October 30, 1904, was operating the car mentioned in the evidence, for the purpose of carrying passengers for hire, and that on said day it stopped said car at or near the corner of Thirty-ninth street and Woodland avenue, in Kansas City, Missouri, for the purpose of taking on or discharging passengers, and that while said car was so stopped plaintiff was standing at such stopping point, and thereupon immediately exercised reasonable expedition to get upon said car, and that while she was in the act of getting upon said car it was started forward by defendant before plaintiff could, by the exercise of reasonable expedition and reasonable care on her part, have gotten safely upon said car, and that the conductor of said car saw, or by the exercise of the highest practical degree of care ought to have seen, said plaintiff while she was attempting to get on said car (if she was); and if you further believe that by the starting of said car (if it was started) said plaintiff was thrown off her balance, and that defendant's conductor in charge of said car jerked plaintiff toward him on the car in attempting to keep her from falling to the ground (if she was), and that she was thereby caused to fall against parts of said car and to the ground; and if you further believe that prudent men engaged in the street railway business, in the exercise of the highest practicable degree of care, would not have started said car forward under such circumstances, then the defendant was guilty of negligence; and if you believe that said plaintiff was, as the direct result of such negligence (if any), thrown against parts of said car and to the ground, and was thereby injured, then your finding should be for the plaintiff, provided you further believe that plaintiff was in the exercise of reasonable care, at the time."—Approved: Wellman v. Metropolitan St. Ry. Co., 219 Mo. 126, 118 S. W. 31.

(e) "If you find from the evidence that on or about the 17th day of March, 1907, plaintiff was on West Commerce street in the city of San Antonio, and that, as one of defendant's cars approached the point where plaintiff was, he signalled to an employe in charge of said car to stop same so that he (plaintiff) might take passage thereon, and you further find that, in obedience to said signal, if any, said car was

reduced to a slow rate of speed, and that thereupon plaintiff stepped aboard the running board of said car, and you further find that as plaintiff stepped aboard said running board, if you find he did, defendant's employe operating said car caused said car to suddenly and violently start forward, and that plaintiff was thereby thrown against the side of said car, and by reason thereof sustained any of the injuries complained of in his petition, and you further find that in causing said car to suddenly and violently start forward, if you find he did, said defendant was guilty of negligence, and that such negligence, if any, was the direct cause of plaintiff's injury, if any, and you further find that plaintiff was not guilty of any negligence that caused or contributed to his injury, if any, then you will find for plaintiff."—Approved: Gildemeister v. San Antonio Trac. Co. (Tex. Civ. App.), 135 S. W. 1097.

§ 4143. Reasonable Time to get Aboard.

"The court instructs the jury that if you find and believe from the evidence that the car upon which the plaintiff boarded, or attempted to board, stopped at the usual stopping place where plaintiff claims to have been injured, a reasonable length of time to enable plaintiff to board the same in safety, by the exercise of ordinary care on his part, then you will find your verdict for the defendant."—Approved: Quinn v. Metropolitan St. Ry. Co., 218 Mo. 545, 118 S. W. 46.

§ 4144. To Stand Still not Required until Passenger is Seated.

"It was not the duty of the agent or servant of the defendant in charge of the car which plaintiff attempted to board to have the car remain standing until plaintiff was seated in said car, and unless you believe from the evidence that the said agent or servant in charge of said car failed to exercise that degree of care which is imposed upon him as set out in instruction No. 3, and by recklessness or jerks or lurch of said car started the same, and the plaintiff was injured thereby, the law is for the defendant, and you should so find."—Approved: Howard v. Louisville Ry. Co. (Ky.), 105 S. W. 932 (not reported in state reports).

§ 4145. Knowledge Either of Conductor or Motorman that Passenger is Boarding Car.

"If you believe from the evidence that the plaintiff was standing upon the rear platform of defendant's car for the purpose of requesting passage thereon from the conductor, while the same was stopped and standing at ————; that said car was in charge of and being operated by its motorman and conductor, and that in operating the same the motorman had control of the power which caused its motion, and so controlled the stopping, starting, and speed of the car, and said motorman was under the direction of the conductor, and was required to stop and start said car upon signals from the conductor by means of a bell to be rung by the conductor; that either of them—the said conductor or motorman—knew, or by the exercise of ordinary care would have known, that plaintiff was so standing upon said plat-

form, and failed to exercise ordinary care for the safety of the plaintiff in the starting of said car, and that such failure caused the said car to be started suddenly, and without notice or warning to plaintiff, at a rapid rate of speed, upon a curve in the track, and thereby caused the plaintiff to be thrown from the said platform of the car and injured, as the result of such failure in the exercise of ordinary care—then you should find that such failure constituted negligence."—Approved: Brock v. St. L. T. Co., 107 Mo. App. 109, 81 S. W. 219.

§ 4146. Per Contra—Where Passenger was Entering Car from Platform.

"You are further instructed that if you believe from the evidence in this case that Cecelia A. B—, one of the plaintiffs, in her efforts to get upon the platform of and to enter the defendant's car, at the time and place and manner alleged in plaintiffs' complaint, acted as an ordinarily prudent woman generally acts under circumstances similar to all those which then surrounded her, and if you believe from a preponderance of the evidence that the said Cecelia A. B— did get upon the rear platform of the defendant's car while the same was there standing still, and immediately after other passengers had alighted from said car, and that the defendant's servants and employes started said car without having exercised the highest degree of care and prudence reasonably practicable under the circumstances and conditions existing at the time and place in question to see that the said Cecelia A. B— was in a place of safety and had had ample opportunity, she exercising ordinary care, to secure a seat in said car, and that the negligent starting of the said car through the said Cecelia A. B— against the handles of the rear door of said car, and then down and upon and against the rear doorsill of said car, and then upon the floor of said car, as alleged in the complaint and that she was injured as is alleged in the complaint, then and in that event your verdict will be for the plaintiffs.

"You are further instructed that, if you find from a preponderance of the evidence that the said Cecelia A. B— got upon the rear platform of said car, and thereafter, while endeavoring to secure a place of safety and a seat in said car, she exercised reasonable and ordinary care for her own safety under all the circumstances, and proceeded as expeditiously as she could under all the circumstances toward a seat in said car, and if before she became seated the defendant's servants and employes started said car without exercising the highest degree of care reasonably practicable under the circumstances and conditions existing at the time and place in question, and by reason thereof the said Cecelia A. B— was injured as is alleged in the complaint, such acts of the defendant's servants and employes would constitute negligence, and the defendant would be liable to the plaintiffs for damages sustained by the said Cecelia A. B— as a result of being thrown against the handles of the doors in said car, and against the sill thereof and then thrown upon the floor of said car, provided you further find that she was without negligence on her part."—Approved: Behl-v. Seattle Electric Co., 50 Wash. 150, 96 Pac. 954.

§ 4147. Duty of Conductor to Countermand Stranger's Signal to Start.

"If the jury believe from the evidence that some person not in the employment of the defendant company rang the bell which started the train at the time in question, still that fact will not exempt the defendant company from liability in this case, provided the jury believe from the evidence that the conductor could, by use of due care and diligence, have countermanded the unauthorized signal for starting the train in time to have prevented any injury to plaintiff, if he, the conductor, had exercised due care and diligence in the discharge of his duties, and provided the jury believe from the evidence that the plaintiff, at the time in question, was in the exercise of reasonable care and diligence for his own safety."—Approved: N. C. St. Ry. Co. v. Cook, 145 Ill. 551, 33 N. E. 958.

§ 4148. Alighting from Car—Sudden Starting.

(a) "If the jury find from the evidence that the plaintiff arose from her seat and stepped down onto the step with intent of alighting while the car was standing still (and that such act was observed by the motorman or conductor), such act was a sufficient notice to the employes in charge of said car of her desire to alight therefrom; and if the jury (further) believe that, while she was in the act of alighting, the car was suddenly started through the negligent act of the employe in charge of said car, (and) the plaintiff was thereby thrown to the ground and injured, she is entitled to recover."—Approved: Joyce v. Los Angeles Ry. Co., 147 Cal. 274, 82 Pac, 204.

(b) "If the jury find from the evidence that the plaintiff was a passenger and had paid her fare on the car in question, and that while the car was standing still she arose from her seat and stepped down onto the step, with a view of leaving the car, and while in the act of alighting the defendant's servants caused the car to start forward with a jerk, which caused her to fall, whereby she was injured, she has established a prima facie case of negligence in the management of the car, and the burden of proof, which primarily rested on her, was uplifted, and the burden of disproof thrown upon the defendant."—Approved: Joyce v. Los Angeles Ry. Co., 147 Cal. 274, 82 Pac. 204.

(c) "You are instructed that a passenger in alighting from a car of a common carrier is entitled to a reasonable time in which to get off of the car after he has been given an opportunity to do so; and if you believe from the evidence that the plaintiff was a passenger on a car of the defendant, and that the same was started after having been stopped, if you find it did stop, without allowing him such reasonable time in which to alight, then the defendant Butte Electric Railway Company is liable for any injuries he may have received by reason of the car starting, provided you believe from the evidence that plaintiff was in the exercise of reasonable and ordinary care to avoid injury to himself, or was not guilty of contributory negligence as defined in these instructions."—Approved: Lehane v. Butte Electric Ry. Co., 37 Mont. 564, 97 Pac. 1038.

(d) "It was the duty of the conductor of the defendant, the Metropolitan Street Railway Company, in charge of the car in question to exercise the highest possible caution and prudence in the letting off of passengers at the station in question—the James Street Station of the defendant—and it was also his duty to see and know that the plaintiff was safely off the car and through the doors of the waiting room; and, having failed in his duty in that behalf, the plaintiff is entitled to recover a verdict against the defendant. So that the only question for you to determine in this case is, how much the plaintiff is entitled to recover for the result of the injuries sustained at the time and place in question."—Approved: Metropolitan St. Ry. Co. v. Hanson, 67 Kan. 256, 72 Pac. 773.

(e) "The court instructs the jury that if they shall believe from the evidence that at the time mentioned in the petition the plaintiff, Johnetta O—, was a passenger upon one of the defendant's cars, and that the car upon which she was riding stopped at the corner of Fourteenth and Broadway streets for the purpose of allowing her to alight therefrom, then it was the duty of the defendant's employes in charge of the car not to start it until she had an opportunity to alight therefrom with reasonable safety; and if they shall further believe from the evidence that when she was in the act of alighting, and was exercising ordinary care for her own safety, the defendant's employes in charge of the car suddenly started the car before she had an opportunity to alight with reasonable safety, and by reason thereof she was thrown on the street and caused the injuries of which she complains, then the law is for the plaintiff, and they should so find. But unless the plaintiff, Johnetta O—, was a passenger upon one of defendant's cars, as mentioned in instruction 1, and the car was stopped for her to alight, and was suddenly started before she had an opportunity to alight by the exercise of ordinary care upon her part, and she was thereby caused the injury of which she complains, the law is for the defendant, and they should so find."—Approved: Louisville Ry. Co. v. Owens (Ky.), 97 S. W. 356 (not reported in state reports).

(f) "If you believe from the evidence that the plaintiff was a passenger upon one of defendant's street cars at the time and place in controversy; that the said car had stopped for the purpose of allowing passengers to alight therefrom; that the plaintiff attempted to so alight; that while she was in the act of so doing the defendant negligently started said car forward with a sudden jerk or movement, thereby throwing plaintiff to the pavement and injuring her—then the plaintiff would be entitled to recover, unless it has been shown by the evidence that plaintiff was herself guilty of negligence which approximately contributed to her injury, in which latter case plaintiff would not be entitled to recover."—Approved: Indianapolis Traction & Terminal Co. v. Miller, 40 Ind. App. 403, 82 N. E. 113.

(g) "The plaintiff was not bound to apprehend any carelessness or lack of care on the part of the defendant; and, if you further find that before stopping, and being near the place where the car stopped,

the defendant's conductor had announced that the next stop would be Sixth street, plaintiff had a right to rely when said defendant stopped its car, and passengers were being discharged therefrom on said date, that said car would not be started until she was safely off the same. She was not bound to apprehend that the motorman might start the car while she was walking down the aisle and attempting to gain the rear platform of the car on which she was riding, before she had reached a position of safety. She was not bound to apprehend that the defendant might do anything that would place her in jeopardy. On the contrary, she had a right to place full reliance on the defendant's doing its full duty towards her, and exercising the highest degree of care which the law requires of it for her protection."—Approved: Terre Haute Traction & Light Co. v. Payne, 45 Ind. App. 132, 89 N. E. 413.

(h) "Said car should, after the same had been stopped, be held a sufficient time to enable each passenger to get clear of the car; and the company will be negligent, if, by its employes in charge of said car, it permits the car, after having stopped the same, to start while such passenger is in the act of alighting."—Approved: Indianapolis Traction & Terminal Co. v. Miller, 43 Ind. App. 717, 88 N. E. 526.

(i) "The court instructs the jury that if you find from the evidence that the plaintiff was the wife of William J. L. M— at the time of his death, if you find that he died, as mentioned in the evidence, and that the defendant St. Louis Transit Company was on April 23, 1904, operating and using cars on a street car line on Sixth street in the city of St. Louis, State of Missouri, to carry passengers for hire from one point to another, and that on said day said William J. L. M— was received as a passenger on one of said cars at Sixth and Locust streets, and paid his fare to the conductor of said car, and that said car was in charge of a conductor and motorman of said defendant, and that said car was stopped at the northeast corner of Sixth street and Franklin avenue to discharge passengers therefrom, and that said William J. L. M— immediately started to leave said car by way of its rear platform and that the rear platform was a usual and customary way for passengers to leave the said cars of defendant, and that in attempting to so leave said car he was in the act of passing to the steps of said rear platform, and that while in said act, and before he had a reasonable time or opportunity to alight from said car, the said motorman of said car caused and permitted said car to suddenly and without warning, start, and go forward with a sudden motion and jerk for a few feet and then stopped with a sudden shock and jerk, and that thereby said William J. L. M— was caused to fall and be thrown, and thereby received an injury in his back, and that said injury was the direct cause of his death, and that he died on December 18, 1904, and that said motorman in so causing and permitting said car, to suddenly and without warning start and go forward with a sudden motion and jerk for a few feet and then stop with a sudden shock and jerk, if you find from the evidence this oc-

curred, did not exercise a high degree of care such as a very careful and skillful motorman would exercise under the same or similar circumstances, then your verdict should be in favor of the plaintiff, and against the defendant St. Louis Transit Company; and, if the jury further find from the evidence that the defendant United Railways Company of St. Louis, on April 23, 1904, owned the street car line and street cars mentioned in the testimony, and that the same was being operated by the defendant St. Louis Transit Company under the lease offered in evidence from the United Railways Company of St. Louis, then you will also find in favor of plaintiff against said defendant United Railway Company of St. Louis."—Approved: Millar v. St. Louis Transit Co., 215 Mo. 607, 114 S. W. 945. See also Westervelt v. St. Louis Transit Co., 222 Mo. 325, 121 S. W. 114.

§ 4149. Conductor should see Passenger has Alighted.

"If a car stop at a place where cars are accustomed to stop, for the discharge of passengers, a passenger desiring to alight has a right to assume that the car will remain standing long enough to enable all that desire to do so, to safely alight from said car. You are instructed that stopping a reasonable time for a passenger to alight from such car is not sufficient, but it is the duty of the conductor or other person in charge of the said car to see and know that no passenger is in the act of alighting from such car, or in a dangerous position, before putting the car of which he is in charge in motion again."—Approved: Louisville & S. I. Trac. Co. v. Korbe (Ind. App.), 90 N. E. 483.

§ 4150. Slow Moving Car—Sudden Increase of Speed While Passenger is Alighting.

"The jury are instructed that if they believe from the testimony that at the date of the alleged injuries the plaintiff was a passenger on one of the defendant's cars, and that at or near where Eighteenth street would intersect Main street he signaled or notified the conductor that he desired to get off, and thereupon in response to such signal the speed of the car was slackened or slowed up, and the plaintiff, while the speed of the car was being slackened, stepped upon the rear step of the platform when the car was moving slowly, and, while he was in the act of stepping from the car, its speed was suddenly increased and thereby threw the plaintiff down, causing the injuries complained of, then the defendant company would be guilty of negligence, and you must find for the plaintiff unless you further believe from the testimony that the plaintiff, in undertaking to step from the car while in motion, was guilty of contributory negligence,, which proximately contributed to the injuries complained of."—Approved: Little Rock Ry. & Electric Co. v. Doyle, 79 Ark. 378, 96 S. W. 353.

§ 4151. Alighting Passenger Struck by car on Parallel Track.

(a) "If you believe from the evidence that on or about ————, at the place alleged in this suit, the plaintiff was a passenger on one

of the defendant's electric cars, and that as the plaintiff was in the act of alighting from the car, and just before he had safely landed, another car of the defendant approached from the opposite direction, running at a reckless and unusual rate of speed, struck and injured plaintiff; and if you believe such running of said car was negligent (that is, the absence of extraordinary diligence), and that such negligence, if you find it to be negligence, caused plaintiff's injury, and that by ordinary care plaintiff could not have avoided the consequences to himself of defendant's negligence, if you find that to have existed as explained,—the plaintiff would be entitled to recover."—Approved: Atlanta Consol. St. Ry. Co. v. Bates, 103 Ga. 333, 30 S. E. 41.

(b) "If the jury believe from the evidence that defendant's car upon which plaintiff was riding was being slowed down by defendant's employees in charge of the car for the purpose of permitting plaintiff to alight therefrom, and if the jury further believe from the evidence that the plaintiff, when said car was slowing down, was preparing to alight therefrom, and if the jury further believe from the evidence that while plaintiff was so preparing to alight said car was, without notice to plaintiff, and through the negligence of said employees, caused to suddenly start forward at an increased rate of speed, and that the plaintiff, by reason of said car being so suddenly caused to start forward, was thrown from said car, the jury should find for the plaintiff."—Approved: Sandlin v. Lexington Ry. Co. (Ky.), 110 S. W. 374 (not reported in state reports).

(c) "Before the jury can find for the plaintiff they should believe from the evidence that the plaintiff was thrown from defendant's car by reason of a sudden jerk or forward movement of said car at a time when speed of the car was reduced to an extent or degree which would reasonably warrant an ordinarily prudent person in assuming he could alight therefrom with safety, and that such jerk or forward movement of this car occurred after the plaintiff had given notice to defendant's employees in charge of the car to stop the same for the purpose of enabling the plaintiff to alight therefrom, and after the speed of the car had been reduced by the motorman for the purpose of enabling the plaintiff to alight from the car, and unless the jury should so find, they should find for the defendant."—Approved: Sandlin v. Lexington Ry. Co. (Ky.), 110 S. W. 374 (not reported in state reports).

§ 4152. Assisting Passenger to Alight where Step is Muddy and Slippery.

"Or if you believe from the evidence that said car was stopped near the corner of Simon and South Flores streets, and that plaintiff's wife proceeded to alight therefrom, and that the step or platform, or both, was muddy and slippery, and that the agent of the defendant, the conductor in charge of said car, failed to assist plaintiff's wife to alight therefrom, and that the failure of said conductor to assist plaintiff's wife from said car was negligence, and that such

negligence, if any, was the proximate cause of the accident to plaintiff's wife, if any, and that she was injured thereby, then you must find your verdict for the plaintiff."—Approved: San Antonio Traction Co. v. Flory, 45 Tex. Civ. App. 233, 100 S. W. 200.

§ 4153. Notifying Conductor of Desire to Alight.

(a) "Applying for and receiving from the conductor a transfer to the Mulberry Street line was equivalent to a declaration by the plaintiff to the conductor that she intended to continue upon the car until it arrived at the passing switch, and unless the plaintiff, after receiving the transfer, in some manner communicated to the conductor that she desired to leave the car at the intersection of Iowa avenue and Second Street, or did something at that point to indicate that she was about to leave the car, or made some attempt to do so, he had a right to assume that the plaintiff would remain upon the car until the passing switch was reached, and his giving the signal to start the car, after the other passengers had safely alighted therefrom, was not a negligent act, unless the conductor actually saw the plaintiff in the act of starting to alight or alighting when he gave such signal, or should have seen her by the exercise of the high degree of care required of him, as explained in other instructions given you, if in fact she did start to alight before such signal was given by the conductor."—Approved: Farrell v. Citizens' Light & Ry. Co., 137 Iowa, 309, 114 N. W. 1063.

(b) "If you believe from the evidence that the place where the car in question stopped just before plaintiff attempted to alight therefrom was not a regular stopping place, but a 'call stop' only, and that plaintiff did not inform the conductor or motorman of said car that she wished to alight at said place, you would not be warranted in finding the defendant guilty of negligence in causing said car to be started ahead while plaintiff was attempting to alight therefrom unless you further believe from the evidence that the conductor or motorman of said car saw or knew that she was intending or attempting to do so at the time said conductor signaled his motorman to proceed with his car. If the conductor of the car on which the plaintiff was a passenger saw the plaintiff at the time she was alighting from the car, or by the exercise of ordinary care in performing his duties as such conductor he could have seen her, then it was his duty to hold his car until she had alighted; and, under such circumstances, if he did signal the motorman to start the car while the plaintiff was alighting, such act was negligence on his part."—Approved: Peterson v. Baker, 78 Kan. 337, 97 Pac. 373.

§ 4154. Sufficient Time to Alight—Presumption of.

(a) "The law does not require the same foresight and prudence of one suddenly and unexpectedly placed in a dangerous position by the wrongful act of a common carrier as is ordinarily required; and, if the plaintiff knew the car had stopped to let off passengers at a street crossing, where cars were accustomed to stop for the discharge

of passengers, she had a right to assume that the car would stop long enough for all to alight who desired; and as she was proceeding in reasonable haste to get off, she had a right, without something took place to put her on her guard, to act upon the theory that the defendant would do its duty with respect to the length of the stop."—Approved: Indiana Union Traction Co. v. Thomas, 44 Ind. App. 468, 88 N. E. 356.

(b) "The court instructs the jury that if they shall believe and find from the evidence in this case that on the 14th day of February, 1905, plaintiff was a passenger upon one of the electric street cars of the defendant's South Broadway line exercising reasonable care and diligence, and that when said car had reached about the middle of the block on Grand Avenue, between Seventeenth and Eighteenth streets, plaintiff gave the customary signal to stop said car at the north side of Eighteenth street, and that, when the said car had reached a point on Grand Avenue about twenty-five to thirty feet from said Eighteenth street the conductor in charge of said car called out Eighteenth Street, and that plaintiff then left her seat in said car, and went out upon the rear platform of said car, and that said car came to a full stop, and that plaintiff then commenced to step down from the platform and step off said car, and that while she was in the act of stepping down from said car, and before she had alighted therefrom, the said car was negligently, carelessly moved suddenly forward and by reason of such sudden forward movement of said car plaintiff was thrown violently from said car to the ground, and was injured, then your verdict in this case should be for the plaintiff."—Approved: Hufford v. Metropolitan St. Ry. Co., 130 Mo. App. 638, 109 S. W. 1062.

(c) "You are instructed that if from the evidence you believe that the conductor or person in charge of the car on which plaintiff was riding as a passenger, if you find he was so riding, was informed by plaintiff that he desired to alight at the corner of Park and Oklahoma streets, and that the said conductor or person in charge of said car assented to such request, and if you further believe that said car did as a matter of fact stop at the corner of Park and Oklahoma streets, then you are instructed that the plaintiff had the right to assume that the defendant company through its conductor or other person in charge of said car and controlling its movements would give plaintiff a reasonable opportunity to alight from said car without injury to himself. And you are further instructed that if said car did so stop at the corner of Park and Oklahoma streets, and that the plaintiff, exercising the care and prudence that a reasonably careful man under like circumstances would have used, did attempt to alight from said car, and while engaged in such attempt to alight therefrom the said defendant company through its agents in charge of said car did not give him a reasonable opportunity to get off of said car, then you are instructed that, even though the said car started while plaintiff was so engaged in attempting to get off of said car, nevertheless, said conduct on the part of the plaintiff did not necessarily render plaintiff guilty of contributory negligence, unless

you believe from all of the evidence that a reasonably prudent man in attempting to get off of said car would not have conducted himself as the plaintiff did at the time and under the circumstances when he was attempting to alight from the street car in question. In determining whether plaintiff was guilty of negligence on his part which directly contributed to his injury, you are instructed that you are to take into consideration all of the facts in this case, and from them determine whether plaintiff, under the circumstances, conducted himself as a reasonably prudent man would have done under like circumstances; and, if from the evidence you believe that a reasonably prudent man under like circumstances would have acted in the same manner as plaintiff acted, then you are instructed that plaintiff was not guilty of contributory negligence."—Approved: Lehane v. Butte Electric Ry. Co., 37 Mont. 564, 97 Pac. 1038.

§ 4155. Passenger After Alighting Injured by Car in Effort to Escape an Approaching Vehicle.

"The court instructs the jury that, after the plaintiff alighted in the street from the defendant's car, so as to be free from injury by its forward movement, the defendant ceased to owe the plaintiff any further duty, except to use ordinary care to avoid injuring him; and if the jury believe from the evidence that the plaintiff was injured by a backward movement, or movement towards the car, on his part, caused by an approaching vehicle in the street, or from any other cause over which the defendant had no control, and that by ordinary care on the part of the defendant's employees in charge of said car the injury to the plaintiff could not have been avoided after they discovered, or could by ordinary care on their part have discovered, plaintiff's peril, and by the exercise of ordinary care could then have avoided injuring him by stopping the car, the law is for the defendant, and the jury so find."—Approved: Louisville Ry. Co. v. Meglemery, 25 Ky. 1587, 78 S. W. 217.

§ 4156. Alighting at Wrong Place.

"If the jury believe from the evidence that the car had passed the usual station or stopping place for the discharge of passengers and stopped at a place where there was a depression in the ground, and that, by reason of such depression, it was a long step from the platform or step of the car to the ground, and that plaintiff in attempting to leave said car at said point staggered, or was turned, and injured as the result of the condition of the ground where she attempted to alight (and without any such want of care on the part of the operative of the car [as defined in other instructions herein]) then the plaintiff cannot recover in this action, and your verdict will be for the defendants."—Approved: Westervelt v. St. Louis Transit Co., 222 Mo. 325, 121 S. W. 114.

§ 4157. Alighting as Car Starts up when Difficult to Turn Back.

"If you find that the night of the accident was a dark, rainy night, and that for that reason while on the car the plaintiff could

not see the situation of the car with reference to the waiting room at Royal Oak, or where it was on the street, and the conductor of the car opened the door and called 'Royal Oak,' and soon thereafter the car stopped still, and the plaintiff then believed from such announcement that she had reached the proper place to alight, and no warning was given to delay, or not to get off at that place, and she did not know she was near a railway crossing, and two passengers had preceded her in getting off the car there—that is, if you find these things from the evidence—then I charge you that, under such circumstances she had a right to assume that sufficient time would be given her to get off the car in safety if she acted with reasonable care and diligence. And I charge you further in this case, if you find, in undertaking to get off the car at the place where she did undertake to alight, and was just in the act of stepping off, and had reached a point where it would be difficult, as she was situated, to turn back, that the car started at the very instant she was so acting, then I charge you, as a matter of law, that she would not be guilty of negligence herself in continuing her descent from the car."—Approved: Smith v. Detroit United Ry., 155 Mich. 466, 119 N. W. 640.

§ 4158. Passenger on Foot Board Must Exercise Reasonable Care.

"It is not negligence on the part of a railway company to permit passengers to ride on the footboard of its cars, provided a passenger voluntarily chooses that place when the seats are full, rather than await the arrival of another car, and a passenger taking such position is bound to exercise reasonable care to avoid accident or injury to himself; but if he fails to exercise reasonable care, and by reason thereof is injured, the railway company is not liable for such injury." —Approved: Anderson v. City & Suburban Ry. Co., 42 Or. 505, 71 Pac. 659.

§ 4159. Voluntary Alighting While Car in Motion.

"The court instructs the jury that, to entitle the plaintiff to recover in this action, it must appear from the evidence that the injuries sustained by the plaintiff were occasioned by the carelessness or negligence on the part of defendant or its servants or employees as charged in the complaint, and were not the result of the plaintiff's own fault; and if you believe from the evidence that the plaintiff was injured in consequence of her voluntary alighting from the car of defendant, at the time of the accident, when it was in motion, then your verdict should be for defendant."—Approved: Joyce v. Los Angeles Ry. Co., 147 Cal. 274, 82 Pac. 204.

§ 4160. Stepping From Moving Car in the Wrong Direction.

(a) "You are instructed that if you should find and believe from the evidence that plaintiff herein attempted to alight from one of the defendant's cars while the same was moving, and that, in alighting therefrom, she did not follow the motion of the car, but stepped therefrom in a negligent manner, and that a person of ordinary care

would not have so acted under the same or similar circumstances, then this would constitute contributory negligence on the part of plaintiff, and you will return your verdict for the defendant; and this regardless of whether you find the defendant was in any manner negligent, and regardless of your finding upon any other issue herein." —Approved: Dallas Consol. Electric St. Ry. Co. v. Barnes (Tex. Civ. App.), 119 S. W. 122.

(b) "If the jury shall find from the evidence that the feme plaintiff was at the time of her injury in feeble health, and that she undertook to alight from the car while it was moving slowly, and in attempting to alight stepped from the car at right angles to the direction in which the car was moving, or with her back in the direction in which the car was moving, and she was thrown to the ground and injured, then she was guilty of contributory negligence, and the jury will answer the second issue 'Yes.' "—Approved: Allen v. Durham Traction Co., 144 N. C. 288, 56 S. E. 942.

§ 4161. Boarding Moving Car—Warning Against.

"While it was the duty of defendant, as a carrier of passengers to exercise a high degree of care, in receiving and protecting plaintiff if she sought to enter defendant's car as a passenger, yet plaintiff ought on her part to exercise ordinary care when seeking to become a passenger, and if she entered, or attempted to enter, defendant's car while it was in motion she did so at her own peril, unless the jury further believe that defendant's servants in charge of the car by their conduct invited her to enter before the car stopped; and if the jury further believe that defendant's conductor, and others, if any, acting upon the request of defendant's servants, publicly warned those seeking to become passengers to stay off the car until it stopped, and that notwithstanding plaintiff entered, or attempted to enter, the car before it stopped, then plaintiff was not received as a passenger and was not exercising ordinary care on her part, and the verdict must be for the defendant."—Approved: Flaherty v. St. Louis Transit Co., 207 Mo. 318, 106 S. W. 15.

§ 4162. Same—Negligence Question of Fact.

"Everyday observation and experience show that it is not necessarily negligent to attempt to board a moving street car. Whether it is or not depends upon the circumstances of each case. While it might be negligence for a man to try to board a car running very rapidly, it might not be negligence to try to board the same car running very slowly. It might be negligence to try to board a moving car of one kind, but not so to try to board a moving car of a different kind. It might be negligence for one man to try to board a car moving at a given rate, but not so for another man to try to board the same car, at the same place, in the same manner, and moving at the same rate. You are the judges of the question whether it was negligence for N— to try to board the car in question in this case, and for that purpose are to take into consideration all the evi-

dence in the case and all the circumstances surrounding him at that time."—Approved: Nilson v. Oakland Trac. Co., 10 Cal. App. 103, 101 Pac. 413.

§ 4163. Boarding Slow Moving Car—Carrier to Stop Car to Avoid Injury.

"The court instructs you that if you find from the evidence that the car in question had started at the time plaintiff attempted to get thereon, but was moving at such a rate of speed that under the circumstances it was reasonably safe for plaintiff to attempt to get thereon, and that the servants of defendant in charge of said car knew, or by the exercise of ordinary care and caution could have known, that plaintiff was about to attempt to get on said car, and by the exercise of ordinary care could have stopped said car in time to have prevented the injury complained of, if any, but carelessly and negligently failed to do so, and by reason thereof plaintiff was injured, then your verdict will be for plaintiff."—Approved: Peterson v. Metropolitan St. Ry. Co., 211 Mo. 498, 111 S. W. 37.

§ 4164. Refusal to Pay Fare—Fight Brought on by Passenger—No Liability.

"If you find that the defendant's conductor in charge of the car had demanded of the plaintiff's husband that he pay his fare and that he refused so to do, and that a scuffle and fight ensued, which was brought on by the plaintiff's husband or voluntarily entered into by plaintiff's husband, and that during such scuffle or fight he was thrown, pushed, or fell from said car and was thereby injured, then this defendant is not liable for the acts of the conductor, and your verdict will be for the defendant. In order to voluntarily enter into a scuffle, one must do so for the purpose of offensive attack. One who engages in a scuffle for the purpose of defending himself cannot be said to do so voluntarily."—Approved: Garrett v. St. Louis Transit Co., 219 Mo. 65, 118 S. W. 68.

§ 4165. Collision brought about or Contributed to by Carrier

(a) "The law made it the duty of the defendant, the Louisville Railway Company, and its agents in charge of the car upon which plaintiff was a passenger, to exercise the highest degree of care for her safety in the control and management of the car; and, if the jury shall believe from the evidence that the said defendant, or any of its agents, failed to exercise the highest degree of care in the control or management of the car on the occasion under investigation in this case, and that by such failure on their part, or on the part of either of them, the collision was brought about, or so far contributed to that but for such failure on the part of the said defendant or its said agents or some of them the collision would not have occurred, the law is for the plaintiff as against said defendant, and the jury should so find."—Approved: Louisville, H. & St. L. Ry. Co. v. Kessee (Ky.), 103 S. W. 261 (not reported in state reports).

(b) "The court instructs the jury that, if they believe from the

evidence that Rosa K— was injured by reason of the collision between the freight train and the street car on which she was a passenger on the occasion in the evidence referred to, then the law is for the plaintiff, and the jury should so find against the defendants or defendant whose negligence caused the said collision, as the jury may determine under the evidence and the following instructions. But unless the jury shall believe from the evidence that the said Rosa K— was injured in and by reason of the collision between the car on which she was a passenger and the freight train, on the occasion in the evidence referred to, the law is for the defendant, and the jury should so find."—Approved: Louisville, H. & St. L. Ry. Co. v. Kessee (Ky.), 103 S. W. 261 (not reported in state reports).

§ 4166. Where Motorman not at Fault no Recovery.

"The facts are for you. The value of the testimony is for you. If the plaintiff, without any fault of his own, was injured by the fault of the defendant's motorman, then he can recover, and if he can recover, he can recover according to the measure of the damages I have given you. If, however, he in the smallest degree contributed himself to the injury, he cannot recover. Moreover, he cannot recover if, however innocent the plaintiff was, the motorman did nothing wrong. If the motorman did his duty simply, and in consequence of some other set of circumstances, not known to us, the accident happened, then the plaintiff cannot recover. It requires negligence in the defendant and freedom from negligence in the plaintiff, both, to enable the plaintiff to recover."—Approved: Fitzpatrick v. Union Traction Co., 206 Pa. 335, 55 Atl. 1050.

§ 4167. Presumption of Negligence Arises from Injury.

(a) "When the plaintiff has shown that the deceased met with an injury while being transported by the defendant, and plaintiff has sustained damages thereby, then the burden of proof is upon the defendant to prove, by a preponderance of the evidence, that it was not guilty of negligence, the proximate cause of his death. This is true, unless the plaintiff's own testimony shows negligence upon the part of the deceased, contributing to his death, as a proximate cause thereof. The burden of proof is upon the plaintiff to prove, by a preponderance of the evidence, the other allegations of its petition—that the deceased received injuries while being transported by the defendant company, resulting in his death; that by reason thereof the plaintiff has sustained pecuniary damages as alleged in the petition; and the amount of such damages, if any."—Approved: Lincoln Traction Co. v. Heller, 72 Neb. 127, 100 N. W. 197.

(b) "It is admitted by the defendant that it is a common carrier employed in transporting passengers. It is the duty of defendant not to expose its passengers to any danger which human care and foresight could reasonably anticipate and provide against, and to exercise the highest degree of care and diligence reasonably consistent with the practical operation of its railroad and the conducting of its busi-

ness. And if, from the evidence introduced upon the trial, you believe that the plaintiff, while a passenger on the car of defendant, received an injury, resulting from the carelessness or negligence of the defendant or its employees in providing a seat without any guards, substantially as alleged, or in running, managing, and operating said car, or in constructing and maintaining its track at the place alleged, you should find for the plaintiff, provided you further believe from the evidence that plaintiff's own negligence did not contribute to such injury."—Approved: Fitch v. Mason City & C. L. Traction Co., 124 Iowa, 665, 100 N. W. 618.

(c) "Contributory negligence on the part of a passenger cannot be presumed from the mere fact of injury, but must be proved. On the other hand, the proof of an injury to a passenger on the car of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care and foresight could not prevent, or by contributory negligence of the plaintiff, unless the proof on the part of the plaintiff tends to show that the injury was occasioned by the contributory negligence of the passenger, or by inevitable casualty, or by some other cause which human care and foresight could not prevent."—Approved: Boone v. Oakland Transit Co., 139 Cal. 490, 73 Pac. 243.

§ 4168. Same—Explosion in Car.

"The court instructs the jury that if you believe and find, from the evidence, that the plaintiff was a passenger on one of defendant's cars, and while such passenger she was in the exercise of ordinary care for her own safety, an explosion occurred on said car, by reason of which a panic was caused among the passengers in said car, in consequence of which the plaintiff, without fault on her part, was pushed from said car and thereby injured, then the plaintiff has made out a prima facie case of negligence against the defendant, and this places upon the defendant the burden of rebutting that presumption by proving that the explosion could not have been prevented by all that human care, vigilance, and foresight could reasonably do, consistent with the mode of conveyance and the practical operation of the road."—Approved: Chicago Union Trac. Co. v. Newmiller, 215 Ill. 383, 74 N. E. 410.

§ 4169. Same—Derailment and Rebuttal.

(a) "If you find from the evidence that plaintiff was a passenger on defendant's car, and the car became derailed, then the court instructs you, while proof of the derailment raises a presumption of negligence against the defendant, yet defendant may rebut this presumption by showing that the derailment arose from an unaccountable or unavoidable accident, or an occurrence which could not have been prevented by the highest degree of care, foresight, and diligence of the defendant consistent with the practical conduct of its business; and if you find from the evidence that defendant has rebutted this presumption of negligence arising from derailment, then it is your duty to find

in its favor."—Approved: Sloan v. Little Rock Ry. & Electric Co., 89 Ark. 574, 117 S. W. 551.

(b) "If you find that, although the car was derailed, yet the preponderance of the evidence shows that at the time and place of the derailment both car and the track were in good order and condition, and without defects or imperfections, and the car was not being operated in a negligent manner, then the presumption of negligence against the defendant which arises from the derailment of the car would be overcome, and it would be your duty to find for the defendant. It does not devolve upon the defendant to show the cause of the derailment, or to explain it, further than to show that it was not guilty of negligence which caused the derailment, and that it exercised the highest degree of care for its passengers consistent with the practical conduct of its business."—Approved: Sloan v. Little Rock Ry. & Electric Co., 89 Ark. 574, 117 S. W. 551.

§ 4170. Boarding or Alighting from Moving Car Negligence per se.

(a) "The court instructs the jury that the plaintiff had no right to get upon or attempt to go upon the car in question after it had started and while it was in motion, and if he did so he thereby assumed all risk of danger caused thereby; and if you believe and find from the evidence that after the car had started, and while it was in motion, plaintiff attempted to get upon the car, and was struck or thrown down and injured by the motion of the car, then you are instructed that his injuries, if any, were caused by his own fault and negligence, and you must find your verdict for the defendant."—Approved: Joyce v. Metropolitan St. Ry. Co., 219 Mo. 344, 118 S. W. 21.

(b) "If the jury believes from the evidence that Mary Van H— while a passenger on defendant's car of her own volition got off said car while the same was in motion, and that in consequence of her own act in getting off of said car while it was moving she was thrown to the ground and sustained injuries of which she afterwards died, then the verdict must be for the defendant, even though the jury may further believe that the car had not sufficient guards to the seats, or was unduly crowded, or was running at an unusual rate of speed, or that the track was rough and caused jerks and shocks of the car run on the track of said railroad."—Approved: Van Horn v. St. Louis Transit Co., 198 Mo. 481, 95 S. W. 326.

§ 4171. Injury from Act of Carelessness by Passenger Carrier could not Anticipate.

(a) "If plaintiff was sitting in an apparently dangerous position, next to an open space, without any barrier to protect him from falling or being thrown from the car, and, while so sitting, carelessly leaned outward to spit, and, by reason of such leaning outward, fell from the car, then such leaning was negligence on his part, and was the proximate cause of his injury, and defendant's agents and servants who were operating the car were not under any obligations to anticipate any such action on the part of plaintiff, or to ward or guard him

against such act, or against the consequences that might result therefrom; and, under such circumstances, plaintiff would not be entitled to recover any sum whatever in this action, and your verdict should be for the defendant."—Approved: Fitch v. Mason City & C. L. Traction Co., 124 Iowa, 665, 100 N. W. 618.

(b) "The court instructs the jury that if you find and believe from the evidence that plaintiff got upon the car in question before the car started, or while it was in motion, and rode upon said car some distance with each hand holding to the guardrail in a reasonably safe position and place upon said car, and that thereafter he let go of one of one of said guardrails and fell from the car, your verdict will be for the defendant."—Approved: Quinn v. Metropolitan St. Ry. Co., 218 Mo. 545, 118 S. W. 46.

§ 4172. Explosion from Controller Box Causing Passenger to Jump from Car.

"The court instructs the jury that if they believe from the evidence that prior to the 24th day of August, 1902, explosions in the controller boxes used by defendant on its cars in St. Louis were of frequent occurrence, and that such explosions were attended by such noise and flame as would imperil, excite and frighten passengers on the front platform and near the controller boxes on defendant's cars, and that the occurrences and probability of such explosions and the danger to passengers on the front platform near to such controller boxes by reason of such explosions were known to the defendant and its agents operating its said cars, and were not known to the plaintiff; and if the jury further believe from the evidence that on the said 24th day of August, 1902, plaintiff boarded one of defendant's Delmar Avenue cars with the intention of becoming a passenger thereon and paying her fare as such passenger, when she might be called upon so to do by the conductor of said car; and if the jury further believe from the evidence that plaintiff, upon boarding said car, found said car crowded with passengers, and that she thereupon, and with the knowledge or consent of defendant's motorman or conductor in charge of said car, and in ignorance of the fact that explosions in the controller box on said car might occur with a loud report, causing flames to leap out therefrom, took a seat on the sand box on the front platform of said car and within a few feet of the controller box on said car, and was permitted by the employees of defendant in charge of its said car to occupy said position while said car was in motion; and if the jury further believe from the evidence that the agents and servants of the defendant in charge of its said car were negligent in allowing plaintiff to occupy a position on such front platform of said car close to the controller box (that is, if the said agents and servants of the defendant in charge of its said car in so doing failed to exercise that high degree of care for the safety of plaintiff which would ordinarily be exercised by very skillful and prudent street railway men under similar circumstances); and if the jury further find from the evidence that, while so seated on said sand box, and while said car

was in motion going at a moderate rate of speed, an explosion occurred in said controller box, attended by a loud report, and which caused flames to protrude from said box and partially envelop the space of the front platform of said car, whereby plaintiff was placed in peril and was excited and greatly frightened, and that, while plaintiff was in such condition, she, believing it to be necessary for her safety so to do, jumped from said car to the street and was injured—then the jury will find their verdict for the plaintiff, provided they further find from the evidence that plaintiff was, at the time of receiving her said injuries, and at the time she boarded said car and took the seat upon the sand box on the front platform of said car and in close proximity to said controller box, and at the time that she jumped from said car to the street, exercising ordinary care for her own safety, that is, such care as a reasonably prudent person would ordinarily exercise under the same or similar circumstances."—Approved: Williamson v. St. Louis Transit Co., 202 Mo. 345, 100 S. W. 1072.

§ 4173. So Where Other Negligence Produces Apparent Peril.

"If you believe from the evidence that the defendant, at or about the time and place mentioned in the plaintiff's petition, was operating one of its electric cars on which the plaintiff was riding as a passenger at a high and dangerous rate of speed, and that at said time the trolley wires and guy wires stretched over the line of its track at said point broke and fell upon the car or ground, and the trolley poles were thrown down and fell along the side of the car, and that the speed at which said car was being propelled, in connection with the breaking and falling of the trolley wires and guy wires and poles, caused said car to pitch and jump with such force and violence upon the track as to throw the plaintiff from the car upon the ground, or if you believe that the breaking of said wires and said poles appeared to the plaintiff to render his position in the car dangerous, and that plaintiff, acting upon apprehension of immediate danger of injury to himself, and in order to avoid danger, attempted to escape therefrom, in so doing then and there jumped from said car and fell upon the ground, or in such attempt to escape did then and there fall from the same on or against the ground, and that, as a proximate cause of said fall, was thereby injured in one or more particulars, substantially as alleged in his petition, you will find for plaintiff, and assess his damages, if any, as hereinbefore directed, unless you should find for the defendant under other portions of this charge."—Approved: Houston El. St. Ry. Co. v. Elvis, 31 Tex. Civ. App. 280, 72 S. W. 216.

§ 4174. Inspection of Car as Rebutting Presumption of Negligence.

"If the jury find from the evidence that prior to the accident in question here defendant had employed competent inspectors to inspect the controller and motors, and other electrical appliances in use on defendant's cars, and that such inspector had used a very high degree of care in making reasonable inspection of the car upon which plaintiff was injured a short time prior to the time of her injury, and that

such inspection failed to disclose any defect in the said controller, motors or electrical appliances, and that said car and its appliances were apparently in a reasonably safe condition for the purposes for which it was being used by defendant, and that the accident in question here could not have been reasonably anticipated, foreseen, or prevented by defendant by the exercise of a very high degree of care in inspecting said car, and its appliances, then plaintiff cannot recover in this action and your verdict must be for the defendant."—Approved: Brod v. St. Louis T. Co., 115 Mo. App. 202, 91 S. W. 993.

B. Injuries to Other Persons.

§ 4175. Equal Rights on Street Cars and Other Vehicles.
4175a. Injury to Passenger in Collision between Hose Cart and Street Car where Ordinance Confers Right of Way to Fire Department.
4176. Except that Street Car Cannot Turn out and Another Vehicle Can.
4177. And if Vehicle Meets Car it Should Yield the Right of Way.
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4192. Observance of Ordinance as to Persons or Vehicles on or Approaching Track.
4193. Look Out for Persons and Vehicles and Keeping Car Under Reasonable Control.
4194. Car Approaching Path Across Track.
4195. Vigilant Watch for Children on Track, or Moving Toward it.
4196. Ejecting Child of Tender Years from Car—Duty to Slow Down.
4197. When Danger of Collision is, or should be seen Ordinary Care to be used to Avoid Same.
4198. Motorman Need not Slow Down Because Vehicle Might turn on Track.

4199. And May Presume that Such Will Clear Track.
4200. Peril Discovered, or which Should have been Discovered in Time to Avoid Injury.
4201. Prior Negligence not Material in Discovered Peril.
4202. Plaintiff Attempting to Cross Unsafe Track With Loaded Wagon.
4203. Negligence by Plaintiff Immediately at the time of Collision.
4204. Negligence Attributable to Intoxication of Deceased.
4205. Plaintiff's Negligence Concurring with that of Defendant's Servants.
4206. Inability to Avoid Accident When Peril is, or Ought to have Been Seen.
4207. When such Inability is from Car Running at Dangerous Speed.
4208. Negligence—Frightening Horse—Proximate Cause of Injury.
4209. Motorman Misled by Plaintiff's act Bringing on Collision.
4210. Defendant's Negligence Concurring with, or Preceded by Plaintiff's Negligence.
4211. Failure to Look and Listen as Want of Ordinary Care.
4212. Sudden Peril too Late for Avoidance of Accident.
4213. Attempting to Cross Track in Face of Obvious Danger.
4214. Horse Frightened at Car Operated in Careful Manner.
4215. Where Fright is from Car Operated in Unusual Manner.
4216. Conductor Injured by Act of Incompetent Motorman.

§ 4175. Equal Rights on Street Cars and Other Vehicles.

"One driving a wagon or vehicle, and a street car company, have equal rights on the streets. Neither one or the other has any superior right to the other. Each must use them in such manner as to preserve the rights of the other within the limit of the exercise of ordinary care."—Approved: Savannah Electric Co. v. Elarbee, 6 Ga. App. 137, 64 S. E. 570.

§ 4175a. Injury to Passenger in Collision between Hose Cart and Street Car when Ordinance Confers Right of Way to Fire Department.

(a) "The court instructs the jury that the defendant by its servants in charge of its cars, in one of which the plaintiff was a passenger, was bound in law to exercise a high degree of care, as defined in the instructions, to watch and listen for an approaching vehicle at the crossing of ——— street, where defendant's car crossed such street, and was bound also to use such care to avoid collision with any such vehicle. And if the defendants in charge of the said cars failed, even in a slight degree, to use such care, and thereby directly contributed to cause plaintiff's injury, then defendant is liable, although the jury should find from the evidence that the employees of the city fire department also failed to exercise ordinary care and thereby contributed to cause said collision."—Approved: Olsen v. Citizens Ry. Co., 152 Mo. 426, 54 S. W. 470.

(b) "Although the jury should find from the evidence in this case, that the employees of the city fire department did not exercise ordinary care in driving the hook and ladder wagon; and although the jury

should find from the evidence that such want of care (if there was such want of care) directly contributed to cause the collision by which the plaintiff was injured; yet if the jury find from the evidence that defendants' servants in charge of its car in which plaintiff was such passenger, if they had exercised a high degree of care, such as could have been exercised by very prudent, careful and skillful railroad men under the same or similar circumstances, could have averted said collision and injury, then plaintiff is entitled to recover."—Approved: Olsen v. Citizens' Ry. Co., 152 Mo. 426, 54 S. W. 470.

§ 4176. Except that Street Car Cannot Turn Out and other Vehicles Can.

"The place where this accident occurred was on one of the streets of the city. Both parties have rights in the streets of the city, and these rights, in the main, are alike. The defendant company, of course, cannot turn out, as plaintiff's servant might turn out, so that in that respect it may be said that the defendant company has a paramount right over its tracks. Beyond that, their duties are reciprocal, and their rights are reciprocal, and they are charged with the same measure of care and the same duties."—Approved: Armstead v. Mendenhall, 83 Minn. 136, 85 N. W. 929.

(b) "If you find from the evidence that defendant was, at the time mentioned in plaintiff's complaint, operating a system of street cars over its track or tracks in Garrison avenue in the city of Ft. Smith, then it became and was the duty of the defendant in so operating its cars over said track, to use that degree of care and caution that a man of ordinary care and prudence engaged in such business would exercise so as not unnecessarily or negligently to injure persons occupying said avenue."—Approved: Ft. Smith Light & Traction Co. v. Barnes, 80 Ark. 169, 96 S. W. 976.

§ 4177. And if Vehicle Meets Car it Should Yield the Right of Way.

"A street car has the right of way upon that portion of the street upon which it alone can travel. If, therefore, a private vehicle, in traveling upon the public highway, meets with a street car, the private vehicle must yield the right of way to the street car."—Approved: Doolin v. Omnibus C. Co., 140 Cal. 369, 73 Pac. 1060.

§ 4178. Ordinary Care not to Injure Persons on and Along Track.

"You are instructed that a street car company has no right to the exclusive use of that part of the street upon which its track is laid, but all persons have an equal right to use the same for travel (over) and across the street, and such persons so using that part of the track are lawfully there, and the degree of diligence which the law imposes upon the street car company to prevent accident and injury to persons on and along its tracks is ordinary care, which is that care which a man of ordinary prudence would use under like circumstances. This charge, although given you at the request of plaintiff, is a part of the law of the case, and you will be governed thereby."—Approved: San Antonio Traction Co. v. Haines, 45 Tex. Civ. App. 289, 100 S. W. 788.

§ 4179. For Mere Accident or Misadventure there is no Liability.

"If you believe and find from the evidence that the injury and death of the said K— were the result of mere accident or misadventure without the fault or negligence of any one, then you should find for the defendant."—Approved: Koenig v. Union D. Ry. Co., 194 Mo. 564, 92 S. W. 497.

§ 4180. At Intersections Reciprocal Duties Between Cars and Persons or Vehicles.

"You are instructed that the relative rights and duties of street cars and travelers on the highway where they are passing each other or going in the same direction is qualified to a certain extent at street intersections. At such an intersection each have the right to cross, and must cross. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other."—Approved: Omaha St. Ry. Co. v. Cameron, 43 Neb. 297, 61 N. W. 606.

§ 4181. Driver Crossing Streets May Assume Motorman Will Give Signals.

"The court instructs the jury that in running upon the public highway where the plaintiff's intestate, E. B. F—, was injured, the rights of the company's cars were not superior to those of any other vehicle, but simply equal, and said F— had the right to drive either across or along the track just as freely as upon any other part of the street, so long as he did not obstruct the cars or negligently expose himself to danger. He had the right to assume that the servants of the defendant operating said car would give the proper signals and not run at an excessive rate of speed at that crossing, and he had the right to drive his wagon across or even along the track in full view of the approaching car if, under all the circumstances, it was consistent with ordinary prudence to do so. And if the jury believe from the evidence that, under all the circumstances by which said F— was then surrounded, it would have been reasonably apparent to an ordinarily prudent person that, if the defendant's servants should use ordinary care in running and controlling said car, he could drive across the track without danger of a collision, then said F— was not guilty of negligence in driving across said tracks; and if the jury further believe from the evidence that, under such circumstances, the said servants of the defendant did not use ordinary care in operating said car in one or more of the particulars alleged in the declaration, and that as a direct and proximate result thereof the said F— was injured as therein alleged, they should find for the plaintiff."—Approved: Norfolk & P. Traction Co. v. Forrest's Adm'x, 109 Va. 658, 64 S. E. 1034.

§ 4182. Duty Where Fire Engine is Approaching Track.

"The court instructs the jury that by the terms of ordinance No. ————, read in evidence, the person or persons in charge of defendant's car mentioned in the evidence were required to give to the

fuel wagon driven by ———— (if you find from the evidence that said fuel wagon was a part of the fire apparatus of the city of————), the right of way upon the street over which it was passing (if you find from the evidence said fuel wagon was going upon said street in response to an alarm of fire); and if, from the evidence, you find that the person or persons in charge of said car either carelessly or wantonly obstructed or interfered with said fuel wagon while going to a fire, such conduct on the part of said person or persons is negligence on the part of defendant."—Approved: Guinney v. Southern E. R. Co., 167 Mo. 595, 67 S. W. 296.

§ 4183. Car Rails Above Street Level in Contravention of Ordinance.

"The plaintiffs claim that the defendant negligently failed to comply with the terms of the ordinance which had been received in evidence in the following particulars: They claim that on May 2, 1901, at a point on Broadway which has been referred to by the witnesses, one or more of the defendant's street car rails were in such a condition that the tops of the rails were not flush with the surface of the street, but projected above the same sufficiently high to cause an obstruction to public travel, and also claimed that there were no planks laid along the rails at said point in the manner mentioned in the ordinance or at all; and they claim that the alleged absence of planks, and the alleged projection of the rails above the surface of the street, was caused by the negligent failure of the defendant to maintain its track and roadbed as required by said ordinance. And I instruct you that if you believe from the evidence that said track was on May 2, 1901, in the condition claimed by the plaintiffs, and believe that such condition constituted an obstruction of public travel, and also believe that it was by reason of said alleged dangerous condition of the track that the plaintiff Carrie G— was, without negligence on her part, thrown from her carriage as claimed by her, and received the injuries complained of, then I instruct you that the plaintiffs are entitled to recover damages from the defendant."—Approved: Gray v. Washington Water Power Co., 30 Wash. 665, 71 Pac. 206.

§ 4184. Failure to Install Tender on Cars—General Duty.

"Whether or not the defendant, as a duty to the public, should have provided a fender as a necessary part of the equipment of the car in the interest of safety to the public or to persons who may come or be upon or in the vicinity of the defendant's cars is a question of fact to be determined by you, as jurors, from the whole evidence. If you shall be therefrom affirmatively satisfied, in the manner stated, that it was such duty of the defendant to provide and maintain a fender, in such case you should so find. If not so affirmatively satisfied that it was the duty of the defendant to operate its cars with a fender, in such case you should so find."—Approved: Fisher v. Waupaca Electric Light & Ry. Co., 141 Wis. 515, 124 N. W. 1005.

§ 4185. Ordinary Care to Supply Car with Brakes Reasonably Effective.

"You are instructed that defendant was under no obligation to supply the safest or most effective brakes that could be obtained, or

to use the utmost care in keeping the brakes on its cars in repair, but was bound to use only ordinary care in the selection of its brakes and in maintaining and keeping the same in repair; but ordinary care in such a case requires the care usually exercised in the operation of electric street car lines, and it is the duty of a party, in operating an electric car, to use the best appliances in common use, and the best brakes in common use, and to exercise great care in keeping its appliances for stopping cars in good condition."—Approved: Mock v. Los A. T. Co., 139 Cal. 616, 73 Pac. 455.

§ 4186. Defective Switch and Dangerous Rate of Speed.

"If, therefore, you find from a fair preponderance of the evidence that at the time and place in question the said switch leading from defendant's west track in Illinois street east into Maryland street had become defective, worn, and loosened prior to the happening of the alleged injuries to plaintiff, and by reason thereof said switch was dangerous and liable to be thrown open so as to allow or cause the rear tracks of said cars to turn to the east into the track leading into Maryland street, and thereby likely to injure pedestrains or persons in vehicles lawfully upon said street, and if your further find that the defendant knew, or by the exercise of ordinary care and diligence could have known, of the said defective and dangerous condition of said switch in time to repair the same and place the same in a reasonably safe condition for use in said track prior to plaintiff's accident, but that defendant negligently and carelessly failed so to do; and if you further find that at the time and place in question one of the defendant's cars, approaching from the north in Illinois street, on the west track, was run by the employes of defendant, in the line of their employment, negligently and carelessly, at a high and dangerous rate of speed, over said switch, and if you further find that, as the proximate result of the negligence of the defendant in the particulars or respects above stated, plaintiff was injured, as averred in the complaint—then I instruct you the plaintiff would be entitled to recover under said first paragraph of complaint, provided you also find that she herself was free from any negligence proximately contributing to her said injury, and in such event your verdict should be for the plaintiffs."—Approved: Indianapolis St. Ry. Co. v. Fearnaught, 40 Ind. App. 333, 82 N. E. 102.

§ 4187. Track in Dangerous Condition for Persons Crossing Same in Vehicles.

"If you believe and find from the evidence that the Rosen Company acquired a franchise from the city to build and operate a line of street railway over said street (Central Avenue), and that in order to hold said franchise it placed in said street the rails and ties mentioned in the evidence, and that afterwards, on the 1st day of August, 1906, said Rosen Company sold all of its property and rights and franchises to said Citizens' Company, and in this connection the court charges you that by the terms of the conveyance read in evidence the property in and title to said railway track and ties passed to said Citizens' Company, if the said Rosen Company owned the same at the time of said transfer, then you are charged that it became the duty of said Citizens'

Company to use the same care as hereinbefore defined as to the city in the preceding paragraph hereof to keep said rails and ties and said street where same were situated in a reasonably safe condition in order to avoid injuries to persons driving vehicles over same at night; and if you further believe from the evidence that it failed to use such care, and if you find from the evidence that the said street at said place, on account of such rails protruding above the surface of the street, if they did so protrude, rendered said street unsafe and dangerous to persons traveling upon the same in vehicles, and that a person of ordinary care, if owning such railway, rails, and ties, would not have permitted said street and rails to be and remain in such condition, then you are charged that said defendant was guilty of negligence in respect to the matter about which you are being charged; and if you believe and find from the evidence that the plaintiff, in the night time, about the date mentioned in the petition, was driving a wagon on and over said street, accompanied by his wife, and while attempting to drive over said railway track, that the wheel of his wagon came in contact with said rail, if it did come in contact with same, and that plaintiff was using due care for the safety of himself and wife, and that by reason of the wheel of said wagon so colliding with said rail, if it did collide with it, the plaintiff's wife was injured thereby, if you find from the evidence that she was injured, then it will be your duty to find for the plaintiff against said defendant and assess his damages as hereinafter directed."—Approved: Citizens' Ry. & Light Co. v. Johns, 52 Tex. Civ. App. 489, 116 S. W. 62.

§ 4188. Driver of Horse Car Not Using Ordinary Care to Prevent Collision.

"The court further instructs the jury that it was the duty and incumbent upon the driver of the defendant's car to stand on the front platform, with the lines from the horses drawing the car in his hands, and to exercise a reasonable degree of care and watchfulness to prevent all collisions and injury to persons crossing and traveling on and over said street. And if you believe from the evidence that the injury in this case was caused by the want of the driver remaining on the front platform, ceasing to have and hold the lines in a careful manner, his failure to watch carefully, or in any manner use reasonable care to prevent the injury, and that for any of said reasons the injury occurred, then the defendants are liable, and you will find for the plaintiff, and assess the damage at such sum as from all the evidence you believe he has sustained, unless you further find from the evidence plaintiff might, by the exercise of ordinary care, have avoided the consequences of defendant's negligence."—Approved: Brooks v. Lincoln St. Ry. Co., 22 Neb. 816, 36 N. W. 529.

§ 4189. Right to Assume Car is Running at Lawful Rate of Speed.

(a) "In this case it is undisputed that the plaintiff was driving a six-horse team, hauling a heavily loaded wagon. It is undisputed that the car was approaching him, and that he saw it. Under those circumstances it was his duty to exercise the special care and caution to avoid a collision which such circumstances demand of a reasonably

cautious and prudent man, and he had no right to take any chances, or to gamble upon the possibility of getting across; and, if he did so, he cannot afterwards appeal to the courts for compensation for losing on the gamble. He can only recover in this case by showing that the car was so far away, at the time that he turned upon the crossing, that he could reasonably assume that he might cross before the car reached him if the car was running at a lawful rate of speed, and that he did have a right to assume. If the car was running at an unlawful rate of speed, he could not even then recover, unless he exercised reasonable care and caution. Even though the car was not running at an unlawful rate of speed, if he suddenly turned upon the track when the car was too near him for an accident to be avoided, and if he turned upon the track when the car was so close that the motorman had no reasonable warning and opportunity to get his car under control, and stopped before the accident, then the plaintiff cannot recover. In order to recover in this case he must satisfy you that the car was running at an unlawful rate of speed; that it was not under control; that it was so very far away that he could have safely passed if the speed had not been excessive, such as an ordinarily prudent man under like circumstances would exercise. In other words, briefly stated again, he must satisfy you that the accident was wholly due to the unlawful, negligent, and reckless manner in which the car was run, and not to any contributory negligence on his part."—Approved: Deitsch v. Trans. St. Mary's Trac. Co., 155 Mich. 15, 118 N. W. 489.

(b) "The court instructs the jury that, if the plaintiff's wife, as she started and walked across to defendant's south-bound tracks, saw defendant's south-bound car mentioned in the evidence approaching going south, and if the said car was at such a distance as not to imperil her in crossing said track, if said car was not running faster than eight miles an hour, and if the plaintiff's wife did not know that said car was running at a speed in excess of eight miles an hour, and in the exercise of ordinary care in looking and listening would not have so known. And if said car was in fact running at a speed in excess of eight miles an hour, then the court instructs the jury that plaintiff's wife had a right to cross said track, relying on said car not being run in excess of eight miles an hour, and using ordinary care and expedition in doing so, and, if she was doing so, she was not negligent."—Approved: Powers v. St. Louis Transit Co., 202 Mo. 267, 100 S. W. 655.

§ 4190. If Excessive Speed not Proximate Cause this Negligence is not Ground for Liability.

"With respect to the alleged negligence of defendant in operating its cars at a high and excessive rate of speed, you are instructed that, under the ordinance of the City of St. L., defendant had the right to operate its car at the place mentioned in the testimony at a rate of speed not exceeding 10 miles per hour. Before, therefore, you can find against the defendant on account of the excessive speed, you must find either that the defendant operated its car in excess of the speed of 10 miles an hour, or at such a speed which, under the evidence and circumstances given in the testimony, amounted to negligence, and

unless you so find, and also further find that such excessive or negligent speed was the cause of the death of plaintiffs' son, then plaintiffs are not entitled to recover on account of such speed."—Approved: Masterson v. St. Louis, Transit Co., 204 Mo. 507, 98 S. W. 505.

§ 4191. Conditions to be Observed in the Exercise of Ordinary Care.

"In determining whether the defendant was negligent, you will consider the definitions of 'ordinary care' and 'negligence' elsewhere given you in these instructions; and you will consider, as shown by the evidence, the nature and character of the business in which the defendant was engaged, the location where the accident is alleged to have occurred, and the surroundings thereabouts; whether it was light or dark at said place at said time; the rate of speed at which a street car might lawfully have been running at the time and place where it is said that plaintiff was injured; the rate of speed at which said car was being run at said time; what sounds or signals, if any, were or should have been given from said car at or immediately before the happening of the accident in question; what the motorman of said car did, or should have done, as he ran said car along the street at said time and place; what said motorman did or should have done after discovering the plaintiff, his team and wagon; what said motorman knew or in the exercise of ordinary care should have known; what said motorman did, or in the exercise of ordinary care should have done, together with any other facts or circumstances disclosed by the evidence showing or tending to show that the defendant was or was not negligent as alleged by the plaintiff in his petition."—Approved: Doherty v. Des Moines City Ry. Co. (Iowa), 121 N. W. 690.

§ 4192. Observance of Ordinances as to Persons or Vehicles Approaching Track.

"The court further instructs you that there is an ordinance of the city of Memphis, a violation of which is a misdemeanor, which provides as follows:

"Article 39, paragraph 5: 'Conductors and drivers of each car shall keep a rigid lookout for all teams, carriages, and persons, on foot, and especially children, either on the track, or moving towards it, and on the first appearance of danger to such team or persons, or other obstructions, the car shall be stopped in the shortest time and space possible.'

"Also another section, namely:

"Article 39, paragraph 25: 'At no point within the city limits shall they (meaning the street cars) run at a greater speed than 15 miles per hour.' "—Approved: Memphis St. Ry. Co. v. Haynes, 112 Tenn. 712, 81 S. W. 374.

(b) "The court instructs the jury that it was the duty of the motorman of defendant in charge of the east-bound car which struck the wagon on which plaintiff was driving to keep a vigilant watch for persons and vehicles driving upon or approaching the track on which such car was being operated, and upon the first appearance of danger to any vehicle or person to stop the car in the shortest time and space possible with the means at his command, and if the jury find from the

evidence that plaintiff was driving his wagon upon, or so near the track of defendant as to be in danger of being struck by said eastbound car, and that defendant's motorman in charge thereof neglected to keep such vigilant watch or neglected to stop his car in the shortest time and space possible with the means at his command, when the danger of striking said wagon became apparent or should have become apparent if such vigilant watch had been kept, and that in consequence thereof the wagon upon which plaintiff was driving was struck and he was injured, then plaintiff is entitled to recover, even though the jury should believe from the evidence that he did not, under all the circumstances in evidence, exercise ordinary care in driving said wagon upon defendant's track at the time and place in question."—Approved: Kirchof v. United Rys. Co. of St. Louis (Mo. App.), 135 S. W. 98, 101.

§ 4193. Look out for Persons and Vehicles and Keeping Car Under Reasonable Control.

(a) "It was the duty of the motorman of the defendant's car which ran over and killed plaintiff's decedent, Julius G—, at the time mentioned in the petition, to have his car under reasonable control and to keep a lookout for the presence of vehicles, and to exercise ordinary care in so running and operating his car as to prevent injury to persons using the street; and if you believe from the evidence that said motorman failed to exercise these duties or any of them, and by reason of such failure Julius G— was run over and killed, the law in the case is for the plaintiff, and you should so find."—Approved: Goldstein's Adm'r v. Louisville Ry. Co. (Ky.), 115 S. W. 194.

(b) "It was the duty of the defendant's motorman in charge of the car to keep a lookout ahead for persons or vehicles upon the street, and to run the car at such speed and to have it under such control as ordinary care for their safety demanded and to exercise ordinary care to avoid a collision with them; and, if the jury believe from the evidence that the motorman in charge of the car referred to in the evidence failed to keep a lookout ahead for persons or vehicles upon the street, or failed to run the car at such speed or to have it under such control as ordinary care for their safety demanded, or failed to exercise ordinary care to avoid a collision with the plaintiff, and by reason thereof the collision occurred, they should find for the plaintiff."—Approved: Louisville Ry. Co. v. Gaar (Ky.), 112 S. W. 1130 (not reported in state reports).

(c) "Unless the jury believe from the evidence that the motorman in charge of the car failed to keep a lookout ahead for persons or vehicles upon the street, or failed to run the car at such speed or to have the car under such control as ordinary care for their safety demanded, or failed to exercise ordinary care to avoid a collision with plaintiff, and that by reason thereof, plaintiff was injured, the jury should find for the defendant."—Approved: Louisville Ry. Co. v. Gaar (Ky.), 112 S. W. 1130 (not reported in state reports).

(d) "If you find from the evidence that the employes of the defendant, operating the car which caused the injury, were running said car too near to the Central Park car for safety, and in an unusual manner,

or that defendant's employes operating said car were operating the same at an unsafe rate of speed, and not under reasonable control, or if the said defendant's said employes operating the same failed to give timely signals or warning of the approach of said car to said crossing, as required by the rules of the defendant company, or as was necessary for the proper safety of vehicles passing upon or crossing the avenue, and that in any of the respects referred to the said defendant's said employe or employes were not exercising ordinary care, and that such want of ordinary care on the part of said employe or employes caused said collision, without any negligence upon the part of the driver of said vehicle or plaintiff or said W— directly contributing thereto, and that by reason of said collision injury was caused, either to the person of the plaintiff or said W—, then your verdict should be for the plaintiff."—Approved: Hart v. Cedar Rapids & M. C. Ry. Co., 109 Iowa, 631, 80 N. W. 662.

(e) "The court instructs the jury that it was the duty of the motorman of defendant in charge of the car which struck James K— to keep vigilant watch for all persons on foot, especially children, either on the track over which such car was about to be operated, or moving towards such track, and on the first appearance of danger to such persons or children, to use the means at his command to stop the car in the shortest time and space possible, and if the jury believe from the evidence that on the 13th day of November, 1907, plaintiffs were husband and wife and the parents of James K—, a minor under the age of 21 years, and that on said date, between the hours of 5 and 6 o'clock in the afternoon, a northbound car of defendant in charge of its conductor and motorman was allowed to strike and cause the death of said James K— while he was crossing Gravois avenue a short distance north of its intersection with Milentz avenue, and that said Gravois avenue was then a public highway in the city of St. Louis, then if you further find from the evidence that said car was so allowed to strike and cause the death of said James K—, in consequence of the failure of the motorman of defendant operating same, immediately prior to such casualty to keep vigilant watch for persons moving towards the track over which said car was about to operate, or in failing to stop said car within the shortest time and space possible with the means at his command, upon the first appearance of danger to said James K—, or when by keeping such vigilant watch the danger to him would have become apparent, then plaintiffs are entitled to recover against the defendant, even though the jury should believe from the evidence that James K— did not exercise ordinary care in going upon the track over which such car was being operated at the time and place in question."—Approved: Kaiser v. United Rys. Co. (Mo. App.), 135 S. W. 90.

§ 4194. Car Approaching Path Across Track.

"If the jury shall believe from the evidence that there was a pathway across the tracks of defendant company leading to the spring in the evidence referred to, and that at and prior to the happening of plaintiff's injuries said pathway was used by persons going and coming

from said spring, and that such fact, if it were a fact, was known to the defendant's agents in charge of the car in the evidence referred to, or could have been known to them by the exercise of ordinary care, then the law made it the duty of the defendant's agents in charge of said car to exercise ordinary care to have the said car under reasonable control approaching said pathway, and to give such reasonable signal of its approach to said pathway, as the jury may believe from the evidence was reasonably necessary to the safety of persons using said pathway; and if the jury shall believe from the evidence that the defendant's agents, or either of them, in charge of said car in the evidence referred to, on the occasion under investigation in this case, failed to exercise such ordinary care to have the car under reasonable control, or failed to give reasonable signal of its approach to said pathway, and that by reason of such failure upon their part, or upon the part of either of them, the plaintiff sustained the injuries in his petition complained of, then, unless the jury shall believe from the evidence that the plaintiff on the occasion failed to exercise ordinary care for his own safety, and that by such failure on his part he so far helped to bring about his injury that, but for such failure, if any there was on his part, he would not have been injured, then the law is for the plaintiff, and the jury should so find."—Approved: Louisville Ry. Co. v. Hofgesand (Ky.), 104 S. W. 361 (not reported in state reports).

§ 4195. Vigilant Watch for Children on Track or Moving Toward It.

(a) "The jury are instructed that at the time when and the place where said Olive L. S— was struck by the car and dragged and killed, the law imposed upon the motorman, while running said motor car, the duty to keep a vigilant watch for all persons on foot, and especially children, either on the track or moving toward it, and on the first appearance of danger to such child, to stop the car within the shortest time and space practicable, consistent with the safety of passengers. And if the jury find from the evidence that the motorman operating said car failed to perform such duty, then such failure is negligence on the part of the St. Louis Transit Company; and, if the jury believe from the evidence that in consequence of such negligence above specified the death of said child was caused, your finding should be for the plaintiffs, unless you find from the evidence that plaintiffs, or one of them, or said child, was guilty of negligence which directly contributed to the death of said child, and the burden of proving contributory negligence on the part of said child or plaintiffs rests on defendant, and unless defendant has proven such contributory negligence by a preponderance of evidence, you cannot find for the defendant on that ground."—Approved: Spencer v. St. Louis Transit Co., 222 Mo. 310, 121 S. W. 108.

(b) "If the jury find from the evidence that on the 18th day of October, 1904, the defendant St. Louis Transit Company was a carrier of passengers by street railroads propelled by electricity, and that it used the railway and car mentioned in the evidence for such purpose, and if the jury further find from the evidence that on that day Robert C. S— and Laura E. S— were the father and mother of Olive L. S—,

a minor, aged five years, and that the latter was born in lawful wedlock of plaintiffs, and if the jury find from the evidence that said Olive L. S— on the 18th day of October, 1904, while crossing the double street-car tracks of defendant, on Gravois avenue, was struck and knocked down by the electric street car mentioned in the evidence, at the eastern crossing of Jefferson avenue, in the city of St. Louis; and that after being so knocked down, she was dragged by such car about fifty feet, thereby causing her death; and if the jury further find from the evidence that said Olive L. S— was unmarried and left no child surviving her, and if the jury further find from the evidence that on said occasion a motorman in the employ of the St. Louis Transit Company was operating said car for said St. Louis Transit Company, and if the jury further find from the evidence that such motorman so operating said car saw, or by the exercise of reasonable care would have seen, said child approaching the track, and in a dangerous situation, a sufficient length of time before she was struck by said car, as that, by the exercise of reasonable care, with the appliances at hand, and with due regard to the safety of passengers, he could and would have so operated said car, as that after she was struck he would have averted the dragging of her such a distance as resulted in her death, if the jury find she was so dragged, and that such dragging caused her death, then the jury should find for the plaintiffs and against the defendant St. Louis Transit Company, unless they further find that there was negligence on the part of such child or of plaintiffs directly contributing to the death of said child."—Approved: Spencer v. St. Louis Transit Co., 222 Mo. 310, 121 S. W. 108.

§ 4196. Ejecting Child of Tender Years from Car—Duty to Slow Down.

"The jury are further instructed by the court that if the plaintiff, H. R. W—, at the time of the injury, was a child of tender age of 7 years, and was riding upon defendant's car in the city of ————, whilst the same was in motion, and that the defendant's servants in charge of said car knew of his presence on the car and ordered him to get off, it was their duty to have reduced the speed of said car, before ordering the plaintiff to leave the same, to such a rate of speed as the plaintiff might depart from the car with safety, notwithstanding the jury may believe that the plaintiff was at the time a trespasser upon the defendant's car. But in order to find for the plaintiff the jury must believe that the order of the conductor was given in such a manner as to frighten or intimidate the plaintiff to such an extent as to cause him to jump from the car while it was in motion; taking into consideration the age and capacity of the plaintiff."—Approved: Richmond T. Co. v. Wilkinson, 101 Va. 394, 43 S. E. 622.

§ 4197. When Danger of Collision is or Should be Seen Ordinary Care to be Used to Avoid Same.

(a) "It was the duty of the motorman in charge of defendant's car to keep a lookout for persons and vehicles upon the track, and to exercise reasonable care in discovering and avoiding injuring them; and, if you believe from the evidence that said motorman saw, or by the

exercise of reasonable care, could have seen, that there was danger of a collision between his car and plaintiff's buggy, and after he saw, or by the exercise of reasonable care could have seen, that there was such danger, he failed to exercise ordinary care to prevent same, and by reason of such failure on his part the collision occurred, and plaintiff was injured, then you should find for plaintiff, unless you shall further believe from the evidence that the plaintiff was herself guilty of negligence as defined in instruction No. 3."—Approved: Lexington Ry. Co. v. Woodward (Ky.), 106 S. W. 853 (not reported in state reports).

(b) "The court instructs the jury that the plaintiff on the occasion in question was lawfully upon the street and had the right to use any part of it; that the defendant was entitled to the use of its track for the free passage of its cars, but it was the duty of those in charge of the car in question to keep a lookout for persons and vehicles upon or near the track, and to exercise ordinary care to discover them and use such means as were at hand to avoid injuring them after their presence would be discovered; that it was the duty of the plaintiff to exercise ordinary care for his own safety."—Approved: South Covington & C. St. Ry. Co. v. Eichler (Ky.), 108 S. W. 329 (not reported in state reports).

§ 4198. Motorman Need not Slow Down Because Vehicle Might Turn on Track.

(a) "The court instructs the jury that the defendant's car had the right of way at the point on the street at which this accident occurred, and if you believe from the evidence that he was proceeding at a lawful rate of speed, and that the plaintiff, as he approached her, was riding a bicycle down the street of the city, with her bicycle under control, and far enough from the track for the car to pass her in safety, and was not approaching a place of obvious danger of her turning in front of the car, then the motorman owed her no duty to slow down or stop the car."—Approved: Norfolk & P. Traction Co. v. O'Neill, 109 Va. 670, 64 S. E. 948.

(b) "The court instructs the jury that the defendant's motorman was not bound in the exercise of ordinary care to anticipate that the plaintiff would change the course of his wagon at the time he appeared from the evidence to have done so, and defendant's said motorman was not in the exercise of ordinary care required to check the speed of his car with a view of averting a collision with plaintiff's wagon until he saw, or by the exercise of ordinary care could have discovered, plaintiff's peril."—Approved: Louisville Ry. Co. v. Boutellier (Ky.), 110 S. W. 357 (not reported in state reports).

§ 4199. And May Presume that Such Will Clear Track.

"You are instructed that if you find that the motorman saw the automobile upon the track, and there was nothing to obstruct the view of the occupants of the automobile of the approaching car, such motorman had a right to assume that the automobile would be turned off of the track and out of danger in time to avoid a collision, and the motorman had a right to indulge in such assumption until the danger of a

collision became imminent."—Approved: Pantages v. Seattle Electric Co., 55 Wash. 453, 104 Pac. 629.

§ 4200. Peril Discovered or Which Should Have Been Discovered in Time to Avoid Injury.

(a) "If the jury find and believe from the evidence that one William E— was driving a two-horse team drawing a wagon load of manure on the north side of Gravois avenue, partly in the west-bound track of the defendant railroad, and that a car of defendant in charge of its servants, or employes, ran into said wagon and forced said wagon against a wagon being driven along said Gravois avenue in a westerly direction by the plaintiff Erst B—, and caused the wagon with said Ernst B— to be thrown down an embankment and injured, then the jury will find a verdict for the plaintiff Ernst B—; provided, the jury further find and believe from the evidence that the motorman in charge of said car saw, or by the exercise of reasonable care and diligence would have seen, the said William E— in a position of danger from the approach of said car, in time to have stopped said car, by the exercise of reasonable care and diligence, with the means at his command, before colliding, and further find that said motorman failed to exercise reasonable care and diligence to bring said car to a stop, after he discovered, or by the exercise of ordinary care and diligence would have seen, said E— on the track in time to have averted the collision."—Approved: Beier v. St. Louis Transit Co., 197 Mo. 215, 94 S. W. 876.

(b) "If the jury find from the evidence that on the 18th day of March, 1903, the defendant was using the car mentioned in the evidence; and if the jury further find from the evidence that on said date the plaintiffs were husband and wife and were the father and mother of the child Esther C—, and that said Esther was then a minor and unmarried; and if the jury further find from the evidence that at said time Eleventh street, at point mentioned in the evidence, was an open public street in the city of St. Louis; and if the jury further find from the evidence that on said day, while the plaintiffs' said child, Esther, was attempting to cross Eleventh street, she was run over and killed by the car mentioned in the evidence, which was being operated by the defendant, St. Louis Transit Company, through its motorman; and if the jury further find from the evidence that the said motorman in charge of said car saw, or by keeping a vigilant watch, would have seen the plaintiff's said child, Esther, crossing said street and in position of danger of being struck by said car, and by stopping said car within the shortest time and space practicable, under the circumstances, with the means and appliances at hand, by the exercise of ordinary care consistent with the safety of said car and of the persons on said car, could have avoided running over and killing said child, and neglected to do so—then plaintiffs are entitled to recover of the defendant the sum of five thousand dollars unless you further find from the evidence that the plaintiffs, or either of them, were guilty of negligence in the care and custody of their child, which contributed to cause the death of said child."—Approved: Cornovski v. St. Louis Transit Co., 207 Mo. 263, 106 S. W. 51

(c) "If you find from the evidence that one of defendant's servants or agents was in charge of one of defendant's cars in and upon Garrison avenue in the city of Ft. Smith at the time mentioned in plaintiff's complaint, and that said servant or agent saw plaintiff on or near the track upon which said car was moving, and that said servant saw plaintiff was in danger of being struck and run over by said car, and that she was unaware of such danger and could not avoid it, and that he so saw her in time to have avoided the said car striking and running over her by the exercise of ordinary care on his part, if, in fact, she was struck and run over by said car, and that said servant or agent, after he so saw plaintiff, neglected and failed to use ordinary care to prevent said car from so striking and running over her, if, in fact, she was so struck and run over, then your verdict will be for plaintiff, notwithstanding you may further find from the evidence that plaintiff was negligent in being upon or near said track."—Approved: Ft. Smith Light & Traction Co. v. Barnes, 80 Ark. 169, 96 S. W. 976.

(d) "If, therefore, you find from the evidence that the defendant at the time of the accident was negligently running the car which killed plaintiff's son at an excessive rate of speed, or failed to sound a gong or bell for the purpose of giving warning to travelers or in failing to check the speed of the car after the motorman thereon discovered the perilous position of the child, if he was in such position, or in failing to have the car equipped, and if you further find that any one of these facts was sufficient to, and did bring about the death of said child independent of any other, you will be warranted in finding actionable negligence on the part of the defendant, and your verdict should be for the plaintiff, if the said child was not, at the time, at fault."—Approved: Louisville & S. I. Traction Co. v. Short, 41 Ind. App. 570, 83 N. E. 265.

§ 4201. Prior Negligence Not Material in Discovered Peril.

(a) "The court instructs the jury that it was the duty of the defendant's motorman, in charge of the car mentioned in evidence, to exercise reasonable care to keep a vigilant watch-out ahead for persons and vehicles upon or approaching the track upon which the car in question was running. If, therefore, you believe from the evidence that Matthew L. K— was, at the time and place in question, in a position of imminent peril of being struck by the car mentioned in evidence, by reason of the fact that the buggy in which he was seated was upon or approaching the track upon which said car was running, and that the motorman saw him in such position of danger, if any, or by the exercise of reasonable care would have so seen him in time to have slackened the speed of said car or to have stopped the same, upon the exercise of reasonable care, and thus have avoided striking and injuring him, but negligently and carelessly failed to do so; and if you further believe and find from the evidence that by reason of the foregoing careless and negligent acts of said motorman, if you find them to have been careless or negligent, the buggy in which plaintiff's husband was riding was struck, and plaintiff's husband was thrown out of the same and under said car and killed,—then your ver-

dict must be for the plaintiff, even though you believe and find from the evidence that deceased negligently placed himself in dangerous proximity to the street car mentioned in evidence."—Approved: Kinlen v. Metropolitan St. Ry. Co., 216 Mo. 145, 115 S. W. 523.

(b) "If the jury find from the evidence that Mrs. S— took the same degree of care of the child on the occasion in question as a reasonably prudent person ordinarily would under the same or similar circumstances, then she was not guilty of such contributory negligence as would defeat this action; and even if the jury should believe that she did not exercise reasonable care, in that the child escaped from her grasp and ran across the railroad track as shown in the evidence, yet this would not defeat plaintiff's recovery, if you believe that the motorman after seeing the child either on the track or moving toward it, and on the first appearance of danger to such child, failed to stop the car within the shortest time and space practicable, consistent with the safety of the passengers on board the car, and that such failure by said motorman occasioned the death of said child."—Approved: Spencer v. St. Louis Transit Co., 222 Mo. 310, 121 S. W. 108.

(c) "If you believe from the evidence that Estelle E— got upon the track of the street car, or was in the act of approaching the track in such a way as to indicate to the motorman, or apprise the motorman in charge of the car, that she was in the act of going upon the track or about to go upon the track, far enough ahead of the car that the motorman, in the exercise of ordinary care, could have seen that fact in time, either by stopping the car, or arresting its motion, or giving a signal of its approach so as to notify her, and could thereby have avoided injuring her, and you believe from the evidence that the motorman failed so to do, then the law is for the plaintiff, although you may believe that she herself was negligent; that is, failed to use such care as I have said persons of her age, experience, and intelligence usually exercise under such circumstances."—Approved: Eirk's Adm'r v. Louisville Ry. Co. (Ky.), 98 S. W. 293 (not reported in state reports).

(d) "The law made it the duty of the defendant's agent, in charge of the car, after he saw, or by the exercise of ordinary care could have discovered, the presence of plaintiff's wagon or himself in peril of collision, to exercise ordinary care to prevent the collision, and if you should believe from the evidence that the defendant's agent, the motorman, saw the plaintiff's peril, or by the exercise of ordinary care could have discovered it, although brought about by his negligence—that is, the plaintiff's negligence—in time to have enabled the motorman by the exercise of ordinary care to prevent the collision, and he failed to do so, the law is for the plaintiff, and the jury should so find."—Approved: Louisville Ry. Co. v. Boutellier (Ky.), 110 S. W. 357 (not reported in state reports).

(e) "If you find that plaintiff was guilty of negligence in trying to cross the track, and then changing her mind and turning back, yet if defendant's employees, by the use of ordinary care, discovered her danger in time, and had a clear opportunity to stop the car thereafter, or otherwise prevent the accident, then trying to cross or turning back, if any, was not contributory negligence on the part of plaintiff, but the

later negligence of defendant's employees, if any, is the proximate cause of the injury."—Approved: Wahlgren v. Market St. Ry. Co., 132 Cal. 656, 62 Pac. 308.

(f) "No more in law than in morals can one wrong be justified by another. A person is bound to conduct himself with reasonable care and prudence toward even a wrongdoer, and if he can so conduct himself, and does not, he is liable, if injury is sustained by the other. Even if there was negligence on the part of the plaintiff in some degree, yet if at the time when the injury was committed it might have been avoided by the defendant by the exercise of reasonable care and prudence, and if the defendant was aware of that fact, then the defendant is liable to the plaintiff for injuries so committed."—Approved: Nilson v. Oakland Traction Co., 10 Cal. App. 103, 101 Pac. 413.

(g) "If, under all the evidence and the foregoing instructions, you find that the plaintiff was negligent, still the defendant cannot avoid liability if you find from the evidence that plaintiff, at the time in question, was in a perilous position, and that defendant's employe, in charge of said car saw plaintiff, and knew the fact that he was in peril, or might have so known by the use of ordinary care, and thereafter failed to use ordinary care to stop said car and prevent injury to plaintiff; and if you further so find that, by use of ordinary care, defendant's said employe in charge of said car, under such circumstances, could have avoided any injury which you so find plaintiff may have sustained, then the plaintiff will be entitled to recover, and you will find for plaintiff. If you fail to so find, then, upon this part of the case you will find for the defendant."—Approved: Orr v. Cedar Rapids & M. C. Ry. Co., 94 Iowa, 423, 62 N. W. 851.

(h) "If you find the deceased was guilty of negligence, as defined in the preceding instructions, then the plaintiff cannot recover in this action, unless you further find that, after the deceased placed himself in his dangerous position, the employes of the defendant, engaged in operating its trains, discovered the dangerous position of the deceased, and might thereupon, by the use of such means as they had at hand, in the exercise of due care, avoid the accident."—Approved: Omaha St. Ry. Co. v. Loehneisen, 40 Neb. 37, 58 N. W. 535.

(i) "The court instructs the jury that if they believe from the evidence that after the servants of the defendant in charge of its car knew, or in the exercise of ordinary care ought to have known, of the danger to which the plaintiff's intestate was exposed in crossing the track in front of the car, they could have avoided the accident by the exercise of ordinary care, but failed to do so, and that the plaintiff was injured thereby, as alleged in the declaration, they must find for the plaintiff, whether the plaintiff's intestate was guilty of contributory negligence in attempting to cross the track at that time or not."—Approved: Norfolk & P. Traction Co. v. Forrest's Adm'x, 109 Va. 658, 64 S. E. 1034.

§ 4202. Plaintiff Attempting to Cross Unsafe Track With Loaded Wagon.

"If the jury find from the evidence that the defendant's street car track was in an unsafe condition, and that the rails projected above

the surface of the street to such an extent as to render crossing over the same dangerous at the point where the said G— attempted to cross the same, and that the said G— actually saw or discovered the dangerous condition of said track or rail, or in the exercise of ordinary care ought to have seen it, and attempted to cross the same with a loaded wagon, and was injured thereby, and that an ordinarily prudent person would not have done so, and that he was negligent in so doing, then and in this event the plaintiffs could not recover, and you will find for the defendant."—Approved: Citizen's R. Co. v. Gossett, 37 Tex. Civ. App. 603, 85 S. W. 35.

§ 4203. Negligence of Plaintiff Immediately at or Before the Collision.

"The issues you are sworn to try in this case are as follows: Was the electric car which collided with the wagon in question carelessly and improperly driven or managed by the servant or servants of the defendant? Was the said electric car travelling at an unnecessarily high or dangerous rate of speed? Did the servant or servants of defendant negligently fail to ring a gong or bell at the time and place in question? Did the servant or servants of defendant in charge of said car know that W— was in a position of peril in time to have stopped the car in time to have avoided the collision by the use of reasonable care on their part? Could the servant or servants of defendant in charge of the electric car, by the use of reasonable care, have seen that W— was in a position of peril in time to have stopped the said car before the collision? Was W— at and just before the time of the collision using ordinary care and caution for his own safety? If you conclude that the greater weight of the evidence does not show that W— was using such care and caution for his own safety, you need not concern yourselves with the other issues, because in no event can the plaintiff be entitled to recover a verdict unless it has been shown by the greater weight of the evidence that such care and caution was used by W—. If you do find from the greater weight of the evidence that such care and caution was used by W—, you will examine the evidence bearing upon the other issues, and if you do not find the greater weight of the evidence, taken as a whole, will warrant you in answering one or more of them in the affirmative, you should find the defendant not guilty."—Approved: Chicago City Ry. Co. v. O'Donnell, Adm'r, 208 Ill. 267, 70 N. E. 294, 477.

§ 4204. Negligence Attributable to Intoxication of Deceased.

"I further instruct you that if you believe from the evidence that without such an act on her part that would indicate to the motorman, in the exercise of ordinary care, that she was about to go upon the track, the plaintiff's intestate, E—, suddenly and without the knowledge of the motorman, and without warning of her intention, went upon the track so near in front that the motorman, in the exercise of ordinary care, could not stop the car or warn her in time to avoid injuring her, then the law is for the defendant, and you should so find."—Approved: Eirk's Adm'r, v. Ry. Co. (Ky.), 98 S. W. 293 (not reported in state reports).

§ 4205. Plaintiff's Negligence Concurring with that of Defendant's Servants.

"The court instructs the jury that as the plaintiff was about to cross the tracks of the defendant in Forty-seventh street the law placed upon the plaintiff, and upon the employes of the defendant in charge of the car in question, the same legal duty, viz., the duty of exercising ordinary care to avoid a collision. If, therefore, you find, from the evidence, that a want of ordinary care on the part of the defendant's employes in charge of said car and a want of ordinary care of the plaintiff combined to bring about the accident, and that a want of ordinary care on the part of both of the said employes and of the plaintiff contributed proximately to such accident, then, in such case, you should find the defendant not guilty."—Approved: Flanagan v. Chicago City Ry. Co., 243 Ill. 456, 90 N. E. 688.

§ 4206. Inability to Avoid Accident When Peril is or Ought to have Been Seen.

(a) "If you believe from the evidence that the motorman in charge of this Brook street car performed his duty as set forth and defined to you in instruction number one, and if you further believe from the evidence that the plaintiff's decedent, Julius G—, came upon the track in front of the Brook street car so suddenly or so close to the same that the motorman in charge thereof could not by the exercise of ordinary care on his part slacken the speed thereof or stop the car in time to prevent the same from colliding with the deceased, the law is for the defendant and you should so find."—Approved: Goldstein's Adm'r v. Louisville Ry. Co. (Ky.), 115 S. W. 194.

(b) "If the jury believe from the evidence that the plaintiff went out in the street so close to the car that, if the car was running at a reasonable rate of speed as defined in No. 1, the motorman could not by the exercise of ordinary care have perceived his danger, and stopped the car so as to avoid injury to him, the jury should find for the defendant."—Approved: Louisville Ry. Co. v. Gaar (Ky.), 112 S. W. 1130 (not reported in state reports).

§ 4207. When Such Inability is from Car Running at Dangerous Speed.

"The court instructs the jury that if they believe from the evidence plaintiff's intestate, when the car with which he collided was approaching, saw it and undertook to cross the track in front of it so close to the front end of such approaching car that the motorman in charge of same could not, after discovering his peril, by the exercise of ordinary care and the means at his command stop said car or check the speed of same in time to avoid colliding with plaintiff's intestate, then the law is for the defendant and the jury should so find, unless they further believe from the evidence that the inability, if any, of the motorman to stop the car, was due to the unusual or dangerous speed at which he was running it, if he was so running it."—Approved: Louisville Ry. Co. v. Byer's Adm'x, 130 Ky. 437, 113 S. W. 463.

§ 4208. Negligence Frightening Horse Proximate Cause of Injury.

(a) "The court instructs the jury that it was the duty of the defendant railway company, in operating the car mentioned in evidence in this

case on Clark avenue in the city of St. Louis to exercise ordinary care to avoid coming in contact with the buggy mentioned in evidence when the same was on the track, or in such proximity thereto as to be in danger of being hit by a car running on defendant's track, and, if you believe and find from the evidence that the collision between the car and the buggy in which the plaintiff, H—, was riding, was occasioned by the omission of the motorman in charge of the movement of defendant's car to use reasonable care to avoid a collision with said buggy, and that because of such want of care, the collision took place, and as a direct consequence thereof the horse attached to said buggy ran away and became unmanageable, and that, as a direct result of said facts, plaintiff, H—, received the injuries mentioned in evidence, and that the plaintiff, H—, personally, at and before the events above described, exercised ordinary care to avoid injury and danger, then your verdict should be for the plaintiff."—Approved: Petersen v. St. Louis Transit Co., 199 Mo. 331, 97 S. W. 860.

(b) "In this case, if you shall find from all the evidence before you that the motorman, under the circumstances shown, had reason to apprehend from what he saw that the horse was likely to become unmanageable and run away, or otherwise injure himself or the persons in the carriage, it was his duty to use his best efforts, making use of all the means at his command, and all the methods and appliances upon his car, to stop the car as quickly as could thereby be done, if so doing would be likely or tend to avoid danger of injury or danger to any persons or property in peril. If you shall so find that the motorman neglected to do anything so reasonably required of him, under the circumstances as above stated, if they existed, and such failure or negligence upon his part was the proximate cause of the death of Mrs. F—, it will be your duty to return your verdict for the plaintiff in this action."—Approved: Fisher v. Waupaca Electric Light & Ry. Co., 141 Wis. 515, 124 N. W. 1005.

§ 4209. Motorman Misled by Plaintiff's Act Bringing on Collision.

"If you find from the evidence that the motorman in charge of the car in question slowed up the car, or stopped it, at the intersection of Ninth and State streets, expecting that the plaintiff's team would pass in front, and that thereupon the said motorman noticed the heads of plaintiff's team turning towards the south as if to pass behind the car; and if you find that the said motorman believed, and had reason to believe, that it was the intention of the plaintiff to turn southward, and pass behind the car, and that thereupon the motorman moved the car forward to give the plaintiff more room in which to pass behind said car, and that the plaintiff's horses thereupon became frightened, and started suddenly toward and in front of the said car, and were by that means struck by the car; and if you conclude from such facts, if such you find to be the facts, that the accident occurred without negligence on the part of the defendant, as defined to you in these instructions—then your verdict will be for the defendant."—Approved: Christy v. Des Moines City Ry. Co., 126 Iowa, 428, 102 N. W. 194.

§ 4210. Defendant's Negligence Concurring with or Preceded by Plaintiff's Negligence.

(a) "If you believe from the evidence in this case that Lorena R—, the plaintiff, in approaching the defendant's track at the point of collision, either saw said car approaching, or could and would have seen the same by the exercise of such care and prudence as a person of her age and discretion would ordinarily exercise under the same or similar circumstances, and you further believe she knew the dangers of contact with a moving car, and you further believe she failed to exercise such ordinary care to prevent the collision after she saw the car, or after by the exercise of such ordinary care she could have discovered the car, and that such failure caused or contributed to the injury, then you will find for the defendant, notwithstanding you may believe the defendant was guilty of negligence."—Approved: Citizens Ry. Co. v. Robertson (Tex. Civ. App.), 103 S. W. 443 (not reported in state reports).

(b) "If you find from the evidence that the plaintiff was injured while attempting to cross this track at the car house, in front of a car approaching dangerously near, which she knew, or by using her faculties with ordinary care could have known, was dangerously near, and which might have passed her in safety, had she paused for a few seconds before making the attempt to cross, then she was guilty of contributory negligence, and your verdict must be for the defendant, even though you should believe that the railroad company did not ring any bells or maintain any lookout at the place of this accident."—Approved: Wahlgren v. Market St. Ry. Co., 132 Cal. 656, 64 Pac. 993.

(c) "If you should believe that the defendant's agent was negligent in the operation of the car, nevertheless, if you shall also believe that the plaintiff himself failed to exercise ordinary care in the control and operation of his wagon, and that by such failure upon his part he either caused the collision between his wagon and the car, or so far contributed to bring about the collision that but for such negligence upon his part, if there was any, the collision would not have occurred, and he would not have been injured, the law is for the defendant, and the jury should so find."—Approved: Louisville Ry. Co. v. Boutellier (Ky.), 110 S. W. 357 (not reported in state reports).

§ 4211. Failure to Look and Listen as Want of Ordinary Care.

(a) "It is the duty of persons traveling on the street to use ordinary care to prevent injury by being struck by street cars. Therefore, if you believe from the evidence that a person of ordinary prudence would have looked and listened for the approach of defendant's car, and that by so looking and listening plaintiff could have discovered the approach of said car, and that plaintiff's injuries, if any, were proximately caused by her failure to look and listen, then you are instructed that the plaintiff is not entitled to recover, and your verdict shall be for the defendant."—Approved: Northern Texas Traction Co. v. Nelson (Tex. Civ. App.), 105 S. W. 846 (not reported in state reports).

(b) "But if you find that the car which struck the wagon and team which plaintiff was driving was standing still at the time when plaintiff

started to drive across the car track of the defendant, then in that event plaintiff was not required as a matter of law to stop and listen before starting to drive across said car track, unless you find that the conditions surrounding said car and the acts and conduct of those in charge of said car were such as to indicate to an ordinarily careful and prudent person that said car was in the act of starting and was about to start."—Approved: Wilson v. Seattle, R. & S. Ry. Co., 55 Wash. 651, 104 Pac. 1112.

§ 4212. Sudden Peril too Late for Avoidance of Accident.

(a) "If you find from the evidence that the motorman in charge of defendant's car, when about a block away from the point of the accident, saw the plaintiff riding upon his bicycle between the inner rails of the defendant's east and west tracks, and far enough away from the track on which he was propelling his car so that his said car could have passed the said plaintiff safely, and that he gave warning of his approach, and that the front of his car did pass the plaintiff and that the plaintiff then, either through excitement or otherwise, lost his balance, veered in towards the car, and that the hind step of said car struck plaintiff and that the said car was traveling upon a straight track at the time of the accident, then I charge you, gentlemen, that your verdict must be for the defendant."—Approved: Hamlin v. Pacific Elec. Ry. Co., 150 Cal. 776, 89 Pac. 1109.

(b) "The court instructs the jury that if from the evidence the jury believe that defendant's motorman operating the said car saw plaintiff's wagon and horses resting near defendant's track, but so far away from said track as not to be in danger of being struck by said moving car, defendant's motorman had the right to assume that plaintiff's horses would remain in said position, and had the right to move his car forward; and if the jury further believe from the evidence that thereafter plaintiff's horses changed their position, and got in front of said car, and thereby caused or directly contributed to plaintiff's alleged injuries, and that the motorman in charge thereof could not then stop his car and avoid said accident, plaintiff cannot recover, and your verdict must be for the defendant."—Approved: Rapp v. St. Louis Transit Co., 190 Mo. 144, 88 S. W. 865.

(c) "The jury are instructed that if they believe from the evidence that the plaintiff came upon defendant's track while defendant's car was in motion, without the knowledge of the motorman on said car, and was struck by the edge of the car as she was about a foot west of the east rail, and the jury find that the motorman was not guilty of negligence and at the time was in the exercise of such care as an ordinarily prudent person would have exercised under similar circumstances and conditions, and that plaintiff possessed at the time of the accident sufficient intelligence to know and appreciate the danger of coming in collision with a moving car, and without using ordinary care and prudence stepped or ran in front of said car, then the jury will find for the defendant."—Approved: Citizens Ry. Co. v. Robertson (Tex. Civ. App.), 103 S. W. 443 (not reported in state reports).

§ 4213. Attempting to Cross Track in Face of Obvious Danger.

(a) "If the deceased, Matthew K—, knowingly drove across the street car tracks in question in such close proximity to a moving car as to be struck before he could get across said tracks, then your verdict must be for defendant."—Approved: Kinlen v. Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523.

(b) "The court instructs the jury that if you believe from the evidence that the car of the defendant was coming south on Botetourt street approaching Pembroke avenue, and that the plaintiff's intestate was driving westwardly on Pembroke avenue, approaching Botetourt street just before the accident, and that the plaintiff's intestate as he approached and entered Botetourt street saw, or by the exercise of ordinary care could have seen, the car of the defendant approaching, and could have avoided this accident, either by stopping his team or turning to the right or left, but elected to take the chance of crossing the track on which the car was approaching at a time when he saw, or by the exercise of ordinary care could have seen, that there was danger of a collision in so doing, your verdict must be for the defendant."—Approved: Norfolk & P. Traction Co. v. Forrest's Adm'x, 109 Va. 658, 64 S. E. 1034.

(c) "The court instructs the jury that, even though you may believe from the evidence that the motorman failed to ring his bell as he approached the crossing, and that he was running at an excessive rate of speed, and that he failed to exercise ordinary care under the circumstances to avoid the accident, after he saw, or by the exercise of ordinary care could have seen, that there was danger of a collision with the wagon, you still cannot find a verdict for the plaintiff, if you believe from the evidence that F— attempted to drive across the track in front of the approaching car, after he knew, or by the exercise of ordinary care could have known, that the car would not stop in time to avoid a collision with the wagon."—Approved: Norfolk & P. Traction Co. v. Forrest's Adm'x, 109 Va. 658, 64 S. E. 1034.

§ 4214. Horse Frightened at Car Operated in Careful Manner.

"If you shall believe from the evidence in this case that said horse became frightened at defendant's street car while the same was being operated in a careful and prudent manner by the motorman in charge of same, and that said motorman in charge of said car could not by the exercise of the utmost care have prevented the collision and injury to plaintiff, if any, then the law in this case is for the defendant, and you will so find."—Approved: Wynn v. Paducah City Ry. (Ky.), 102 S. W 824 (not reported in state reports).

§ 4215. Where Fright is from Car Operated in Unusual Manner.

"If the jury believe from the evidence that the horse of plaintiff was frightened by the noise and smoke arising from the machinery of the car of defendant, and that said noise and smoke was not incident to the ordinary operation of their cars, they are instructed that this raises the presumption that such noise and smoke would not have been caused if those who had the providing, maintaining, and care of defendant's

machinery had used proper care in regard thereto, and, in the absence of an explanation on the part of the defendant showing due care on its part, they may infer that the defendant was guilty of negligence; and if they further believe that such negligence caused the accident as set forth in the declaration, and that the plaintiff was free from fault, they must find for the plaintiff."—Approved: Richmond R. & E. Co. v. Hudgins, 100 Va. 409, 41 S. E. 736.

§ 4216. Conductor Injured by Act of Incompetent Motorman.

"If the jury believe from the evidence in this case that the motorman in charge of the car upon which the plaintiff was conductor was inexperienced and incompetent to run and operate the said car as a motorman at the time and place when and where the plaintiff claimed he was injured, and that defendant knew, or by the exercise of ordinary care should have known, that the said motorman was inexperienced and incompetent as aforesaid, and that the defendant negligently and knowingly employed and directed the said motorman to run and operate the said car at the said time and place, and that, by reason of the inexperience and incompetency of the said motorman, the said car was derailed, and that the plaintiff had no knowledge nor means of knowing that the said motorman was inexperienced and incompetent to run the said car, then I charge you that, if you find from the evidence that the plaintiff was injured by the derailment of the said car, without any negligence or default upon his part, which directly contributed to his injuries, if any, and without which he would not have been injured, then you may find a verdict in favor of the plaintiff."—Approved: South Covington & C. St. Ry. Co. v. Brown (Ky.), 104 S. W. 703 (not reported in state reports).

CHAPTER CXVI.

NEGLIGENCE—ELEVATORS AND STAGE COACHES.

§ 4217. Elevator—Common Carrier of Passengers—Duty to.
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4219. Highest Degree of Care for Safety of Passengers.
4220. Hotel Servants Carried in Passenger Elevator.
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4229. Warning to Passenger not to Go upon Unsafe Deck.
4230. Injury from Attempt to Escape from Elevator Suddenly descending.

§ 4217. Elevator—Common Carrier of Passengers—Duty to.

"A company operating a passenger elevator in its office building for the use of its tenants and their patrons is a common carrier of passengers for hire, and as such is required to exercise the most perfect care of prudent and cautious men, and its undertaking and liability to its passengers go to this extent: That as far as human foresight can reasonably go, it will transport them safely. It is not liable for injury happening from sheer accident or misfortune, when there is no negligence or fault, and where no want of caution, foresight, or judgment would prevent the injury, but it is liable for the smallest negligence in itself and its servants. It is also responsible for defects in the vehicle which it furnishes, which might have been discovered by a proper examination."—Approved: Ohio Valley Trust Co. v. Wernke, 42 Ind. App. 326, 84 N. E. 999.

§ 4218. Faulty Construction Causing Elevator to Fall.

"The court instructs the jury that if they believe, from the evidence in this case, that the plaintiff, on or about ————, was rightfully in an elevator in the possession of and operated by the defendant, and situated in the defendant's building, for the purpose of being carried thereby from one of the upper floors of defendant's said building to the ground floor thereof; and if you further believe, from the evidence, that while the plaintiff was so in such elevator and in the exercise of reasonable and ordinary care on his part, said elevator, owing to the negligent and faulty construction thereof, or owing to the negligence and carelessness on the part of the servants of the defendant in operat-

ing the same, fell; and if you further believe, from the evidence, that the injury to the plaintiff complained of was caused by the fall of such elevator, then your verdict should be for the complainant."—Approved: Hartford Deposit Co. v. Sollitt, 172 Ill. 222, aff'g 70 Ill. App. 166, 50 N. E. 178, 64 Am. St. Rep. 35.

§ 4219. Highest Degree of Care for Safety of Passengers.

"The jury are instructed that it is the duty of the person or persons operating an elevator, such as the elevator in question, in the carriage and transportation of passengers upon such elevator, to have, take, and exercise the highest degree of care, reasonably practicable, for the personal safety and safe carriage of such passengers, and that this care should be used and exercised for the purpose of safely operating said elevator, in having said elevator, its operating machinery, safety devices, and all machinery and apparatus constituting a part of said elevator and said operating machinery maintained and kept in a reasonably good and safe condition, and for such purpose to take and exercise about the same the highest degree of care reasonably practicable, in inspecting and keeping such elevator, its operating machinery, safety devices, and all machinery and apparatus constituting a part of said elevator and said operating machinery in good and reasonably safe working order and condition; and a failure to so do would be negligence."—Approved: Orcutt v. Century Bldg. & Mississippi Valley Trust Co., 214 Mo. 35, 112 S. W. 532.

§ 4220. Hotel Servants Carried in Passenger Elevator.

"The court instructs the jury that the plaintiff was not in the position of a passenger upon the elevator in question, and that the plaintiff was not in the position of a guest of the hotel in boarding and riding upon the elevator in question, and that the defendant did not owe to the plaintiff that highest degree of care which would be owing to a passenger or guest of the hotel, but that the test of the duty of the defendant toward the plaintiff was a test of ordinary care on the part of his servant in charge of the elevator."—Approved: Walsh v. Cullen, 235 Ill. 91, 85 N. E. 223.

§ 4221. Riding on Freight Elevator—Usual Incidents.

"The expression 'due care' used in these instructions is defined to be care commensurate with the instrument or means being used, and danger to be apprehended, and while the plaintiff in entering a freight elevator in the Century Building, to be carried up and down the building in it, accepted and acquiesced in the usual incidents and conduct of a freight elevator, yet the party or parties in control of said Century Building was or were bound to exercise, in the repair, guarding from accident, and management of said freight elevator that high degree of care which prudent and competent men exercise under like circumstances, and the failure by the party or parties in control of said Century Building to use that high degree of care which is exercised by prudent and competent men under like circumstances, would be a failure to exercise due care."—Approved: Orcutt v. Century Building Co., 201 Mo. 424, 99 S. W. 1062.

§ 4222. Passenger Misled into Open Elevator Shaft.

"The court instructs the jury that it was the duty of the defendants in the operation and management of its elevator to exercise the highest degree of care and skill usually exercised by prudent persons in the same business in the management and operation of elevators of the kind and character as shown by the proof, and if the jury believe from the evidence that the plaintiff entered the storehouse of defendant, and in the exercise of ordinary care attempted to enter the elevator cage in the storehouse to go to the cellar by invitation of defendants' servant, or when the acts of the servant were such that a person of ordinary prudence would reasonably infer such an invitation, and the plaintiff, in the exercise of ordinary care, when he attempted to enter the elevator, failed to discover that the elevator cage was not in the proper position, and by reason of the negligence of the defendants the plaintiff fell down into the elevator well, injuring himself by the fall, the law is for the plaintiff, and the jury should so find."—Approved: Eilerman v. Farmer (Ky.), 118 S. W. 289.

§ 4223. Upsetting of Stage Coach Presumptive Negligence.

"The upsetting of the stage coach in this case (if proven to the satisfaction of the jury) is prima facie evidence of negligence, and the plaintiff need prove nothing more; but it devolves on the defendant to prove that his driver acted with the utmost skill, prudence and caution, and that the injury sued for was occasioned without the least negligence or want of skill or prudence on the part of the driver; and if the defendants fail to satisfy the jury that the driver exercised the utmost degree of care and skill and prudence, by reason of which failure the injury was occasioned, the defendants are liable."—Approved: Tuller v. Talbot, 23 Ill. 357, 359.

§ 4224. Runaway Due to Unavoidable Accident.

"While the defendant, as a common carrier of passengers, is charged with the highest degree of care in the operation of his line to insure the safe transportation and delivery of his passengers, he is not an insurer of their personal safety; and, if in this instance the runaway was due to unavoidable accident, your verdict should be for the defendant."—Approved: Taillon v. Mears, 29 Mont. 161, 74 Pac. 421.

§ 4225. Duty as to Roadway Conveyance and Competent Driver.

"It was the duty of the defendants to furnish, in addition to a suitable and sufficient conveyance, a fully competent, careful and trustworthy driver, and if they neglected to do so, and by reason thereof any injury resulted to the plaintiff, the jury must find for the plaintiff."—Approved: Tuller v. Talbot, 23 Ill. 358.

§ 4226. Care Required of Owner of Steamboat in Respect of Crew.

"If the jury believe, from the evidence, that the plaintiff was a passenger on the defendant's boat at the time of the alleged injury, then it was the duty of the defendant, by its officers and employes, to use the utmost practicable care and diligence to carry the plaintiff safely

and securely to his destination, and said company was also bound to use all reasonably practicable care and diligence to maintain among the crew of said boat, including deck hands and roustabouts, such a degree of order and discipline as might be requisite for the personal safety and security of the plaintiff and other passengers who might be traveling on said boat; and said company was also bound to have due supervision and control over the crew of said boat by its proper officers."—Approved: Keokuk, etc., Packet Co. v. True, 88 Ill. 609. Citing Chicago, etc., R. Co. v. George, 19 Ill. 510; Galena, etc., R. Co. v. Fay, 16 Ill. 558; Galena, etc., R. Co. v. Yarwood, 15 Ill. 469; Frink v. Potter, 17 Ill. 406, 410.

§ 4227. Presumption of Negligence—Elevator Injury.

"The jury are instructed that if you believe and find from the evidence that on or about the 30th day of May, 1902, the defendant Mississippi Valley Trust Company as agent of the Century Building was operating a freight elevator in the Century Building in the city of St. Louis, under the contract of December 18, 1896, in evidence, and at said time carried passengers thereon, who were taking freight in and out of said building for tenants, and that plaintiff was such passenger, and had taken passage upon said elevator in said building, and that while he was so a passenger, being carried upon the said elevator, operated by said defendant, as aforesaid, the said elevator fell from about the seventh story, and suddenly dropped to the bottom of the elevator shaft in the basement of said building, and that plaintiff was himself exercising ordinary care, and that he was by such fall and dropping of the elevator car precipitated to the bottom of said elevator shaft, and injured thereby, then the law presumes that such injury to plaintiff was caused by defendant's negligence, and such facts, if proved by a preponderance of the evidence, make out a presumptive case for the plaintiff, and you should find a verdict for the plaintiff against both defendants, unless you further believe from the evidence that, notwithstanding this presumption, the defendants, at the time of the happening of the injury, in fact had then fully performed, or were then fully performing their duty, as defined and stated in other instructions herein, toward plaintiff as such passenger; or that such injury to plaintiff, if any, did not occur because of any failure of the defendants in such respect."—Approved: Orcutt v. Century Bldg. & Mississippi Valley Trust Co., 214 Mo. 35, 112 S. W. 532.

§ 4228. Same—Collapse of Steamboat Deck.

"The jury are instructed that if you find from the evidence that plaintiff was a passenger, lawfully on board defendant's boat, at the time of the accident mentioned in the evidence, and received injuries therefrom, and that said accident consisted in the falling down and giving way of one of the decks of defendant's boat and that plaintiff's injuries arose from the said falling down and giving way of the deck of defendant's said boat, then the burden of proof is shifted upon defendant to show to the satisfaction of the jury that the said falling down of said deck was through no fault, negligence or carelessness of defendant; and, unless so shown, you should find for the plaintiff, pro-

vided you do not further find from the evidence that plaintiff was guilty of negligence in going upon or remaining upon the hurricane deck, which negligence contributed to the injuries complained of."—Approved: Evers v. Wiggins Ferry Co., 127 Mo. App. 236, 105 S. W. 306.

§ 4229. Warning to Passengers Not to go Upon Unsafe Deck.

"The jury are instructed that even though you find from the evidence that some of the passengers were warned not to go upon the top, or hurricane deck, plaintiff cannot be charged with negligence in going upon said deck unless he heard or was aware of said warnings, or unless the condition of said top deck, at the time plaintiff went thereon, was such as to be apparent to a reasonably careful observer was unsafe, or was not meant for the use of passengers.

"And in considering whether plaintiff should have known that said top deck was unsafe, or not meant for passengers, you may consider all the physical facts regarding the approach to said deck."—Approved: Evers v. Wiggins Ferry Co., 127 Mo. App. 236, 105 S. W. 306.

§ 4230. Injury From Attempt to Escape From Elevator Suddenly Descending.

"The court instructs the jury that if you find and believe from the evidence that the elevator started downward by reason of the hydraulic machine being defective in condition and out of order and that it was so known to the defendant Century Reaity Company, or by the exercise of ordinary care would have been so known at the time of and prior to the injury, long enough to repair it, if you find such condition and knowledge from the evidence; and if the jury further find and believe from the evidence that plaintiff exercised ordinary care for her own safety while approaching, entering, and while on said elevator, and that, after said elevator had started to descend and by reason of the descent thereof, plaintiff was seized with terror and alarm for her own safety, and that the plaintiff had reasonable cause to apprehend peril and danger to herself, and that the appearance of danger was imminent, leaving no time for her to deliberate, then the court instructs the jury that her attempt to escape from said elevator resulting in her injuries is not contributory negligence on the part of the plaintiff, such as will prevent her from recovering for her injuries, if the attempt was one such as a person acting with ordinary care and prudence, might under the circumstances make."—Approved: Cooper v. Century Realty Co., 224 Mo. 709, 123 S. W. 848

CHAPTER CXVII.

NEGLIGENCE—RAILROADS AS CARRIERS OF PASSENGERS.

§ 4231. Relation of Passenger Begins when Purchaser of Ticket Enters Train.
4232. Carriers of Passengers not Insurers of Safety.
4233. Burden of Proof to Show Plaintiff a Passenger.
4234. Relation Terminates when Passenger Alights, and Has Reasonable Time to Depart.
4235. Where Passenger Delays Alighting Without Knowledge of Carrier and is Carried Beyond Station.
4236. Relation Exists Between Carrier and Mail Clerk.
4237. And Between Carrier and Bail with Prisoner in His Custody.
4238. Relation Continues in Transfer of a Passenger over a Break in the Line.
4239. Duty of Passenger to Pay Heed to Station Announcements.
4240. One Attempting to Board a Train as Passenger Entitled to Protection Against Falling.
4241. Ticket with Wrong Date Stamped Thereon, is a Ticket as of the True Date.
4242. Wrongful Refusal to Validate Ticket Takes away no Passenger Rights.
4243. Person Riding on Train with no Intention to Pay, is not Passenger.
4244. Where Ticket Defective Through Agent's Fault, Not Trespass by Conductor to Eject.
4245. Care—Degree of by Carrier—High Degree used by Very Prudent Persons.
4246. Must use all Human Care, Vigilance, Foresight, Reasonably Practicable.
4247. Must Provide Reasonably Safe Track, and Slow Down Train in Running over Insecure Part.
4248. Must Warn Passenger Against Known Danger.
4249. When Train has Stopped, Passenger Must be Notified of its Moves.
4250. If Signaled at Place where Train Stops on Signals, it must Stop.
4251. Utmost Care, Diligence and Foresight to keep Track in Safe Condition.
4252. Must Carry Passenger to Destination.
4253. And Maintain its Duty to Him Until he has Alighted.
4254. Not Bound to Utmost Degree of Care the Mind May Invent nor Insure Against Accidents.
4255. High Care Extends to Roadway, Equipment and Selection of Servants.

4256. Injury from any Omission of Duty is Negligence.
4257. Ejection Should be With no More Force than Necessary for the Purpose.
4258. A Trespasser Should not be Compelled by Force or Fear to Leave Moving Train.
4259. But Train May Stop Between Stations to Eject for Non-Payment of Fare.
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4311. Presumption of Negligence—Injury to Passenger.
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4313. Presumption of Negligence—Derailment.
4314. Presumption of Negligence—Breaking or Sagging of Wire.
4315. Presumption of Negligence Where Delay Caused by Breaking Down of Cars.

§ 4231. Relation of Passenger Begins When Purchaser of Ticket Enters Train.

(a) "The court instructs the jury that if you find from a preponderance of the evidence that plaintiff applied to the ticket agent of the defendant company, as alleged in her complaint, for a ticket from Texarkana to St. Louis, that such a ticket was sold to her by such agent and paid for by her, and that, at the time of the purchase of the said ticket, the said agent advised plaintiff that her train was then at the depot, and that she would have time to take passage on it; and if you further find from a preponderance of the evidence that the plaintiff, in the exercise of ordinary diligence, proceeded to the train so pointed out to her by said ticket agent, that the door of said train was open, and that plaintiff entered said train for the purpose of taking passage thereon for St. Louis—then you are instructed that plaintiff was a passenger."—Approved: St. Louis, I. M. & S. Ry. Co. v. Fambro, 88 Ark. 12, 114 S. W. 230.

(b) "If you believe that the plaintiff entered into an office or waiting-room provided by defendant for passengers, and informed the depot or ticket agent of her intention and desire to become a passenger; that she placed herself, in good faith, under his direction as such; and such agent directed her in getting on (attempting to get on) the car; these facts, if established to your satisfaction by the evidence, would

be sufficient to justify you in finding that the relation of passenger existed, although she had not purchased a ticket, and had not entered the car."—Approved: Allender v. Chicago, etc., R. Co., 37 Iowa, 270.

§ 4232. Carriers of Passengers not Insurers of Safety.

(a) "The court instructs the jury, that common carriers of passengers are liable only for negligence; they are not insurers of the safety of their passengers like common carriers of goods. There is a well-established distinction in that respect between the responsibility of the carriers of goods and the responsibility of the carriers of passengers; which distinction is founded in the consideration that in the case of goods committed to a carrier the owner is deprived of all control and custody over them; and also upon the consideration that if the contrary rule prevailed it would enable the carrier of goods to collide with other people for the purpose of depriving the consignor of his rights and his property. But common carriers of passengers are not liable for injuries happening to passengers from unforeseen accidents, where there has been no negligence. They do not undertake absolutely to be responsible for unavoidable accidents; for accidents which, in a word, are not the result of their own negligence."—Approved: Meier v. Pennsylvania Ry. Co., 64 Pa. 226, 227.

(b) "The court instructs the jury that the rule in regard to carriers of passengers is this: The utmost care and vigilance is required on the part of the carrier. This rule does not require the utmost degree of care which the human mind is capable of imagining; but it does require that the highest degree of practicable care and diligence should be adopted that is consistent with the mode of transportation adopted. Railway passenger carriers are bound to use all reasonable precautions against injury of passengers; and these precautions are to be measured by those in known use in the same business, which have been proved by experience to be efficacious. The company are bound to use the best precautions in known practical use. That is the rule; the best precautions in known practical use to secure the safety of the passengers; but not every possible preventive which the highest scientific skill might suggest."—Approved: Meier v. Pennsylvania Ry. Co., 64 Pa. 226, 227.

§ 4233. Burden of Proof to Show Plaintiff a Passenger.

"The court instructs the jury that the plaintiff has alleged in his declaration that at the time and place in question he was a passenger of said car. This is a material allegation of said declaration and the burden of proof is upon the plaintiff and he must prove said allegation by a preponderance or greater weight of the evidence before he can recover in this case. If you find from the evidence, under the instructions of the court, that the plaintiff has failed to prove by a preponderance or greater weight of the evidence that at the time and place in question the plaintiff was a passenger on said car, then the plaintiff cannot recover and you should find the defendants not guilty."—Approved: Kulpinsky v. Sampsell, Receiver, 145 Ill. App. 242.

§ 4234. Relation Terminates When Passenger has Alighted and has Reasonable Time to Depart.

(a) "Or if you find that, after arrival at this point of destination, and alighting from the train, and having a reasonable time to make his exit from the premises of the defendant company, and while the train was moving off, or in the act of leaving, that he followed after it, pursued it, that there was some trouble existing, that a reasonable time for William L. M— to have made his exit from the premises of the company had been allowed, which had not been done, but pursued and followed after the train, that whatever trouble may have occurred at such a time as that, then, under the rules, the court charges you that relations and duties existing between the conductor and the passenger would have ceased; and if the conductor then shot William L. M—, wounding and injuring him, the court charges you that if you should find that to be true of this matter, then, in that event, the plaintiff would not be entitled to recover damages from the defendant railroad company."—Approved: Brunswick & W. R. Co. v. Moore, 101 Ga. 684, 28 S. E. 1000.

(b) "If O—, his wife and child, were received upon one of the trains under the control of the receiver or his servants, to be carried to some point, then they were passengers, and would continue such, at least until they had been carried to their point of destination, and had safely alighted from the train upon which they had been carried, and in addition to such length of time, if their baggage had been received on such train for carriage to the same place, and no receipt, bill of lading, check or other like evidence had been delivered to him for it; and if it was for this reason proper, under the circumstances, for him to go to the car where such baggage was stored for the purpose of identifying and claiming his property and receiving it from the employes on the train, then he had the right to do so subject to the rules hereinafter given as to the effect of any negligence of which he himself may have been guilty. And he would continue to occupy to the receiver the relation of passenger, so long as he did nothing more than just indicated, and to aid and assist the servants in identifying and removing his own baggage from the car to the platform. * * * But if there were no such facts as just explained to continue the relations, he and his family would cease to be passengers when they had arrived at the point of their destination and had safely alighted from the cars. And if O—, after he had safely alighted from the train with his family, without the existence of any such facts as are above supposed to render it necessary or proper for him to do so, went into a box car to aid and assist the men there employed in getting out his goods, without the existence of any necessity or propriety therefor, and while so assisting was killed, then he made himself a fellow-servant for the time being, with the conductor, engineer and fireman on the train; and if, under such circumstances, he was killed through the negligence of some or all of them, no recovery could be had therefor."—Approved: International, etc., R. Co. v. Ormond, 64 Tex. 487, 488.

§ 4235. Where Passenger Delays Alighting Without Knowledge of Carrier and is Carried Beyond Station.

"Gentlemen of the jury: You are charged that if you believe from the evidence that an employe of the defendant announced the station of Naples, just before its train reached such station, and that thereafter the train was stopped at said station of Naples, and remained standing a reasonably sufficient length of time for plaintiff to get off, and if you further believe from the evidence that she delayed getting off from said train in waking her children, or in talking to some other passenger, or from any other cause, and that this delay, if any, was unknown to defendant and its employes in charge of its train and car, then you are charged that her contract relations with defendant ceased, and the defendant would not be liable for carrying her past said station of Naples and to Omaha."—Approved: St. Louis Southwestern Ry. Co. v. Rose (Tex. Civ. App.), 93 S. W. 1105.

§ 4236. Relation Exists Between Carrier and Mail Clerk.

(a) "It was the duty of the railroad company to exercise the same degree of care in protecting the plaintiff while riding in its mail car and handling the mail intrusted to him that was due to a passenger on its trains, compatible, of course, with the performance of his own duties as such railway postal clerk while the train is in motion; and this degree of care extends to the obligation to furnish mail cars with suitable doors, and keep them in such repair and condition that they could be opened and shut with reasonable facility, and in this respect it was required to exercise the highest degree of care."—Approved: Decker v. Chicago, M. & St. P. Ry. Co., 102 Minn. 99, 112 N. W. 901.

(b) "You are charged by the court that plaintiff, G. A. K—, as shown by the evidence in this case, was a mail clerk traveling on and over defendant H. & T. C. R. R. from Houston to Denison. You are further charged that as said mail clerk he stood in the position of a passenger while traveling as said clerk on and over said defendant's road, and said defendant owed him the duty of using the utmost care for his safety and protection while he was so traveling as said clerk over its said road, as looking to his safety and protection."—Approved: Houston & T. C. Ry. Co. v. Keeling, 102 Tex. 521, 120 S. W. 847.

(c) "Under the allegations of the complaint and the admissions of the answer, plaintiff, when upon a mail car of the defendant as a postal clerk in the employ of the United States, and in the discharge of such duties as such clerk, was a passenger, and entitled to the care and caution to preserve him from injury that defendant, under the law, owes to a passenger. That duty was to carry the plaintiff safely, so far as human care and skill would enable it to be done."—Approved: Williams v. Spokane Falls & N. Ry. Co., 39 Wash. 77, 80 Pac. 1100.

§ 4237. And Between Carrier and Bail with Prisoner in his Custody.

(a) "The court instructs the jury that the plaintiff, as one of the bondsmen of Thomas L— for his appearance in the Lawrence county court, had the right to arrest and hold him in custody, and had

also the right while so holding him in custody to carry him on defendant's train to Louisa, in Lawrence county, and was entitled to the same treatment and protection as other passengers on said train."—Approved: Chesapeake & O. Ry. Co. v. Vaughn (Ky.), 115 S. W. 217.

(b) "It was incumbent on the plaintiff to ride in the car, and to keep L—, whom he had in custody, in the car when in motion. It was not the duty of the defendant's servants in charge of the train to assist plaintiff in holding L—; and when, after the train started, they found plaintiff in a struggle with him on the platform, they had the right to stop the train and require them either to go in the car or get off; and if, when the train stopped, plaintiff got off the car to hold L—, who was attempting to escape, it was the duty of the defendant's servants to give plaintiff a reasonable opportunity to get on the car with L—, and if they failed to do this, and by reason thereof, and not by reason of L—'s refusing obedience to him, plaintiff was left by the train, the jury should find for the plaintiff in such sum as will reasonably compensate him for the time he thus lost and any expenses he thereby incurred."—Approved: Chesapeake & O. Ry. Co. v. Vaughn (Ky.), 115 S. W. 217.

§ 4238. Relation Continues in Transfer of Passenger Over a Break in the Line.

"And in case of a break in the line of transportation caused by washouts or other agencies of that kind, and it becomes necessary for passengers to be transferred from one car to another to get over the break, the relationship of passenger and carrier continues during the progress of transferring from one point to another over the break, and it is the duty of the carrier to exercise the same degree of care to passengers while being transferred from one car to another, from one side of the break to another, as it is while actually on board the car."—Approved: Bugge v. Seattle Electric Co., 54 Wash. 483, 103 Pac. 824.

§ 4239. Duty of Passenger to Pay Heed to Station Announcements.

"Gentlemen of the jury, you are instructed that it is the duty of a passenger on a railroad train to use his senses, and take notice of the usual announcement of stations, and if, by reason of his negligence, the passenger fails to hear notice given of the arrival of the train at his place of destination, and remains on the train, and is carried beyond, the fault is the passenger's, and the carrier is not liable therefor. If, therefore, you believe, from the evidence, that defendant's servants in charge of the train gave the usual announcements of stations as the train approached C, and if, by reason of plaintiff's negligence, he failed to hear such announcement, the plaintiff remained on the train and was carried beyond, the fault was the plaintiff's, and the defendant is not liable therefore, and you should return a verdict in its favor."—Approved: St. L. & S. W. Ry. Co. v. Ricketts, 22 Tex. Civ. App. 515, 54 S. W. 1090.

§ 4240. One Attempting to Board a Train as Passenger Entitled to Protection Against Falling.

"If the plaintiff attempted to get on the car while in motion, and the conductor had reasonable ground to believe she was in danger of

falling from the car, it was his duty to take such steps for her protection as under the circumstances ordinary care required; and, if in holding or jerking her to prevent her from falling from the car he used no more force than reasonably appeared to be necessary under the circumstances for her protection, and she was thus accidentally hurt, the law is for the defendant and the jury should so find."—Approved: South Covington & C. Ry. Co. v. Raymer, 132 Ky. 187, 116 S. W. 281.

§ 4241. Ticket With Wrong Date Stamped Thereon is a Ticket as of the True Date.

"The ticket introduced in evidence, and which is admitted as the one purchased by plaintiff of defendant's agent, is dated September 24, 1893, and contains the following clause: 'Continuous passage within one day of date of sale.' You are instructed that said clause is a limitation of the time on which said ticket will be honored, and, as such, is a reasonable limitation and rule. You are further instructed that, presumptively, the date of the ticket was the day of its sale. But if, as a matter of fact, the day of the sale differs from the date of the ticket, yet the said ticket by its express terms was good from the date of sale, and you find from the evidence that said ticket was purchased by plaintiff on the 26th or 27th day of September, 1893, and was presented within one day from the actual date of such sale, it was good for such passage between the points named, to wit, Prescott and Corning."—Approved: Ellsworth v. Chicago, B. & Q. Ry. Co., 95 Iowa, 98, 63 N. W. 584.

§ 4242. Wrongful Refusal to Validate Ticket Takes Away no Passenger Rights.

"If the evidence before you in this case satisfies your minds that Mrs. M—, on or before October 29, 1886, went to the authorized agent of the defendant at St. Louis, Missouri, and was ready to identify herself as the original purchaser, and asked and requested said agent to sign and to stamp the ticket, and this request was by said agent refused; and you further find that as a result of said refusal to sign and stamp the ticket that the conductor in charge of defendant's train refused to recognize and receive said ticket, and threatened to put her off the train, and demanded security for her fare over defendant's line of road; and if the evidence further satisfies your minds that, while plaintiff's wife was such passenger on her return trip, the conductor in charge of defendant's train acted in a harsh, ungentlemanly, and oppressive manner towards her, by reason of the fact that the ticket was not signed and stamped,—then the plaintiff would be entitled to recover the actual damages occasioned thereby."—Approved: Missouri Pac. Ry. Co. v. Martino, 2 Tex. Civ. App. 634, 18 S. W. 1066.

§ 4243. Person Riding on Trains With no Intention to Pay is Not a Passenger.

"It is the duty of a person, when traveling upon a railroad from one station to another, to enter the passenger coaches provided for the carrying of passengers, and to remain therein while such train is in motion, and to procure prior to the entering therein a ticket from the

agents of said company, or, if such ticket be not purchased, then to pay the conductor on said train the proper and legal fare. A person doing this, and not guilty of misconduct on said train, would be a passenger, and the railroad company would be bound under the law to properly care for and attend to the necessary and reasonable conveniences and wants of such passenger, and would be prima facie liable for any injury that such passenger received while so traveling. But a person riding on the outside of such passenger train, whether on the platform or some other place without, or on parts of the baggage car, for the purpose of obtaining a ride on such train without the payment of any fare therefor, would not be a passenger upon such train, but would be a trespasser thereon, and such railroad would owe no duty to such person, and the employes of such company would have the right to put such person off of the train, and the railroad company would not be liable therefor, unless such removal was done in a reckless, careless, or negligent manner, and the injury, if any, was the result of such negligence."—Approved: Pledger v. Chicago, B. & Q. R. Co., 59 Neb. 456, 95 N. W. 1057.

§ 4244. Where Ticket Defective Through Agent's Fault, not Trespass by Conductor to Eject.

"The court instructs the jury that, if a railroad ticket, by mistake of the agent who issued it, does not conform to the contract which in fact was made, nevertheless, as between the passenger and conductor, the terms of the ticket are conclusive, and the right of the passenger to ride on the train is to be determined by the face of the ticket, and if the conductor ejects the passenger by reason of such passenger's failing to recognize the terms of the ticket, using only such force as is necessary to eject him, the conductor commits no tort or trespass, and the passenger is limited, in any suit for such ejection, for such damages, and only such damages, as resulted proximately from the agent's mistake, and cannot recover for damages which he sustains as the result of his own negligence or wrongful act alone, or as the result of a concurrence of his own negligence or wrongful act with the neglience or wrongful act of the defendant."—Approved: Virginia & S. W. Ry. Co. v. Hill, 105 Va. 729, 54 S. E. 872.

§ 4245. Care—Degree of by Carrier—High Degree Used by Very Prudent Persons.

(a) "You are charged that railroad companies engaged in the transportation of passengers are held to that high degree of care which very prudent persons would use under the same or similar circumstances, and a failure in this respect would be negligence on the part of the company."—Approved: Houston & T. C. R. Co. v. Easton, 44 Tex. Civ. App. 95, 97 S. W. 833.

(b) "You are instructed that it is the duty of the defendant to exercise the highest degree of care that would be used by every prudent person under the same or similar circumstances to avoid and prevent injury to passengers upon its cars, and that a failure to exercise such high degree of care constitutes 'negligence' as used in this charge."—

Approved: Galveston, H. & S. A. Ry. Co. v. Norton (Tex. Civ. App.), 119 S. W. 702.

(c) "If you should find from a preponderance of the evidence that plaintiff was a passenger on said train, as defined in these instructions, then you are instructed that it became and was the duty of defendant company to exercise for her safety the highest degree of skill, care, and diligence which a reasonably prudent person under like circumstances would exercise, and which is reasonably consistent with the mode of conveyance and the practical operation of its trains, and for any omission of these duties, whereby injury resulted to plaintiff, the defendant would be liable, unless you should find that such injuries were caused or contributed to by the negligence of the plaintiff."—Approved: St. Louis, I. M. & S. Ry. Co. v. Fambro, 88 Ark. 12, 114 S. W. 230.

(d) "You are charged that the railroad company is not an insurer of the safety of passengers, but must exercise toward them such a high degree of care as a highly prudent person would exercise under the same or similar circumstances; and it it the duty of persons taking passage with the said company to exercise ordinary care to protect themselves from injury, and the failure of the said company to exercise said high degree of care would be negligence, and the failure of the passengers to exercise ordinary care would be negligence."—Approved: Gilmore v. Houston Electric Co., 46 Tex. Civ. App. 315, 102 S. W. 168.

§ 4246. Must Use all Human Care, Vigilance and Foresight Reasonably Practicable.

"It is a duty of a railway company, employed in transporting passengers, to do all that human care, vigilance, and foresight can reasonably do, consistent with the mode of conveyance, and the practical operation of the road, in providing safe coaches, machinery, tracks, rails, angle-bars, or splices, bridges, and roadway, and in the conduct and management of its trains for the safety of its passengers, and to keep the same in good repair. The utmost degree of care which the human mind is capable of inventing or producing is not required, but the highest degree of care, vigilance, and foresight that is reasonably practicable in the conduct and management of its road and business is required. Common carriers of passengers are held to the very highest degree of care and prudence that human care, vigilance, and foresight could reasonably do, which is consistent with the practical operation of their road, and the transaction of their business; yet they are not absolute insurers of the safety of their passengers; and if you find that the defendant exercised all reasonably practical care, diligence, and skill in the construction, preservation, inspection, and repairs of its road-bed, bridges, track, rails, angle-bars, or splices, in the management and operation of its road, and of the train, at the time of the accident alleged and shown to have occurred, and that the accident could not have been prevented by the use of the utmost practicable care, diligence, and skill consistent with the practical operation of its road, and the transaction of its business, then plaintiff cannot recover in this action."—Approved: Frankel v. Chicago, B. & P. Ry. Co., 71 Iowa, 561, 32 N. W. 488.

§ 4247. Must Provide Reasonably Safe Track and Slow Down Train in Running over Insecure Part.

"The jury are instructed that it is the duty of the carrier of passengers to use the highest degree of care, diligence, and skill, which means the highest degree of care, diligence, and skill that a prudent and cautious man would exercise to prevent its passengers from injuries by providing a reasonably safe track, and handling its trains in a careful and prudent manner in view of the nature of said track; and, if you believe from the evidence in this case that plaintiff, while a passenger on defendant's passenger train, and without fault on his part, was injured by reason of defendant's said train running at a high rate of speed over a sink or low place in its track, and that defendant was negligent in permitting said sink or low place in said track, or in running over same at a high rate of speed, then your verdict should be for plaintiff."—Approved: St. Louis, I. M. & S. Ry. Co. v. Richardson, 87 Ark. 602, 113 S. W. 794.

§ 4248. Must Warn Passenger Against Known Danger.

"The common carrier of passengers owes them not merely the duty of transportation, but also that of exercising for their safety the highest care and diligence compatible with the nature of the carriage. The carrier owes the passenger the duty of warning him and protecting him against danger when it is at hand and known to the carrier. Common carriers are required to exercise the highest degree of care to secure the safety of their passengers, and are responsible for the slightest neglect, if injury is caused thereby."—Approved: Pittsburg, C., C. & St. L. Ry. Co. v. Richardson, 40 Ind. App. 503, 82 N. E. 536.

§ 4249. When Train has Stopped, Passenger Must be Notified of its Moves.

"You are told that the carriers of passengers by steam are held to a high degree of care and are responsible for a very small degree of negligence. They are bound to provide safe and convenient means of ingress and egress to and from their cars, to remain stopped at stations a reasonable length of time to permit passengers to leave the cars with safety. When a train has stopped at a station, and before the passengers have had time to alight, it is their duty to give the passengers notice in some way of all moves of the train. If in this case you find from a preponderance of the evidence that the defendant failed in the discharge of its duty in either of these respects while the plaintiff was a passenger on the train, and that such failure caused the injury without fault on plaintiff's part, your verdict should be for the plaintiff."—Approved: St. Louis, I. M. & S. Ry. Co. v. Briggs, 87 Ark. 581, 113 S. W. 644.

§ 4250. If Signaled at Place where it Stops on Signals it Must Stop.

"If you believe from the evidence that at the time charged in plaintiff's petition the plaintiff was at New Waverly station on defendant's line of road, and that it was the custom of defendant to stop its passenger trains when proper signals were given to receive passengers for transportation to other points, and that such signals were given at

the time alleged so that they could be seen by the engineer in charge of the passenger train that plaintiff wished to board to reach said Conroe, and that the engineer failed to stop the train after seeing such signal, or if he failed to see such signal because of the failure to keep a proper lookout, such neglect or failure to stop the train would be a violation of the duty owed by the defendant to the traveling public; and if in consequence of such violation of duty to the traveling public the plaintiff was compelled to hire a buggy and team and drive from New Waverly to Conroe, as alleged, and if a preponderance of the evidence shows that by reason thereof, and not through the failure or neglect of plaintiff to use all such prudence and caution to protect himself from cold and exposure as a person of ordinary prudence and caution would have used under such or similar circumstances and conditions of time and weather, plaintiff suffered physical pain and injuries as a direct and proximate result of such violation of duty to the traveling public by defendant, plaintiff would be entitled to recover for such physical pain and injuries, and if you so find you will find for plaintiff."—Approved: International & G. N. R. Co. v. Addison (Tex. Civ. App.), 93 S. W. 1081 (not reported in state reports).

§ 4251. Utmost Care, Diligence and Foresight to Keep Track in Safe Condition.

"The court instructs the jury that it was the duty of the defendant to use the utmost care, diligence, and foresight, which capable and faithful railroad men would take, under like circumstances, to keep its track and roadbed in a reasonably safe condition for the running of cars over it."—Approved: Kirkpatrick v. Metropolitan St. Ry. Co., 211 Mo. 68, 109 S. W. 682.

§ 4252. Must Carry Passenger to Destination.

"If under the instructions given them the jury find for the plaintiffs against the Pullman Company, then the jury will assess the plaintiff's damages against the defendant Pullman Company at such sum of money as if paid in hand at this time will fairly and justly compensate plaintiff for the injuries sustained, if any, by plaintiff's wife which were caused to her directly and proximately by the acts of the defendant Pullman Company's agents and employes, and in doing so will take into consideration the alarm, if any, and the distress of mind, if any, she was put to by reason of being forced to leave, if she was forced to leave, the Pullman car in which she was riding at Dallas, Tex., by the agents and employes of the Pullman Company."—Approved: Pullman Co. v. Cox (Tex. Civ. App.), 120 S. W. 1058.

§ 4253. And Maintain its Duty to Him Until he has Alighted.

(a) "A railway company in the conduct and management of its train is required to employ agents who will faithfully perform their respective duties and use such means and foresight in providing for the safety of passengers as persons of the greatest care and prudence usually exercised in similar cases; and this duty continues until the passenger reaches his destination and has alighted from the train."—

Approved: Chicago, R. I. & P. Ry. Co. v. Wimmer, 72 Kan. 566, 84 Pac. 378.

(b) "Common carriers of persons are required to do all that human care, vigilance, and foresight can reasonably do, consistent with the character and mode of conveyance adopted and the practical prosecution of the business, to prevent accidents to the passengers riding upon their trains, getting upon them or alighting therefrom."—Approved: Chicago City Ry. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28.

§ 4254. Not Bound to Utmost Degree of Care the Mind May Invent, Nor Insure Against Accidents.

"The jury is instructed that common carriers of persons are required to do all that human care, vigilance, and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers.

"Therefore you are instructed in this case that when the defendant received the plaintiff upon his car as a passenger for hire upon the 13th of December, 1898, that the defendant was bound to make up its train, couple its cars, and manage and control the same, in such a careful, skillful, and prudent manner as to carry the plaintiff with reasonable safety as such passenger.

"You are therefore instructed that if you find the plaintiff was injured by reason of the negligent acts of the defendant's agents or servants, whereby they used a defective link or pin to couple said cars; that human care, vigilance, and foresight could have reasonably discovered such defect; and you further find that the defendant did not contribute to such injury, and was using all reasonable care and caution to avoid said injury,—then your verdict would be for the plaintiff.

"On the other hand, you are instructed that the defendant is not required to use the utmost degree of care which the human mind is capable of inventing, but is only required to use the highest degree of care and diligence which is reasonably practicable under the circumstances of the case in question. The defendant was not an insurer against accidents, nor is the defendant compelled to insure the absolute safety of its passengers. What the defendant was required to do was to do all that human care, vigilance and foresight could reasonably do, consistent with the practical operation of the road, in order to prevent injury to the plaintiff, its passenger."—Approved: Larkin v. Chicago & G. W. Ry. Co., 118 Iowa, 652, 92 N. W. 891.

(b) "If you find from the evidence that the accident was occasioned by a condition of things which the company could neither foresee nor provide against, then you should find for the defendant."—Approved: Bedford, etc., R. Co. v. Rainbolt, 99 Ind. 551, 556.

(c) "A railroad company, in the conduct and management of its trains, is required to employ skillful and competent agents, and to use such means and foresight in providing for the safety of passengers, as persons of the greatest care and prudence usually exercise in similar cases; and should an injury result to a passenger from a failure to use such a degree of care and prudence, the company will be responsible

for such injury, unless it appears that the passenger so injured, by the use of ordinary care and prudence, (that is, the ordinary care and prudence usually exercised by persons of ordinary caution in his condition and circumstances), could have avoided the injury. But a railroad company is not responsible for an injury to a passenger which is the result of a mere accident or casualty, where there is no want of care or skill on the part of the company or its agents."—Approved: Houston, etc. R. Co. v. Gorbett, 49 Tex. 576.

§ 4255. High Degree of Care Extends to Roadway, Equipment and Selection of Servants.

"The high degree of care hereinbefore referred to, and required of defendant, embraces its roadway, track, bridges, and rolling stock, and the selection of its employees, servants, and agents. In supplying materials for and in constructing its roadway, track, bridges, and rolling stock, it was required to exercise that high degree of care to see that materials used were amply sufficient, and of such quality, size, pattern, as were accepted by and in general use and found to be sufficient, and approved by the best and most skillfully managed railroads of the country, doing a like business with defendant. In the selection of trainmen, and in the management of its train, it was bound to exercise that high degree of care, and to provide men of sufficient experience, skill, and prudence to run such train safely, as far as was practicable; and it was bound also, in like manner, to see that, in the actual management of the train at the time of the accident, the trainmen exercised a like degree of care and skill in managing and running the train safely in all respects, so as to avoid injury to the passengers. If defendant failed in any of these respects, and such failure was the cause of the injury complained of, it was negligent, and is liable."—Approved: Pershing v. Chicago, B. & Q. R. Co., 71 Iowa, 561, 32 N. W. 488.

§ 4256. Injury from Any Omission of Duty is Negligence.

"The court instructs the jury that although a person, in taking passage on a freight train, assumes such risks as are ordinarily incident to such mode of conveyance when properly handled by the trainmen, still, if the defendant in the case at bar undertook to carry passengers on this train, and if plaintiff was a passenger thereon, then it became and was the duty of the defendant to exercise the highest degree of care, kill, and diligence in the practical operation of its said train, which a easonably prudent and cautious man would exercise and which is reasonably consistent with the mode of conveyance and the practical operation of its said train and road, and for any omission of these duties, whereby injury results to the passenger, defendant would be liable."—Approved: Abelson v. St. Louis, I. M. & S. Ry. Co., 84 Ark. 181, 105 S. W. 81.

§ 4257. Ejection Should be with no More Force than Necessary for the Purpose.

"The court instructs you that, though you may believe, from the evidence, that the plaintiff failed or refused to give the conductor a transfer or a cash fare, the defendant still owed her the duty not to wantonly

or maliciously injure her, and not to use more force than was reasonably necessary in order to eject her from the car. Therefore, if you believe, from the evidence, that the defendant's conductor in charge of said car, acting within the scope of his employment, ejected or attempted to eject the plaintiff from said car, and that in so doing he used more force than was reasonably necessary in order to eject her, and thereby wantonly and maliciously injured and humiliated her, as charged in the declaration, you should find the defendant guilty."—Approved: Chicago Consol. Traction Co. v. Mahoney, 230 Ill. 562, 82 N. E. 868.

§ 4258. Trespasser Should not be Compelled by Force or Fear to Leave Moving Train.

"If you believe from a preponderance of the evidence that the plaintiff, Alfred B—, was riding upon the defendant's cars and hanging on to a ladder at the side of the said car, and whilst the same was in motion the brakeman of the defendant used violence and threatening language to such an extent that he put the said plaintiff in fear of bodily injury, and through such fear the said Alfred B— let go of the round of the said ladder and fell from the said car, or attempted to jump from the said car, and was injured in the manner set forth in the plaintiff's petition in this case, and if you believe from the evidence that the said brakeman was authorized by the defendant, the Texas & New Orleans Railway Company, to perform the duties that he did perform and to expel trespassers on the said car from riding thereon, and you believe from the evidence that the act of the said brakeman was the proximate cause of the injury to the plaintiff Alfred B—, then you will find for the plaintiff as hereinafter directed, unless you find for the defendant under the following portions of this charge."—Approved: Texas & N. O. R. Co. v. Buch (Tex. Civ. App.), 102 S. W. 124 (not reported in state reports).

§ 4259. But Train may Stop Between Stations to Eject for Non-Payment of Fare.

"Railroad companies have the right to demand and receive legal rates of fare from persons traveling on their trains, and in the event of the refusal of a passenger to pay his fare, or show a ticket, conductors of a train have a right to eject such a passenger from the train without using any more force or violence than may be necessary to overcome any unlawful resistance which such passenger may offer. It is the duty of the conductor to bring the train to a full stop before compelling the party to be ejected to step from the train, and exercise such ordinary care in ejecting him as an ordinarily prudent man would exercise under similar circumstances as connected with this case. In this case it is not necessary that the train should be at a station in order to justify the ejection of a person refusing to pay fare; but a conductor has a right to eject such a person between stations at points not remote from stations, and where the situation of the ground is such as not to expose the person ejected to special risks of danger."—Approved: Brown v. Chicago, R. I. & P. R. R. Co., 51 Iowa, 235, 1 N. W. 487.

§ 4260. Infirm Passenger Carried Beyond His Station Should be Placed in Proper Care.

"If you believe from the evidence that the plaintiff was a passenger on defendant's train from Little Rock to Conway, and that at the time the plaintiff was physically incapacitated to take care of himself, and that the defendant received and accepted him as such passenger, knowing or having been notified of his said infirm condition, or by same being apparent, and unattended, and the plaintiff, on account of his infirm condition, was carried by his destination, Conway, and to the station Menifee, and that at the station Menifee he was told to get off or be put off the train at that station, by the conductor, and that defendant, knowing the physical infirmities of the plaintiff, or being notified thereof, did not use due care in putting the plaintiff in some person's care at Menifee, and that on account of the infirm physical condition of the plaintiff he wandered away from Menifee unattended, and by reason of his mental infirmity was thereby injured, then the defendant is liable for a fair compensation for whatever damage and injury that may have resulted therefrom."—Approved: St. Louis, I. M. & S. Ry. Co. v. Day, 86 Ark. 104, 110 S. W. 220.

§ 4261. Before Ejection Reasonable Time Must be Given to Pay Fare.

"If you find from the preponderance of the evidence that, within a reasonable time after demand thereof by the conductor, the plaintiff tendered him the regular ticket fare from Keota to Washington, and ten cents additional, the conductor had not the right to eject the plaintiff from the train. It must appear, however, from the preponderance of the evidence, that the tender was made within a reasonable time. If the plaintiff delayed the tender beyond this, and until after the conductor had rung the bell to stop the train for the purpose of the plaintiff's ejectment, it was too late, and any ejectment of the plaintiff in the proper manner—that is, without indignity or more than sufficient force—was rightful. Reasonable time for making the tender, as contemplated in these instructions, depends on the circumstances and facts constituting the transaction. If, upon receiving the demand for the additional ten cents, the plaintiff announced to the conductor his willingness to make payment, and at once proceeded to borrow the sum required from a friend in a neighboring seat, and they were, in the ordinary manner and time for such a transaction, producing, and did produce, the money, and tender it, making the full sum due to the conductor, it was in time, and the conductor should have received it, and not ejected the plaintiff. But if the plaintiff instead, after the demand and being warned that if he delayed until after the bell was rung he would have to get off the train, refused to pay, answered that he would not pay, refused to state whether he would or would not pay, or neglected or refused to borrow the sum needed to enable him to make the payment until after the bell was rung, signaling the train to stop for the purpose of the plaintiff's ejectment, he was too late, and his ejectment, if properly made, was rightful. Whatever an ordinarily and reasonably prudent and judicious man would

have done under like circumstances, it was the right and the duty of both the conductor and the plaintiff to do in this case."—Approved: Curl v. Chicago, R. I. & P. R. Co., 63 Iowa, 417, 16 N. W. 69.

§ 4262. Third Person Riding on Non-Transferable Ticket may be Ejected.

"If you find from the testimony that the ticket in question in this case was a third-class or 'emigrant' ticket which had been sold at a reduced rate to a person in San Francisco other than the plaintiff, and said ticket was by its terms not transferable, and the purchaser thereof in San Francisco, in part consideration of such sale, at a reduced price, agreed that it should not be transferable; and you further find that the plaintiff purchased in Omaha from some person other than defendants, or their authorized agent, and offered and attempted to use it as entitling him to passage from Omaha to Chicago on the defendants' road, and refused to pay his fare on the defendants' road, and did not pay his fare, then the defendants were not under obligations to allow the plaintiff to ride upon such ticket, and upon such refusal to pay fare had a right to require the plaintiff to leave the train, and he can recover no damages based on the fact that he was so required to leave."—Approved: Post v. C. & N. W. R. Co., 14 Neb. 110, 15 N. W. 225.

§ 4263. But if Passenger is Directed to Wrong Train and is Ejected he may Recover.

"If you believe from the evidence that plaintiff, on the occasion in question, purchased a ticket from defendant's agent in Louisville, Ky., for Gap-in-Knob, and at and by the direction of defendant's agent or agents took passage upon defendant's Bardstown & Springfield branch passenger train, and that defendant's conductor thereafter ejected plaintiff from said train upon its arrival at South Louisville, you will find for the plaintiff.

"Unless you believe from the evidence that plaintiff, on the occasion in question, purchased a ticket from defendant's agent in Louisville, Ky., for Gap-in-Knob, and at and by the direction of defendant's agent or agents took passage upon defendant's Bardstown & Springfield branch passenger train, and that defendant's conductor thereafter ejected plaintiff from said train upon its arrival at South Louisville, you will find for the defendant."—Approved: Louisville & N. R. Co. v. Summers, 133 Ky. 684, 118 S. W. 926.

§ 4264. Passenger Wrongfully Refusing to Identify Himself or Pay may be Ejected.

"It was the duty of the plaintiff, upon demand so to do, by the conductor in charge of the train, to either identify himself to the reasonable satisfaction of the conductor, or pay his fare, or leave the train. The act of the conductor of the defendant company in removing the plaintiff from the car was the act of the defendant company, and rendered it liable to the plaintiff for all his damages, providing such ejectment was unlawful, or, if lawful, made with unnecessary force

and violence. I instruct you that it was not within the province or authority of the conductor, Mr. R—, to in any manner change or vary the terms of the ticket presented by plaintiff. Under the terms of that ticket, all that the conductor could do was to pass upon the question of the proper identification of the plaintiff, and if the conductor was reasonably satisfied of the identification of the plaintiff—that is, that he was the same person described in the ticket—then the conductor should have accepted the ticket and allowed plaintiff transportation on that train; but, if you find that, not being reasonably satisfied as to the identification, the conductor asked for the identification, and plaintiff refused to identify himself, then the conductor had no right to accept such ticket or allow transportation on the ticket. I instruct you that, as between the conductor and plaintiff, the right of the latter to travel or be transported by this train was governed entirely by the terms of the ticket, and if you find that the conductor reasonably believed, and had good reason to believe, that such a discrepancy existed, then it was proper for him to ask plaintiff to identify himself, and if you find that he did ask plaintiff to identify himself, and plaintiff refused so to do, then it was proper for the conductor to demand that plaintiff pay his fare in cash or leave the train; and, if you find that the plaintiff in turn refused to do either of these things, then it was proper and lawful for the conductor to use such force as was necessary to put plaintiff off the train."—Approved: Pierson v. Illinois Cent. R. Co., 149 Mich. 167, 112 N. W. 923.

§ 4265. Female Passenger—Permitting Vulgarity and Obscenity by Other Passengers.

"If you believe from the evidence that the plaintiff was with other passengers on the train; that the other passengers, in her presence and hearing, in the same coach with her, uttered profane, vulgar, and obscene words, and sang obscene songs; that the conductor was present, and knew of the presence of plaintiff and of the using and singing of said words and songs by the passengers, and did not restrain nor endeavor to prevent them from so doing; that the use of the words and songs alarmed and frightened the plaintiff, and caused her shame, humiliation, and distress of mind; and if you further find that the words and songs were, in their nature, calculated and likely, under the circumstance, to produce alarm, fright, shame, and distress of mind in plaintiff, and that persons of ordinary prudence and judgment, acting in a capacity similar to that of the conductor, under like circumstances, would have commonly anticipated or perceived such a result to plaintiff—you will find for her in such sum as you deem just pecuniary compensation for the alarm, fright, shame, and humiliation and distress of mind caused as aforesaid."—Approved: St. L. S. Ry. Co. v. Wright (Tex. Civ. App.), 84 S. W. 270 (not reported in state reports).

§ 4266. Comfort of Passenger—Illness Brought on by Unheated Car.

"If you believe from the evidence that on the night of December 20, 1901, the weather was cold and uncomfortable, and if you believe the

defendant's agent instructed Mrs. B— to go into the car that she went into, and if you believe that after she remained in said car a while the fire 'died out' and the car became cold and uncomfortable, and if you believe that Mrs. B— became cold and suffered from cold in said car while on the defendant's line of road, and if you believe from the evidence that the servants of defendant were guilty of negligence with respect to the condition of said car—that is, if you believe they failed to exercise that high degree of care to keep said car reasonably warm and comfortable that very cautious and prudent persons would have exercised under the same or similar circumstances —and if you believe such negligence, if any, was the direct and proximate cause of Mrs. B—'s cold and suffering, then in that event you will find for the plaintiff, and assess her damages at such sum as will now in cash compensate him for the cold and suffering, if any, of his wife in said car on the defendant's line of road. And if you believe from the evidence that at the time Mrs. B— went into the car she was in good health and free from pulmonary or lung trouble, and if you believe that in consequence of getting cold in said car (if she did) she contracted a severe cold, became sick, as alleged by the plaintiff, and that she now has consumption, as alleged by the plaintiff, and if you believe such sickness and consumption, if any, was 'proximately caused' by the negligence, if any, of the defendant's servants with respect to the condition of said car as above explained, then in that event you will also find for the plaintiff on that issue, and allow him such sum as will now in cash compensate him for the physical pain and mental anguish, if any, that Mrs. B— has suffered and will suffer in consequence of such disease, if any, and for the effect, if any, of such sickness, if any, upon Mrs. B—'s ability to labor and perform her usual and customary duties."—Approved: Missouri, K. & T. Ry. Co. v. Byrd, 40 Tex. Civ. App. 315, 89 S. W. 991.

§ 4267. Filthy, Unlighted Car Filled with Rowdy Passengers.

"Now, if you find and believe, from the evidence, that defendant's employes furnished to plaintiff's wife a car to take passage in from Dallas to Grand Saline, which was not lighted, and was filthy and dirty, and that plaintiff's wife's fellow passengers were smoking, drinking whisky, cursing, and crowding up against plaintiff's wife; and you further find that the omissions and acts, if any, were negligence, as that term is herein defined; and if you further find that, as the proximate result of said negligence, if any, plaintiff's wife suffered inconvenience, humiliation, fright, alarm, and excitement, and was made sick, and suffered physical pain and mental suffering—then you will find for plaintiff such damages, if any, as plaintiff may have suffered by reason of the loss of his wife's services, and such damages, if any, as plaintiff's wife may have suffered; and in estimating the damages, if any, you may take into consideration the loss of time of plaintiff's wife, the inconvenience, fright, alarm, and excitement, if any, together with her mental suffering and physical pain while sick, if she was sick, which was the proximate result of the negligence, if any, of defendant's

employes in charge of its train, and therefrom you will ascertain and determine what amount of cash money will be a fair and reasonable compensation for such injuries, if any."—Approved: Texas & P. Ry. Co. v. Bratcher (Tex. Civ. App.), 78 S. W. 531 (not reported in state reports).

§ 4268. Comfort of Passenger—Keeping Depot Warm.

"You are charged that the obligation of the defendant to keep its depot warm does not mean that it must necessarily have fire in its depot, but the law only requires that a railroad shall have fire in its depot when a person exercising that degree of care that the court has charged you the defendant was required to use would, under the same circumstances, have had a fire or artificial heat in such depot. The undisputed evidence in this case shows that no fire in the depot was provided for the purpose of warming the depot where the passengers stayed, but whether the defendant was negligent in not having a fire in said depot on the occasion in question is a question of fact for you to determine from all of the evidence and circumstances before you, and the mere failure to have a fire would not be negligence on the part of the defendant, unless you further believe that one exercising the degree of care the court has instructed you defendant was required to exercise under the law would have had a fire in such depot on said night."—Approved: Gulf, C. & S. F. Ry. Co. v. Turner (Tex. Civ. App.), 93 S. W. 195 (not reported in state reports).

§ 4269. Sparks from Engine Without Approved Spark Arrester.

"If, from the evidence, you believe that sparks or cinders escaped from defendant's engine, and got into plaintiff's eyes, which caused plaintiff's injuries, but if, from the evidence, you believe that the engine from which the sparks or cinders escaped was equipped with the most approved spark-arrester, and that the agents and employes of the defendant in charge of said engine used ordinary care in operating said engine to prevent the escape of sparks or cinders, then you are instructed that the prima facie case made out by proof of escape of sparks or cinders is rebutted, and, if you so believe, you will find for the defendant; but if you believe, from the evidence, that the defendant failed to equip its engine from which the sparks or cinders escaped that caused plaintiff's injuries with the most approved spark-arrester in use, or that the agents and employes of the defendant engaged in operating said engine failed to use ordinary care to prevent the escape of sparks or cinders, then you are instructed that the prima facie case made out by proof of sparks or cinders escaping and causing plaintiff's injuries has not been rebutted."—Approved: St. L. S. W. Ry. Co. v. Parks (Tex. Civ. App.), 73 S. W. 439 (not reported in state reports).

§ 4270. Duty to Intending Passenger as to Safety of Depot Platform.

(a) "It is the law of this state that, where an intending passenger is about to take a train in the course of the regular passenger traffic of the railway company, there is an implied invitation on the part

of the company for such passenger to come upon and use its depot platform for such purpose. And such implied invitation extends also to the friends and relatives of such passengers who may desire or who may have occasion to accompany him, and any friend or relative so going upon the depot platform of the railway company to attend upon the arrival or departure of passenger trains for the purpose of speeding departing or welcoming arriving passengers are, by reason of such implied invitation on the part of the railway company, rightfully and lawfully there."—Approved: Banderob v. Wisconsin Cent. Ry. Co., 133 Wis. 249, 113 N. W. 738.

(b) "If you believe from the testimony that the platform through which plaintiff claims to have fallen was in a dilapidated or unsafe condition, which was open and apparent to a reasonably prudent and cautious person, and such a person, under the circumstances, and under such opportunity as plaintiff had to know the condition of the platform, would have discovered that such platform was in a dilapidated or unsafe condition, or had holes in it, then you are charged that plaintiff would be presumed to know of such conditions, and know of the holes in the platform, and if, under the circumstances, you believe that plaintiff went upon the platform and was in any way negligent in moving about or stepping upon the platform, and he was thus hurt by stepping in a hole in the platform, or by a plank therein breaking, and he was thus thrown or fell, and was injured, then plaintiff is not entitled to recover in this case, even though you may believe defendant was negligent."—Approved: Houston E. & W. T. Ry. Co. v. McCarty, 40 Tex. Civ. App. 364, 89 S. W. 805.

(c) "If you believe from the evidence that the defendant failed to provide a reasonably safe approach to its coach for passengers at Myra, and if you further find that such failure, if any, was 'negligence' as heretofore defined herein, and that by reason of such negligence, if any, Mrs. John P—, while approaching defendant's train to take passage thereon, was struck by an engine of defendant, and that plaintiff, in making an effort to rescue Mrs. P—, was himself struck and thereby injured, you will find for plaintiff."—Approved: Missouri, K. & T. Ry. Co. v. Harrison (Tex. Civ. App.), 120 S. W. 254.

§ 4271. And so as to Friend there to See Him Aboard.

"The defendant company was obliged to keep in a reasonably safe condition all portions of its depot platforms and the approaches thereto, to which the public do or would naturally resort for the purpose of taking or leaving trains, and as well all portions of their station grounds reasonably near to the platforms where departing or arriving passengers, going to or from defendant's trains, would naturally or ordinarily be likely to go; and such duty attended to this plaintiff at the time of the accident, if you find from the evidence, as plaintiff claims the fact to be, the plaintiff was at said station for the purpose of seeing a friend aboard the train. It is the duty of railroad companies, who in the ordinary course of their legal passenger business take and discharge passengers from their trains after dark at night,

to see to it that the station and platform are properly lighted."—Approved: Banderob v. Wisconsin Cent. Ry. Co., 133 Wis. 249, 113 N. W. 738.

§ 4272. And for Passengers Alighting from Trains.

"And if you further find that when plaintiff and his wife alighted from said train they went upon said platform, and if you further find that in going upon said platform they did so for the purpose of going to said waiting room in said depot, and if you further find that the place where they went upon said platform was a place where passengers usually and ordinarily went after alighting from said passenger trains, and if you further find that in going upon said elevated platform and in attempting to reach the waiting room by way of said incline, if they did, they acted as persons of ordinary care and prudence would have acted under the same or similar circumstances, and if you further find that in going to said waiting room they were going a way that passengers alighting from said passenger trains at said station would naturally or ordinarily go, and if you further find that when plaintiff's wife started to the waiting room of said station, if you find that she did, and you find that when she reached said incline and attempted to pass down same, if she did, her feet slipped from under her and she fell, and you find that she was injured as alleged in the petition, and if you further find that the fall, if she did fall, was caused by the slippery condition of said incline, if it was in said condition, or by the failure, if any, of said company to have steps or cleats on said incline, or by the failure, if any, of the said railway company to place handholds on the said incline, and if you further find that the negligence, if any, on the part of said railway company in either of these respects was the proximate cause of the injury, if any, to plaintiff's wife, and if you further find that when she approached said incline or attempted to pass down the same in the manner and under the circumstances that she did she was acting as an ordinarily prudent person would have acted under the same or similar circumstances, then you will find for the plaintiff."—Approved: Missouri, K. & T. Ry. Co. v. Criswell, 101 Tex. 399, 108 S. W. 806.

§ 4273. Passengers Leaving and Going to Trains—Safety of Ingress and Egress.

(a) "Now, gentlemen of the jury, I charge you that the mere fact that the plaintiff suffered an injury does not, of itself, entitle him to recover; but his right to recover depends upon whether the company (the defendant in this case) has been negligent in not keeping the way in a reasonably safe condition. If you find, gentlemen of the jury, that the plaintiff, while going from the defendant railway company's depot at Morley on the 24th of December, 1902, made use of a path commonly used for passage on foot across the company's grounds by persons having occasion to go to and from the depot or trains on said grounds, and such path at the time appeared to be in general use for that purpose, and the plaintiff was exercising such a degree of care as a person of ordinary prudence would have exercised under the circum-

stances as they appeared at the time, and received the injuries complained of by slipping and falling because the defendant company had suffered or permitted such path to become and remain in a dangerous condition for passage by reason of ice upon the path, and snow covering and concealing such ice, then the plaintiff is entitled to recover the damages he has sustained by reason of such injury.

"If you find, gentlemen of the jury, that the defendant, without objection, notice, or protest, permitted its passengers to cross its depot grounds on this diagonal walk or line, then it was the duty to keep its grounds along such walk in a reasonably safe condition for the coming and going of its passengers; and, if you find that the defendant permitted such use, it makes no difference that there was another and safer way by which the plaintiff might have passed out. If this diagonal way had been a public and common way, to the knowledge of the defendant, for any considerable length of time, so that it became one of the ways recognized by the company and its agents to go to and from the depot, then it was the duty of the company to keep it reasonably safe to go and come upon, the same as it would a route which it had actually provided. That is to say, gentlemen of the jury, that although there may have been other and safer ways of going from the depot to the town, yet, if the railroad company had permitted this to be used, and it had become of general use, and the company knew it and permitted it, then it became a way of egress which it was the duty of the company to keep in reasonably safe condition before they could escape liability for injuries which might be occasioned by reason of their neglect to keep it in a reasonably safe condition."—Approved: Lemon v. Grand Rapids & I. Ry. Co., 136 Mich. 647, 100 N. W. 22.

(b) "You are instructed that, after completing its road, defendant was under no obligations to build or erect a stile or stairs over the fence from the right of way leading over and into the right of way of the Chicago & Northwestern Railway; but if you find from the evidence that said stile in question was constructed partly on defendant's grounds and partly on the grounds of the Chicago & Northwestern Railway Company, and that the same was used by the passengers from defendant's cars as the usual means of egress from said grounds, and such fact was known to defendant, and defendant permitted the same, and there was no other reasonable or safe way of egress from said grounds, then the fact that said stile was partially upon the grounds of the Chicago & Northwestern Railway Company would not relieve defendant of the obligation to exercise ordinary care in keeping said stile in a reasonably safe condition, if it allowed the same to remain and be used as the only reasonable means of egress from its grounds."—Approved: Cotant v. Boone Suburban Ry. Co., 125 Iowa, 46, 99 N. W. 115.

(c) "If you find from the evidence that the stile in question was constructed partly upon the ground of defendant company, and that the same was ordinarily and generally used by those who were pas-

sengers on defendant company's cars as a means of egress from said grounds, where the railway of defendant terminated, and that there was no other reasonable means of egress from said grounds, and that said defendant company knew that said stile was so used by passengers upon its cars in leaving said grounds, and that it permitted them to do so; and you further find that said stile, by reason of its narrowness, or by reason of the fact that there was no railing thereon, or by reason of the fact that said stile was constructed of light and defective lumber, if such you find the fact to be, was not such means of egress from said grounds as an ordinary person would provide under similar circumstances—you will be justified in finding the defendant guilty of negligence, as charged. If, however, you find that the said stile was such as an ordinary person would employ under similar circumstances as a means of egress from said grounds, then there would be no negligence upon the part of defendant."—Approved: Cotant v. Boone Suburban Ry. Co., 125 Iowa, 46, 99 N. W. 115.

(d) "You are further told that, in providing safe and convenient means of egress and ingress, it is the duty of the railroad company to provide lights at their stations for the safety of passengers arriving or departing at night, and if a passenger is injured, without fault on his or her part, by the failure to provide such lights, the company is liable. So in this case, if you believe from a preponderance of the evidence that the defendant failed to provide lights so that the plaintiff could see how to alight in safety, and that she was, without fault on her part, injured by reason of such failure to provide lights, your verdict should be for the plaintiff."—Approved: St. Louis, I. M. & S. Ry. Co. v. Briggs, 87 Ark. 581, 113 S. W. 644.

§ 4274. Passenger Entitled to Protection from Personal Insult.

"If the jury believe from the evidence that the plaintiff on the fifth day of March, in the year nineteen hundred and seven, was on one of the approaches to the station of the defendant at Havre de Grace, and that said approach was in the occupancy and under the control of the defendant, with the intention of taking passage on one of its trains, he was then a passenger of the defendant and it was bound to exercise all reasonable care to protect him from personal insult, injury, and abuse; and if they shall find that the plaintiff while he was on said approach to the defendant's station for the purpose aforesaid was without any reasonable cause assaulted by one of the defendant's officers, agents, or employes while acting within the scope of his employment, then the plaintiff is entitled to recover."—Approved: P. B. & W. R. Co. v. Crawford, 112 Md. 508, 77 Atl. 278.

§ 4275. Protection of Passenger—Assault by Employe.

"It is the duty of the defendant to exercise the highest degree of care toward the plaintiff as long as she remained a passenger, and you are instructed that if it is admitted by defendant that she was such passenger, then she is entitled to safe carriage to the end of her destination, and if she, while such passenger, was assaulted by an em-

ploye of the defendant, then the defendant is liable for such assault and injuries sustained."—Approved: Garvik v. Burlington, C. R. & N. Ry. Co., 124 Iowa, 691, 100 N. W. 498.

§ 4276. Same—Abusive Language by Employe.

"A passenger on a railway train is entitled to protection from insulting or abusive conduct or language by the servants of the railway company towards such passenger, and such company is liable for the actual damages caused by insulting or abusive conduct or language used by its conductor in charge of the train towards one of its passengers."—Approved: St. Louis Southwestern Ry. Co. v. Granger (Tex. Civ. App.), 100 S. W. 987 (not reported in state reports).

§ 4277. Same—May Eject Turbulent Passenger.

"If the jury believe from the evidence that the plaintiff was upon defendant's train in a drunken condition, that he acted in a disorderly, vulgar, and profane manner, cursed the conductor and the brakeman, and entered into a car where a lady and several well-behaved passengers were traveling, and, while in such car, engaged in cursing and profanity, or talked in a loud and boisterous manner, it was the duty of the conductor and brakeman to remove him from the car, and it was their right to use all the force reasonably necessary therefor; that if they believe the conductor and brakeman did remove him by force from the body of the car into the smoking compartment, but used no more force than was reasonably necessary, the defendant company is not liable in damages for such removal. And if they believe that after he was so removed he did anything which reasonably caused the brakeman to believe that the plaintiff then and there intended to make an attack upon him with a weapon, or with his fists, the brakeman had the right to do what seemed reasonably to be necessary to protect himself against such apparently threatened attack, whether the same was real or not, provided he believed it was real, and for any injury done the plaintiff by the brakeman in using reasonable means to defend himself the defendant is not liable, and if the jury believe that only such means were used, and believe the other matters as supposed in this instruction, they should find for the defendant."—Approved: Norfolk & W. Ry. Co. v. Brame, 109 Va. 422, 63 S. E. 1018.

§ 4278. Officer of Carrier Arresting and Imprisoning Passenger.

"If the jury believe from the evidence that the plaintiff on the fifth day of March in the year nineteen hundred and seven, was a passenger of the defendant and on one of the approaches to its station at Havre de Grace, and that said approach was in the occupancy and control of said defendant, with the intention of taking passage on one of its trains to Elkton, then he was entitled to protection by the defendant from insult, injury, and abuse; and if the jury find that the plaintiff, while a passenger as aforesaid, without any reasonable provocation, was assaulted and imprisoned by one of the defendant's officers, agents, or employes, in charge of its said station and approaches as aforesaid, while acting within the scope of his employment, then the plaintiff is

entitled to recover."—Approved: P. B. & W. R. Co. v. Crawford, 112 Md. 508, 77 Atl. 278.

§ 4279. May Refuse to Receive Intoxicated Person as Passenger.

"That if the plaintiff, when he offered to get on the car, was so far intoxicated as to affect his conduct, or if the conductor believed, and under all the circumstances had reasonable grounds to believe, that if admitted to the car he would be boisterous or disorderly, or if on previous occasions, when intoxicated, he had been guilty of vulgar or offensive conduct on the cars of defendant, and was at the time in a similar state of intoxication, then in any of these states of case the conductor had a right to refuse to receive him on the car, and the jury should find for the defendant."—Approved: Louisville & E. R. Co. v. McNally (Ky.), 105 S. W. 124 (not reported in state reports).

§ 4280. Passenger Alighting—Greatest Care and Prudence Toward.

(a) "It is the duty of the railway company to use such means and foresight, in providing for the safety of passengers alighting from its cars, as persons of the greatest care and prudence would use under similar circumstances. The degree of care required is such as very prudent, careful, competent persons would exercise under similar circumstances, and a failure to exercise such care constitutes negligence."—Approved: Northern Texas Traction Co. v. Danforth, 53 Tex. Civ. App. 419, 116 S. W. 147.

(b) "A railroad company is bound to render reasonable assistance to a female passenger, if feeble or encumbered with heavy baggage or other impediments, in boarding or alighting from its train. When it is reasonably apparent that a passenger needs assistance in alighting from a train, then it is the duty of the carrier to furnish such assistance. I further charge you that where it is obvious that a passenger from any cause, such as sickness, infirmity, or being burdened with baggage or other impediments, needs assistance in alighting, then the railroad company is bound to afford such assistance and exercise such additional degree of care, as the circumstances may require."—Approved: Singletary v. Seaboard Air Line Ry. (S. C.), 71 S. E. 57.

§ 4281. Per Contra—Ordinary Care.

"If you believe from the evidence in this case that, at or about the place where plaintiff's wife and daughter disembarked from said train, plaintiff's wife requested the conductor to let them off at said place, and that in putting them off of said train the conductor used ordinary care (that is, such care as an ordinarily prudent person would exercise under such circumstances), then you are instructed that the plaintiff cannot recover in this case."—Approved: International & G. N. R. Co. v. Hood (Tex. Civ. App.), 118 S. W. 1119.

§ 4282. Reasonable Time Must be Given Passenger to Alight.

(a) "You are instructed that a passenger upon a railroad train is entitled to a reasonable time to leave or alight from the car in which he is riding when a train is stopped for that purpose; and when reasonable time is not in fact given in which to alight in safety, if, in at-

tempting to do so, injuries result to him, he is entitled to recover from the railroad company for such injuries, unless in doing so he is guilty of criminal negligence, as elsewhere defined in these instructions, or unless in doing so he is violating some express rule or regulation of said railroad, actually brought to his notice. (Excepted to by defendant.) If from the evidence in this case you find that the defendant's train did not stop at the station at Elkhorn long enough to enable the plaintiff, Eliza C—, to leave the car in which she was riding, and reach the platform, while the train was standing, and before it was again started, and that she was thrown or precipitated therefrom, or that she stepped off therefrom onto the depot platform, after the train was started and was in motion, it is for you to say, upon consideration of all the evidence upon that question, whether she was guilty of 'criminal negligence,' as elsewhere defined in these instructions. (Excepted to by defendant.)"—Approved: Omaha & R. V. R. Co. v. Chollette, 33 Neb. 143, 49 N. W. 1114.

(b) "The court instructs the jury that, if they find from a preponderance of the evidence that plaintiff was a passenger on said train for the station of Homan, then it became and was the duty of the said defendant to cause its said train to stop at Homan and remain at a standstill for a reasonable length of time, sufficient to enable plaintiff to alight therefrom in safety, in the exercise of ordinary care and diligence on his part; and if in this case you should find from a preponderance of the evidence that the station of Homan was announced by the defendant, and thereafter the train came to a stop, and that plaintiff thereupon immediately proceeded to the platform of the caboose and was attempting to alight therefrom, and that the train of defendant upon which the plaintiff was riding was suddenly moved by the defendant, and that plaintiff was thereby, while in the exercise of ordinary care, injured, then is the plaintiff entitled to recover."—Approved: Abelson v. St. Louis I. M. & S. Ry. Co., 84 Ark. 181, 105 S. W. 81.

(c) "You are instructed that in case the train in question was stopped a sufficient time for plaintiff to alight, those operating such train were under no obligation to ascertain if plaintiff had actually gotten off or not."—Approved: Chicago, B. & Q. R. Co. v. Lampman (Wyo.), 104 Pac. 533.

(d) "If you find and believe from the evidence that on the arrival of defendant's train on which Mrs. Mollie R— was a passenger at Arthur City that she used reasonable diligence, under the circumstances and conditions by which she was surrounded, to get off the train, and you further find and believe from the evidence that said train did not stop a reasonably sufficient length of time to enable her to alight therefrom in safety, and you further find and believe from the evidence that while she was endeavoring to get off of said train and before she had alighted from the platform of the car, that said train commenced to move while she was on the platform of said car, and you further believe from the evidence that plaintiff's wife, on account of the motion of said train, when she stepped off the same,

was caused to come to the depot platform or ground with such force as to injure her, and you further find and believe from the evidence, under all the facts and circumstances of this case, that defendant or its employes were guilty of negligence in moving said train, if it did, before Mrs. R— had been afforded a reasonably sufficient time in which to alight therefrom, and that such negligence on the part of defendant or its employes proximately caused her to be injured, and you further find and believe from the evidence that plaintiff's wife while she was attempting to disembark and alight from said train was exercising such care for her own safety as an ordinarily prudent person would have exercised under the same or similar circumstances, then you will return a verdict for the plaintiff, and assess his damages as hereinbefore instructed, unless you find for the defendant under subsequent instructions."—Approved: St. Louis & S. F. R. Co. v. Ross (Tex. Civ. App.), 89 S. W. 1105 (not reported in state reports).

§ 4283. If not Given and Train Starts up Causing Injury it is Negligence.

(a) "You are instructed that it is the duty of railways and their employes operating trains to stop at stations a sufficient length of time to permit passengers promptly to alight from the trains in safety. If plaintiff was traveling upon defendant's train, and defendant's employes failed to stop at the station long enough to enable plaintiff to alight promptly in safety, and while plaintiff within proper time was trying to alight defendant company suddenly started the train, and that by reason thereof plaintiff sustained an injury, you will find for the plaintiff."—Approved: St. Louis, I. M. & S. R. Co. v. Price, 83 Ark. 437, 104 S. W. 157.

(b) "If you find from the evidence that at the time alleged the plaintiff was a passenger on one of defendant's passenger trains, going from Seguin to Marion, and that, upon the arrival of the train at Marion, the plaintiff, without negligence or unreasonable delay on his part, attempted to alight from the train, and that, while he was so attempting to alight therefrom, those in charge of the train put it in motion, whereby the plaintiff was thrown to the ground and injured substantially as alleged, and you further find from the evidence that the train had not stopped at the station a reasonably sufficient length of time to enable the plaintiff to alight therefrom in safety, and that, under all the facts and circumstances of the case, it was negligence in those in charge of the train to start it when they did, and that the plaintiff's injuries were the proximate result of such negligence, then the plaintiff would be entitled to recover for such injuries."—Approved: Galveston, H. & S. A. Ry. Co. v. Berry, 49 Tex. Civ. App. 521, 109 S. W. 393.

(c) "It is conceded that the deceased, L—, was on the passenger train of the defendant company, a passenger, to be carried from Council Bluffs to the city of Omaha. It was the duty of the employes of the defendant company, when it stopped at Tenth street for the purpose of allowing passengers to alight, to wait as long as it was

necessary for all the passengers to alight, and to see to it that those who desired to alight at that point had an opportunity to do so. And if the conductor of the train failed to look at the front car to see about the alighting of passengers, and to know that all those who desired to alight had alighted, and the deceased, L—, was one of those who desired to alight, and was in the act of alighting, and the conductor gave the signal to start forward before Mr. L— alighted, whether he saw him or not, and by reason of the car starting forward before he had alighted, and by reason of the car starting forward the deceased, L—, fell and was injured, then your verdict should be in favor of the plaintiff for such damages as, under the instructions of the court elsewhere given, you find her entitled to."—Approved: Omaha & C. B. Railway & Bridge Co. v. Levinston, 49 Neb. 17, 67 N. W. 887.

§ 4284. Misleading Passenger so that he Alights at Unsafe Place.

(a) "The court instructs the jury that railway carriers of passengers must be extremely careful not to mislead their passengers into the belief that the halting of the train at a station is meant as an invitation to them to alight when it is not so intended; and, if the conduct of the servants engaged in the management of the train is such as may reasonably produce that impression, and the passenger so understands it, and in the attempt to leave the coach at a place where no facilities are provided for his doing so, and whilst in the exercise of due care and diligence in doing so, he is injured, the company will be liable."—Approved: Kansas City Southern Ry. Co. v. Davis, 83 Ark. 217, 103 S. W. 603.

(b) "If you believe from the evidence that the defendant permitted passengers to get off and on its cars at such place, and that the arrangement and use of the place of exit by passengers between the tracks was such as to afford an invitation to the deceased to get off at such place, then, in such case, the deceased was justified in believing that such exit was a suitable and safe place for him to alight, and was justified in believing that the defendant would exercise such care in regulating its cars that passengers would be warned and notified of the approach of cars on the parallel track while passengers were being discharged. And if you further believe, that while so alighting, the defendant's employes did not give the deceased notice or warning of the approach of the train going south, and that the deceased himself was exercising such care and prudence as a reasonable and prudent man would exercise in the same circumstances, but, notwithstanding, was injured, and that his injury resulted from the negligence of the defendant, then the defendant would be liable."—Approved: Omaha St. Ry. Co. v. Loehneisen, 40 Neb. 37, 58 N. W. 535.

§ 4285. Or at Wrong Place and Train Starts up Suddenly.

"If you find from the evidence that the deceased was a passenger on the defendant's road from Arkadelphia to Texarkana, and that, when the train was approaching Texarkana, the employees announced

the name of the station in the customary manner, and that, after passing the city limits, the train came to a stop before it reached the depot, and the deceased went from her seat in the coach to the platform and steps of the car under such circumstancecs as would lead a reasonably prudent person to believe, and she did believe, that the train had stopped for passengers to Texarkana, and that she acted as a reasonably prudent person, and that in attempting to get off the train moved suddenly forward without sufficient time for her to alight, and that, by reason thereof, she was thrown from the steps of the car, then you will find for the plaintiff."—Approved: St. Louis, I. M. & S. Ry. Co. v. Rush, 86 Ark. 325, 111 S. W. 263.

§ 4286. If Passenger Alighting Needs Assistance it should be Given.

(a) "The defendant was bound, not only to stop its train at the usual place, and for sufficient time, but if there were other circumstances which required extra care, even beyond that, on the part of the defendant, then the defendant was bound to give such extra care to the plaintiff, and, if the defendant failed to do that, and some volunteer, attempting not to perform the duties of the defendant but attempting to aid the plaintiff in her efforts to alight from the train, and in that way, the plaintiff, while exercising the prudence that the circumstances required of her, and that a person of her situation, of her condition, would ordinarily exercise, was attempting to alight from the train, if you find that some person, whether it was a stranger or passenger, or who, was attempting to aid her in her own efforts to do what, under the circumstances of the situation, she thought was proper and prudent for her to do, then, although that conduct on the part of the stranger along with the conduct of the plaintiff herself may have led to her getting off the train and suffering injury, yet if the negligence of the defendant brought about that state of things, and if the negligence of the defendant in failing to stop its train at the proper place, or for a sufficient time, and in failing to render any extra assistance, if it was required by the circumstances of the case, if that was still the direct and proximate cause of the plaintiff's injury then the defendant would still be liable, notwithstanding the fact that some other person may have also intervened and aided the plaintiff in her efforts to get off the train."—Approved: Martin v. Southern Ry. Co., 77 S. C. 370, 58 S. E. 3.

(b) "The court instructs the jury that if they should believe from the evidence that on the occasion in controversy the defendant company negligently failed to stop its passenger train at the station in Auburn long enough to give plaintiff a reasonable opportunity to get aboard the train and inside the car with safety to herself, or if the jury should believe from the evidence that the plaintiff's physical condition was such that she needed assistance in getting aboard said train, and that the defendant's agents engaged in receiving passengers on said coach saw that she needed such assistance and negligently failed to assist her in getting on said train, and if the jury should believe from the evidence that by reason of both or either of these

things the plaintiff was caused to fall or to be injured, then, and in that event, the jury should find for the plaintiff such compensatory damages, if any, as they may believe from the evidence were thereby caused to the plaintiff and which were the direct and natural result of the negligence aforesaid, if any, not exceeding $10,000, the amount claimed. Unless the jury should believe as set out in this instruction, they should find for the defendant."—Approved: Louisville & N. R. Co. v. Arnold (Ky.), 102 S. W. 322 (not reported in state reports).

§ 4287. Passenger About to Alight at Wrong Time or Place Should be Warned.

"It was the duty of the defendant's employees, in the operation of defendant's cars, to exercise the highest degree of diligence and care to avoid injury to passengers; and if the evidence shows that they had stopped the car upon which plaintiff was riding at the time in question at or near the point where it is claimed the injury occurred, but fails to show that it was stopped for the purpose of enabling plaintiff to get off, but does show that the defendant's employees knew, or in the exercise of due care ought to have known, in time to avoid the injury to plaintiff, that plaintiff was attempting to alight from said car, and, under such circumstances, started said car forward while plaintiff was attempting to alight, such act on their part would be negligence; and if such negligent act caused plaintiff's injury, without negligence on her part directly contributing thereto, defendant would be liable therefor."—Approved: Patterson v. Omaha & C. B. Railroad & Bridge Co., 90 Iowa, 247, 57 N. W. 880.

§ 4288. Passenger's Want of Ordinary Care in Alighting.

"If you believe the servants in charge of said train stopped the same the length of time that very prudent, cautious, and competent persons would have done under the circumstances, to enable passengers to alight therefrom while the said train was thus stopped, if it was, or if you believe that Mrs. M— failed to notify any agent or servant of defendant of her purpose or desire to get off said train at Seabrook Station, and, in so failing, omitted to do that which a person of ordinary prudence would have done under the circumstances, and thereby directly contributed to her injury, or if you believe that in attempting to alight from said train while the same was in motion, if she did, or, in the manner of alighting therefrom, she did that which a person of ordinary prudence would not have done under the circumstances, or if you believe that she was caused to be thrown, or that she fell, from the said train by the failure on her part to use the care that a person of ordinary prudence would have done in alighting from the car under the circumstances, or if you believe she jumped from the said moving train, and that in so doing she did what a person of ordinary prudence would not have done under the same or similar circumstances, you will, in either event named in this paragraph, find a verdict for defendant, although you should further find from the evidence that the defendant company was also

negligent in the particulars alleged by plaintiff."—Approved: Galveston, H. & N. Ry. Co. v. Morrison, 46 Tex. Civ. App. 186, 102 S. W. 143.

§ 4289. Relying on Advice in Alighting from Moving Train to which Passenger was Misdirected.

"If you believe from a preponderance of the evidence that, in obedience to the directions of defendant's ticket agent, the plaintiff entered the said train for the purpose of taking passage thereon to St. Louis, and that, while in the vestibule thereof, she was advised by one of the defendant's trainmen in charge of said train, that said train was not a St. Louis train, and was ordered or directed by said trainmen to get off said train, she had a right to rely upon such advice or direction, provided she took no more risk in getting off the train than a prudent person would have taken under the same circumstances. And if you further find from a preponderance of the evidence that, while in the exercise of ordinary care, plaintiff was injured in attempting to alight from said train under such advice of the trainmen, and plaintiff received injuries, then she is entitled to recover."—Approved: St. Louis, I. M. & S. Ry. Co. v. Fambro, 88 Ark. 12, 114 S. W. 230.

§ 4290. Sudden Stop and Lurch Throwing Passenger from Platform.

"If they believed from the evidence that, while plaintiff was riding on defendant's train, he was informed by the conductor of the train that the next station was Allen, and that while plaintiff was standing on the steps of the platform of the car, and while the train was rapidly approaching the station, the agents and employees of the defendant who were operating said train checked the speed of the train very suddenly and thereby caused the car on which plaintiff was riding to make a sudden violent stop and unusual jerk and lurch, and by reason of said violent stop and unusual jerk and lurch plaintiff was hurled from the steps and injured, and that defendant's agents in causing said train to suddenly and violently stop and suddenly jerk and lurch were guilty of negligence which was the proximate cause of plaintiff's injuries, to return a verdict in his favor."—Approved: Houston & T. C. R. Co. v. Harris (Tex. Civ. App.), 120 S. W. 500.

§ 4291. Jerks and Lurches Incident to Ordinary Operation of Train.

"The jury are instructed that while it devolves upon the defendant railroad company to use that highest degree of care, prudence, and foresight which prudent men engaged in the business of operating a railroad as usually conducted would employ—that is, such as is reasonably practicable—yet they are instructed that the defendant is not an insurer of the safety of its passengers, and if the jury believe from the evidence that the plaintiff did go out upon the platform of the defendant's car while the same was in rapid motion for the purpose of alighting therefrom, and that while upon said platform the plaintiff was thrown therefrom and injured by reason of the jerk or lurch of said train, still the plaintiff cannot recover for said injuries occasioned thereby, if the jury find they were so occasioned, unless they further believe from the preponderancce of the testimony

that said jerk or lurch was unusual or violent, and not such jerk or lurch as was incident to the ordinary and proper operation of said train, and further find that plaintiff was not guilty of contributory negligence in going upon said platform under all the circumstances which proximately in part brought about said injuries."—Approved: Houston & T. C. Ry. Co. v. Johnson (Tex. Civ. App.), 103 S. W. 239 (not reported in state reports).

§ 4292. Derailment—Care that could have Prevented.

"If you believe from the evidence that on or about February 22, 1905, when the plaintiff was a passenger on one of the cars in a train operated by the defendant, and that, while plaintiff was riding in said car, the said car became derailed between Sandy Fork and Waelder, Tex., and that by reason thereof plaintiff was thrown about, in, and against said car, and in consequence thereof plaintiff was injured in the manner that you find from the evidence he was injured, if you so find, and that the derailment of said car was the result of negligence on the part of the said defendant, or that the defendant, by the exercise of that high degree of care mentioned in paragraph 1 of this charge, could have prevented or avoided the derailment of said car, and that such negligence, if any, was the proximate cause of the injuries, if any, to plaintiff, then you are instructed that your verdict must be for the plaintiff; but, unless you do so find, your verdict must be for the defendant."—Approved: Galveston, H. & S. A. Ry. Co. v. Norton (Tex. Civ. App.), 119 S. W. 702.

§ 4293. Same—Flaws or Defects in Rails not Discoverable.

"If you find that the rails which were broken were made by a manufacturer of good repute, were made upon the approved method of manufacturing rails, were properly tested by the proper known and usually applied tests then in practical use, and had been on the track for several years, and had successfully stood the strain of numerous passing trains without in any manner affecting their quality or strength, so far as could be seen by proper examination, carefully and skillfully made; if, at the time of the accident, they were placed and lying securely on sound ties, with good angle-bars or splices at the ends, with sufficient ballast under the ties, with all their connections and support well adjusted; if they had been subjected to a daily inspection in the most approved and customary way of inspecting such appliances, by the most careful and best managed railroads in the country, by some servant of competent skill and experience in such matters, and said rails appeared then sound, and all these connections and supports sound and secure; and if there were no flaws or defects visible, or that could have been discovered by such approved and customary inspection, made in the manner hereinbefore explained,—then the defendant was not negligent with reference to said rails."—Approved: Pershing, Adm'r, etc., v. Chicago, B. & Q. R. Co. (Iowa), 32 N. W. 488 (not reported in state reports).

§ 4294. High Rate of Speed not Negligence Per Se.

"A high rate of speed of a railway train will not of itself establish or prove negligence of the railway company. Railway companies may run their cars at such speed as, under all the circumstances, shall comport with the rule of law which requires them to exercise the utmost care and foresight for the safety of their passengers, as explained in paragraph 7 hereof. And whether a given rate of speed comports with the rule depends on the circumstances, such as the condition and curvature of the track, the danger, if any, to passengers occupying any and all seats where passengers are accustomed and permitted to ride of being thrown from the car by the movement thereof, and all the facts and circumstances surrounding the particular time and place in question, as you find same to be shown by the evidence introduced upon the trial."—Approved: Fitch v. Mason City & C. L. Traction Co., 124 Iowa, 665, 100 N. W. 618.

§ 4295. Obstruction on Track not Necessarily Proof of Negligence.

"If you find that there was an obstruction on the rails, the question arises, 'Would the accident have occurred if there had been no obstruction?' If you find that the accident would not have occurred without the obstruction, then, subject to what I have just told you, the obstruction was the proximate cause of the injuries to plaintiff, and he cannot recover from defendant, unless, on the whole case, it has been shown by competent evidence that defendant or its servants placed the obstruction on the rails, or unless the servants of defendant could, by the exercise of the care exercised by a very cautious person, have discovered the obstruction in time to have avoided the accident."—Approved: Bosqui v. Sutro R. Co., 131 Cal. 390, 63 Pac. 682.

§ 4296. Derailment is Presumptive Proof of Negligence.

"The defendant is not an insurer of the safety of its passengers, but that the law made it the duty of the defendant and of its agents and servants to exercise the highest degree of care for the safety of the passengers it undertook to carry, in the management and operation of its cars, in the care and inspection of its track and switches, and in the care and inspection of the running gear of its cars; and if the jury shall believe from the evidence that the plaintiff, Nettie B—, sustained the injuries by her alleged by reason or because of the derailment of the car, then the law is for the plaintiff, and the jury should so find, unless the jury shall believe from the evidence that the derailment of the car was brought about by some cause which the highest degree of care upon the part of the defendant's agents and servants could not have prevented or guarded against, in which latter event the law is for the defendant, and the jury should so find." —Approved: Louisville St. Ry. Co. v. Brownfield (Ky.), 96 S. W. 912 (not reported in state reports).

§ 4297. Collision Caused by Incompetency of Flagman.

"If the jury shall believe from the evidence that the flagman in charge of the crossing was incompetent to discharge the duties intrusted to him by the defendants, the Illinois Central Railroad Company and the Louisville, Henderson & St. Louis Railway Company, and shall further believe from the evidence that the incompetency of said flagman, if he was incompetent, was at the time known to said defendants, or could have been known to them, or either of them, by the exercise of ordinary care, and if the jury shall further believe from the evidence that the collision in the evidence referred to was brought about solely by the incompetency of said flagman, if he was incompetent, the jury should find against said Illinois Central Railroad Company and Louisville, Henderson & St. Louis Railway Company, but not against the Louisville Railway Company. But, unless the jury shall believe from the evidence that the said flagman was incompetent, and that his incompetency was known to the defendant the Illinois Central Railroad Company or Louisville, Henderson & St. Louis Railway Company, or could have been known to them, or either of them, by the exercise of ordinary care, and unless they shall further believe from the evidence that the incompetency of said flagman, if he was incompetent, caused or helped to so as to bring about the collision, that but for such incompetency of said flagman, if he was incompetent, the collision would not have occurred, the jury should not find against said named defendants on that ground."—Approved: Louisville, H. & St. L. Ry. Co. v. Kessee (Ky.), 103 S. W. 261 (not reported in state reports).

§ 4298. Contributory Negligence—Alighting from Train.

(a) "If you find and believe from the evidence that plaintiff's wife, in alighting from said train, failed to exercise ordinary care for her own safety, or if she was guilty of negligence—that is, if she failed to exercise such care to see where she was stepping, and what she was stepping upon, and whether or not there was a step or box for her to step upon, as an ordinarily prudent person would have exercised under the circumstances surrounding her—then you will find for the defendant, even though you should find that the defendant, its servants and employees, were also guilty of negligence."—Approved: Missouri K. & T. Ry. Co. of Texas v. Corse, 46 Tex. Civ. App. 60, 101 S. W. 522.

(b) "The court instructs the jury that if the defendant had prepared on the side of the track opposite that on which the plaintiff attempted to leave the train a platform for the use of passengers in leaving the train, and the plaintiff knew, or by the exercise of reasonable diligence could have known, of said platform, and plaintiff voluntarily attempted to leave the train where there was no platform, and thereby increased the danger of injury to himself in leaving the train, and if the jury believe from the evidence that, if the plaintiff attempted to get off the train on the side where the platform was, he

would not have been injured, then they should find for the defendant." —Approved: Louisville & N. R. Co. v. Payne (Ky.), 104 S. W. 752 (not reported in state reports).

(c) "In passing on the question whether or not plaintiff was himself guilty of contributory negligence in getting off the train, which helped to bring about the accident whereby he was injured, if he was injured, you will consider the speed of the train, the nature and character of the ground where he got off, the hour of the day or night, distance from the step to the ground, age and physical condition of the plaintiff at the time, his experience or want of experience in getting off trains in motion, the manner in which he got off of the train, and all his surroundings at the time and all the circumstances and facts in evidence in the case, and say from it all whether or not a person of ordinary care and prudence would have attempted to get off the train under the same circumstances and in the same way he did. If you find he would, then the plaintiff would not be guilty of contributory negligence in doing so; and if you find that a person of ordinary prudence and care would not have attempted to get off of the train, and in the way the plaintiff did, under the same circumstances, then the plaintiff would be guilty of contributory negligence, which would defeat his right to recover, and you will find for the defendant."—Approved: St. Louis Southwestern Ry. Co. v. Cunningham, 48 Tex. Civ. App. 1, 106 S. W. 407.

§ 4299. Same—Delay in Alighting.

"If you believe from the evidence that the employees of defendant stopped the train at Chandler a reasonably sufficient time for a passenger situated as was plaintiff to depart therefrom, and if you should further believe that the plaintiff delayed getting off said train from any cause, and that this delay, if any, was unknown to defendant, then you are charged that his contract relation with defendant ceased at the expiration of such reasonable time, if any, and the defendant could become liable only through failure of its servants to exercise ordinary care against inflicting injury upon plaintiff."—Approved: St. Louis Southwestern Ry. Co. v. Bryant (Tex. Civ. App.), 92 S. W. 813 (not reported in state reports).

§ 4300. Passenger Alighting with Grips and Valises Causing Him to Stumble.

"But if you find from the evidence that as plaintiff attempted to alight from said train he carried a grip and valise on his back and in his hand, and if you further find that an ordinarily prudent person, situated and circumstanced as plaintiff was would not have attempted to alight from said train incumbered with said grip and valise, and if you further find that in attempting to so alight, if he did, he failed to exercise that degree of care that an ordinarily prudent person would have exercised under the same or similar circumstances, and that such failure, if any, caused or contributed to his injury, or if you find that as plaintiff was coming down the steps he stumbled and

started to fall, and he was caught by the defendant's servant, and was prevented from falling, then, in either event, you will find for the defendant."—Approved: St. L. S. Ry. Co. v. Johnson (Tex. Civ. App.), 94 S. W. 162 (not reported in state reports).

§ 4301. Contributory Negligence—Slow Moving Train—Question for Jury.

"If the jury should find from the evidence that plaintiff was a passenger on the defendant's train, and that the station of Homan was announced, or that such train had arrived at such station, and that plaintiff, while the train was moving slowly, went out upon the platform of the car in which he was riding, to be in readiness to step off when such car fully stopped, and that, instead of stopping fully, such car moved violently and suddenly, and with greater violence than is ordinarily incident to the moving of a freight train, and that by reason of such sudden and violent movement plaintiff was thrown and injured, it is for the jury to say, under all the facts and circumstances of the case shown in evidence, whether the plaintiff was guilty of contributory negligence; and if you further believe that the plaintiff did under the circumstances what an ordinarily prudent man would have done, then he was not guilty of contributory negligence, and is entitled to recover in this case."—Approved: Abelson v. St. Louis, I. M. & S. Ry. Co., 84 Ark. 181, 105 S. W. 81.

§ 4302. Jumping from Train after Delay in Alighting.

"If the jury believe from the evidence that the employees of the defendant, in operating the train on which the plaintiff was riding as a passenger, announced the station of A— prior to the train reaching said station; and if you find from the evidence that said train was stopped a sufficient length of time for passengers to get off, and the plaintiff failed to do so, without the fault of the employees in charge of said train, and the conductor did not know and had no reason to believe that she was still on the train in the act of getting off, and gave the signal for the train to start, and that after the train started, she stepped off or jumped off the train while it was in motion, and was injured—then you are charged that she cannot recover, and if you so find you will return a verdict for the defendant."—Approved: Harris v. Gulf, C. & S. F. Ry. Co., 36 Tex. Civ. App. 94, 80 S. W. 1023.

§ 4303. Contributory Negligence—Violating Known Rule of Company.

"If you find that, at and prior to the time in question, there existed an express rule or regulation of the defendant company that passengers should not stand upon the platform of the cars while the train was in motion, and that such rule or regulation was actually before that time brought to plaintiff's knowledge by means of notices posted upon the doors of defendant's cars, and if she went upon the platform of the moving train in violation of such express rule or regulation, and attempted to step therefrom to the depot platform, she

could not recover in this case; but, if she was in the act of leaving the train at the time the train started, then the standing upon such platform would not be a violation of such rule or regulation, although the train may have been in motion."—Approved: Omaha & R. V. R. Co. v. Chollette, 33 Neb. 143, 49 N. W. 1114.

§ 4304. Same—Riding on Top of Caboose.

(a) "It is negligence per se for a passenger to ride on top of a caboose car, except in an emergency requiring it, and if his act in so doing causes his injury, or contributes thereto as a proximate cause, he cannot recover.

"It is negligence per se for a passenger to ride on top of a caboose car when there is a regular passenger car provided for passengers, and if the passenger's riding on top of the caboose car causes his injury, or contributes thereto as a proximate cause, he cannot recover.

"If a passenger goes into a car provided for passengers and afterwards leaves such car and goes in and upon the top of a caboose car, a place of obvious danger to any man in his senses, and not intended for passengers, and he is injured by reason of his being on top of said car, which injury would not have occurred had he been in the car provided for passengers, he is guilty of negligence or contributory negligence, as a matter of law, and cannot recover."—Approved: McLean v. Atlantic Coast Line R. Co., 81 S. C. 100, 61 S. E. 900.

(b) "The safe and proper place for a passenger on a freight train is, under all ordinary circumstances, in the caboose; and, ordinarily, it is such negligence to be riding elsewhere that a passenger cannot recover damages for injuries sustained when such passenger is so riding upon a car other than the caboose."—Approved: Player v. Burlington, C. R. & N. R. Co., 62 Iowa, 723, 16 N. W. 347.

§ 4305. Passing to Another Car by Direction of Conductor.

"The jury are instructed that they must find for the defendant unless they shall believe, from the evidence, that the defendant was guilty of negligence. If they so believe, they must find for the plaintiff, unless they further believe, from the evidence, that the plaintiff was guilty of contributory negligence on his part; and, if they believe, from the evidence, that the plaintiff was guilty of contributory negligence, they must find for the defendant. The jury are instructed that if they believe, from the evidence, that the plaintiff, after getting on the car he first entered, was unable to find a seat therein, by reason of its crowded condition; that he was told by the conductor of the train that he might find a seat in the forward car; that he went forward after receiving such suggestion, and attempted to pass from that car to the next one; that, when he got out on the platform, he did not remain there, but attempted to pass into the next car, with reasonable promptness; that, while so passing, he exercised reasonable care and caution under the circumstances; that, while so passing, he was thrown from the car by reason of the defendant's train being run

over the switch and along the curve mentioned in the declaration at an unusually rapid rate of speed,—they must find for the plaintiff. The burden of proving these facts is upon the plaintiff. But if the jury shall believe that he did not receive any such suggestion from the conductor, or that if he received it, in passing from one car to the other, or in loitering upon the platform, or in the selection of the time when he undertook to so cross the platform in any other particular, he did not exercise such care and caution as a reasonably prudent man, under all the circumstances, should have exercised for his own protection, they should find for the defendant."—Approved: Chesapeake & O. Ry. Co. v. Clowes, 93 Va. 189, 24 S. E. Rep. 833.

§ 4306. Injury to a Passenger through the Breaking Down of a Railway Bridge.

"If you find from the evidence that the immediate cause of the alleged disaster was the want of proper construction of said bridge over White river, either as to size, material, piers or the adjustment thereof, then you should find for the plaintiff, unless you should further find that the size and construction of the said bridge were right and proper for the use intended, and that the material in said bridge had been properly tested, by tests known to men skilled in such material, or could not be so tested and preserve the strength of said material, and said disaster was caused by a defect in said material which could neither be foreseen nor provided against by human foresight and care, then you should find for the plaintiff."—Approved: Bedford etc. R. Co. v. Rainbolt, 99 Ind. 551, 556.

§ 4307. Roadbed Impaired by Extraordinary Rain or Cloudburst.

"The measure of diligence required in the maintaining of bridges and culverts by railroad companies is that the character and size of the stream, the extent and situation of the agricultural land about it, and the nature of the rainfalls and floods affecting it shall be ascertained and provided for so far as the exercise of ordinary foresight, care, and skill can accomplish them; but there is no requirement that the recurrence of cyclones, cloudbursts, and the like, shall be foreseen or guarded against, though it is known that they have many times happened. And, therefore, if you find from the proof, that the culvert was of sufficient capacity to carry off safely all ordinary accumulations of water, and that the defendant constructed and maintained the same with due care, and frequently inspected the same, and it appeared to be amply sufficient for all purposes, then the court charges you that the company would not be liable for the injury suffered by the plaintiff from such extraordinary downpour of rain or cloudburst as overtaxed the capacity of said culvert, and caused a washout in same."—Approved: Ill. C. R. Co. v. Kuhn, 107 Tenn. 106, 64 S. W. 202.

§ 4308. Injury to Passenger caused by Negligence in making up Train.

"The court instructs the jury that, if they believe, from all the evidence in this case that, on or about the 16th day of February, 1880, the defendant was controlling and operating a train of cars on a rail-

road in this county, and that the defendant received the plaintiff on its cars as a passenger, for hire, then the court instructs the jury that the defendant was bound to make up its train, couple its cars, and manage and control its cars and engines in such a careful, skillful and prudent manner as to carry the plaintiff with reasonable safety as such passenger. * * * If the jury believe from all the evidence in this case, that the plaintiff, on or about the 16th day of February, 1880, had purchased a ticket over the defendant's road, from the city of Quincy, Illinois, to Kansas City, Missouri, and, on or about that day, became a passenger on the defendant's train of cars, to be carried from said Quincy to Kansas City, then the law imposed upon the defendant the duty of using all necessary and reasonable skill, care and caution in making up and running said train, necessary for the reasonably safe conveyance of the plaintiff as such passenger. And if the jury further believe, from the evidence, that while the plaintiff was so a passenger on defendant's train of cars, she was requested by an employee or servant of the defendant to pass from the car in which she was, to the car immediately in front thereof, and that, while she was in the act of passing from one car to the other, in obedience to such request, by the carelessness and negligence of the defendant in making up its said train, and failing to sufficiently couple its said cars, or by the carelessness and negligence of the defendant in moving its engine and the cars attached thereto, without sufficiently and securely coupling its cars, and without any fault or negligence on the part of the plaintiff, the engine and a part of the train of the defendant was started forward, and the car from which the plaintiff was passing was detached and separated from the car into which she was going, and the plaintiff was thereby, without any negligence or fault of her own, precipitated and thrown between said cars to the ground, and thereby injured, then the jury should find the defendant guilty, and assess the plaintiff's damages at such sum, not exceeding $10,000, as they may believe, from all the evidence, she has sustained."—Approved: Hannibal etc. R. Co. v. Martin, 111 Ill. 225.

§ 4309. Care Required toward Passengers on Freight Trains.

"A railroad company is under no legal obligation to transport passengers on its freight trains. The company confines its carriage of passengers to regular passenger trains, and its carriage of goods to freight trains. But, when the company assumes to carry passengers upon its freight trains, it is not bound to furnish to the passengers the same comforts and conveniences which are enjoyed on a regular passenger coach; but, whether a railroad company undertakes to convey its passengers on a freight or passenger train, in a caboose or well cushioned chairs, its duty is to so run and manage the train that passengers shall not, by its own carelessness, be killed or injured. On the other hand, when a person becomes a passenger on a freight train, he is presumed to know the manner in which the trains are ordinarily operated, and to assume any additional risk, aside from negligence of the company, to which he may be exposed in consequence of his riding on a freight train."—Approved: Ohio, etc., R. Co. v. Dickerson, 59 Ind. 317.

§ 4310. Obligation to Keep Ticket Office open for a Reasonable Time before Departure of Train.

"If the jury shall find from the evidence that fifty cents was the ordinary fare from St. Paul to Minneapolis, and the defendant by its regulation exacts the further sum of ten cents only in the case of omission to purchase a ticket in advance, then they are bound to keep their ticket office open a reasonable time in advance of the departure of trains to enable passengers to procure their tickets; and if, on the occasion in question, the ticket office was not open for such reasonable time as to enable the plaintiff to procure his ticket, they had no right to demand of him the extra ten cents, and the expulsion from the train was wrongful, and the plaintiff is entitled to recover. What is such reasonable time for the ticket office to be open in advance of the departure of the train is a question of fact for the jury under the instructions of the court."—Approved: Du Laurans v. St. Paul etc. R. Co., 15 Minn. 55.

§ 4311. Presumption of Negligence—Injury to Passenger.

(a) "The court instructs the jury that if you find from a preponderance of the evidence that the plaintiff was a passenger, and that she was injured, and that such injuries were caused by a moving train of the defendant, then you are instructed that this is a prima facie proof of negligence on the part of said company."—Approved: St. Louis, I. M. & S. Ry. Co. v. Fambro, 88 Ark. 12, 114 S. W. 230.

(b) "If the jury find from a preponderance of the evidence that the plaintiff was a passenger on one of the defendant's trains, and that, while in the exercise of due care and while upon the said train, he received injuries as alleged in the complaint, then you are instructed that this is in law a prima facie case of negligence on the part of the defendant company, and the burden then shifts to the defendant to show that such injuries were not caused by any negligence on its part."—Approved: Abelson v. St. Louis, I. M. & S. Ry. Co., 84 Ark. 181, 105 S. W. 81.

(c) "If you find from a preponderance of the evidence that the plaintiff, a passenger, was injured by the operation of the defendant's train, it is presumed that the injury was negligent, and the burden in such case is upon the defendant to show that the injury was not the result of negligence."—Approved: Huddleston v. St. Louis, I. M. & S. Ry. Co., 90 Ark. 378, 119 S. W. 280.

§ 4312. Same—Explosion of Heating Apparatus.

"If you should believe from a preponderance of the evidence that the plaintiff, on or about the 3d day of January, 1905, and while a passenger, as alleged, on one of defendant's trains received injuries substantially as by him alleged, and that said injuries were caused by the bursting of the drum connected with the heating apparatus in said car, and that said heating apparatus was then and there under the management and control of the defendant company, and its agents and servants, and was in an unsafe and defective condition, or badly

and unskillfully handled and managed by the defendant's servants in charge of the train, and that in the ordinary course of things such drum would not have burst if the defendant company and its agents and servants in charge thereof and having the management thereof had used proper care with respect to the condition of said heating apparatus, or the handling and management thereof, and if you further find and believe from the evidence that the alleged bursting of the drum was directly caused and occasioned by such alleged unsafe or defective condition of the heating apparatus or alleged unskillful handling thereof by the defendant's said servants, and you further believe that such alleged unsafe or defective condition of the heating apparatus, or such alleged unskillful handling of the heating apparatus, constituted negligence on the part of the defendant company, or its said agents or servants (as the term negligence has heretofore herein been defined), and you further believe from the evidence that as the direct and proximate result of such negligence, if any, plaintiff received injuries substantially as by him alleged, then find for the plaintiff and assess his damages as hereinafter instructed in the fifth paragraph hereof."—Approved: Houston, E. & W. T. Ry. Co. v. Roach, 52 Tex. Civ. App. 95, 114 S. W. 418.

§ 4313. Same—Derailment.

"That the plaintiff was a passenger of the defendant, and that the car in which he was riding was derailed or overturned without his fault, is all that the plaintiff need establish in the first instance in order to recover for such injuries as may have been proximately caused him thereby. When the plaintiff has done this, the legal presumption arises that the derailment or overturning of the car occurred through the negligence of the defendant, and the burden of proving that there has been no negligence is cast upon the defendant."—Approved: Bonneau v. North Shore R. Co., 152 Cal. 406, 93 Pac. 106.

§ 4314. Same—Breaking or Sagging of Wire.

"In cases of this character, the law provides that where it is shown that an accident is caused by the breaking or sagging of a wire, or by something going wrong in the business of a defendant engaged, as this defendant was, in propelling cars by electricity by means of overhead wires, and it is further shown that a hanger which broke and a wire which sagged and which caused an accident were the property of and in the custody and control of the defendant, the law presumes then, or raises the presumption, that the defendant was negligent and that the accident was caused by its negligence. And when this is shown, provided there was no contributory negligence shown on the part of the plaintiff, the burden of proof is shifted to the defendant to show to your minds by a preponderance of evidence that it, the defendant, was not at fault, and that the accident happened without any negligence or want of ordinary care upon its part."—Approved: Crosby v. Portland Ry. Co., 53 Ore. 496, 101 Pac. 204.

§ 4315. Presumption of Negligence from Delay Caused by Breaking down of Cars.

"Where a delay happens from the breaking down of any of the cars, engines, roadway, or other appliances or equipments under the control of the railway company, or is caused by the mismanagement or misconstruction of something over which the railway company has control, the law presumes that the same was caused by the negligence of the railway company, and the burden is upon the railway company to disprove this presumption, and, if it fail to disprove, it will be liable to the passenger for damages, if damages result therefrom to a passenger."—Approved: Miller v. So. Ry. Co., 69 S. C. 116, 48 S. E. 99.

CHAPTER CXVIII.

NEGLIGENCE—RAILROADS.

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B. Injuries to Trespassers and Licensees.
C. Injuries to Servants.

A. Injuries at Crossings.

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§ 4316. Pedestrian Approaching Track—Presumption He Will not Put Himself in Peril.

"The jury are instructed that there is no conflict in the evidence that at all the times Mrs. M— was approaching along the pathway to the crossing of the track she was in a position of absolute safety up to the

time she stepped in front of the train, and there is no rule of law which would charge any of defendant's employees with knowledge that while she was in such position of safety she would change her position of safety for one of peril. On the contrary, the employees of defendant had a right to assume that Mrs. M— was in possession of her faculties and would retain her place of safety and not recklessly expose herself to danger. And even if you believe that Mrs. M— gave no indication of knowledge of the approaching train, still the defendant's employees were not bound to assume that she would heedlessly leave a place of safety and put herself upon the track and in danger of her life. And you are instructed, if you believe from the evidence that any of defendant's employees saw Mrs. M— approaching the train on Sacramento street, that such employee had the right to presume that Mrs. M— was in possession of her ordinary faculties and alert to the danger which might ensue from passing trains, and that she would not attempt to cross in view of the train, and that therefore such employee was not required to check the speed of the train in order to enable Mrs. M— to cross in front of it, or to ascertain whether or not she was about to do so."—Approved: Matteson v. Southern Pac. Co., 6 Cal. App. 318, 92 Pac. 101.

§ 4317. Frightening Horse with Unnecessarily Shrill Blasts of Whistle.

(a) "If you believe from the evidence that the employees operating the train, in approaching Shiloh street crossing, discovered, or by the use of ordinary care and foresight could have discovered, the plaintiff and the horse and buggy in which she was traveling, and if you further so believe that such employees caused an unnecessary and unusually loud and shrill blast of the whistle to be sounded about the time the engine was upon said crossing, and if you further so believe that it was reasonably apparent to such employees, or could have been known to them by the use of ordinary care and foresight, that such blast of the whistle was reasonably calculated to frighten the animal and cause it to run away and injure plaintiff, and if you further so believe that such sounding of the whistle was negligence, and caused the animal to become frightened and run away, and if you further so believe that such negligence was the proximate cause of the injury to plaintiff, then you will find for plaintiff, unless you find for defendant under other instructions."—Approved: Paris & G. N. Ry. Co. v. Calvin (Tex. Civ. App.), 103 S. W. 428 (not reported in state reports).

(b) "The jury is instructed that the law distinguishes the necessary nature of a locomotive whistle from that of a stationary whistle, intended for the purpose of notice only; that locomotive whistles are necessary, among other purposes, for the purposes of frightening animals off the track, and to give notice of the approach of trains to persons about to cross the track at such a distance that the bell cannot be heard or the trains readily observed; and that in these and other cases their use upon railroads is both sanctioned and required by law; and that in such cases the usefulness of the whistle depends upon the alarming and frightening character of the noise it makes, and one of the purposes for which it is used is to frighten and to alarm. But the court instructs

the jury the rule is different in respect to stationary whistles, intended for notice only, and that if used, if there is no necessity for constructing or operating them in such a way as to alarm or frighten any person or animal of ordinary gentleness, any unnecessary alarming or frightening use of them, if productive or injury to another, is wrongful, and the proprietors should be holden responsible for the injury."—Approved: Powell v. Nevada, C. & O. Ry., 28 Nev. 305, 82 Pac. 96.

(c) "The court instructs the jury that a railroad company is not liable when an injury results from horses being frightened by the noises or appearance of the train, when due and proper care in the management of the train is used. If the engineer wantonly and maliciously made unnecessary noise for the purpose of scaring the horses, and thereby the injury was brought about, in the loss of the horses, defendant would be liable. Negligence is the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. An act is wantonly done when it is needless for any rightful purpose, and manifests a reckless indifference to the rights and interests of another."—Approved: Everett v. Receivers of R. & D. R. Co., 121 N. C. 519, 27 S. E. 991.

§ 4318. Fright from Noises Usual and Incidental to Use of Engine.

"If you believe that the plaintiff was injured by reason of the defendant's engine emitting a noise as described in the plaintiff's pleadings, and frightening his horse, but if you further believe that such noise was not occasioned by the engineer, or by any of defendant's employees, working its engine, but that it was occasioned merely by the escape of steam through a proper, usual, and necessary apparatus for the escape of an excess of steam, and that such noise was usual and incidental to the use of its engine while under the proper amount of steam, and used in its ordinary manner, then you will find for the defendant, provided you believe that such noise was the sole cause of the plaintiff's injury."—Approved: Galveston, H. & S. A. Ry. Co. v. Simon (Tex. Civ. App.), 54 S. W. 309 (not reported in state reports).

§ 4319. But if Plaintiff Contributed to Causing His Team to Run Away, there is no Recovery.

"The law devolved upon the plaintiff the duty of exercising such ordinary care in approaching said railroad with his family, team, and cattle as would be used by a prudent person under the circumstances; and if from the evidence you believe that he failed to exercise such care, and that thereby he contributed to the runaway of said team, then the plaintiff would be guilty of what is known in law as 'contributory negligence;' and if you so find you will return a verdict for the defendant, although you may also believe the defendant's employees blew the whistle negligently and wantonly."—Approved: Gulf, C. & S. F. Ry. Co. v. Box, 81 Tex. 670, 17 S. W. 375.

§ 4320. Causing Hand-car to Roll Down Embankment and Frighten Horses.

"If you find from the evidence in this case that on the 15th day of April, 1904, the plaintiff approached the crossing of the defendant's

railroad, and was guilty of no negligence in so doing, for the purpose of going to his farm, and you further find that defendant's section hands were in the road crossing with a hand-car loaded with jack, line bar and other tools, and that as plaintiff approached said crossing, defendant's employees seized said hand-car and placed it on the track in front of plaintiff's horse, and caused the jack and line bar on said car to roll down the dump in front of plaintiff's horse, and you further believe that such acts (if any you find occurred) on the part of defendant's employees constituted negligence as that term has been heretofore defined to you, and you further find that such acts (if any) frightened plaintiff's horse and caused the same to become uncontrollable, and to suddenly dash away and to throw plaintiff violently to the ground, and that plaintiff was injured thereby and that such injury (if any there was) was the direct proximate result of the negligence (if any) of defendant, and was not contributed to by the negligence of the plaintiff, then, should you so find, you will return a verdict for the plaintiff."—Approved: Houston & T. C. R. Co. v. Beard, 42 Tex. Civ. App. 427, 93 S. W. 532.

§ 4321. Must Give Warning of Train's Approach.

(a) "If the circumstances and surroundings of the crossing as shown by the evidence were such as that, with the signals that were given by the defendant of the approach of the train, and the speed the train was going, persons at and near the crossing, who were using ordinary care to learn of the approach of the train, had reasonable warning of its approach, then the defendant was under no obligation to check the speed of its train as it approached the crossing."—Approved: Pratt v. Chicago, R. I. & P. Ry. Co., 107 Iowa, 287, 77 N. W. 1064.

(b) "It was the duty of defendant, its agents, servants, and employees in charge of said train in approaching the crossing in question to give reasonably timely warning by bell or whistle or other signal of its approach to the crossing in order to have enabled deceased, if using ordinary care for his own safety, to have avoided being struck; and if the jury believe that they failed to give such warning, and as the result thereof said J. R. U— was struck, whilst using ordinary care for his own safety, at said crossing, and killed, they ought to find for the plaintiff in any amount which in their judgment will reasonably compensate the estate of decedent for the loss of his power to earn money, if any, not to exceed $20,000, the amount claimed in the petition."—Approved: Louisville & N. R. Co. v. Ueltschi's Ex'rs (Ky.), 97 S. W. 14 (not reported in state reports).

(c) "The statutes of this state provide that a bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under the penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half to go to the informer, and the other half to go to the state, and also

be liable for all damages which shall be sustained by any person by reason of such neglect; and in this case, if you find from the evidence that, as the engine approached the crossing of Walnut Street, a bell was not rung or a whistle blown, as required by the statute, and that the accident complained of was caused by the failure to ring the bell or blow the whistle, without any fault or negligence on the part of the plaintiff, then you should find for the plaintiff."—Approved: Union Pac. Ry. Co. v. Elliott, 54 Neb. 299, 74 N. W. 627.

(d) "If you believe that the decedent was killed by the defendant railway company, and that such company did not give any signal for the crossing where the decedent was killed, and if you further believe from the evidence that there is no other evidence in the case which shows how the decedent met his death, then you are charged that the plaintiffs have not established that the proximate cause of the decedent's death was the alleged failure of the defendant to give crossing signals, and in that event your verdict should be for the defendant."—Approved: Rogers v. Rio Grande Western Ry. Co., 32 Utah, 367, 90 Pac. 1075.

(e) "Where a case is brought and there is any allegation or proof that the party was injured at a crossing, and they allege wantonness or willfulness on the part of the agents and servants of the company in injuring him, the party injured would have the right to show as a circumstance to go to the jury that they did not ring the bell or blow the whistle within 500 yards of the crossing, and that goes to the jury as a circumstance to be considered by them as to whether there was a willful disregard of the law or invasion of the rights of the party injured."—Approved: Goodwin v. Atlantic Coast Line R. Co., 82 S. C. 321, 64 S. E. 242.

§ 4322. Signals Ordinarily Sufficient for Persons Exercising Ordinary Care.

"A signal of the train's approach was reasonable which was ordinarily sufficient to give notice of its coming to persons who were themselves exercising ordinary care for their own safety and in possession of their ordinary faculties."—Approved: Louisville & N. R. Co. v. McNary's Adm'r, 128 Ky. 408, 108 S. W. 898.

§ 4323. And to Run Train at such Speed as is Consistent with Due Care.

"It was the duty of the defendant, the Louisville & Nashville Railroad Company, in the operation of its train at the time and place mentioned in the proof, to give such notice of the approach of its train to the crossing, to run its said train at such speed, to keep such lookout, and to use such care to avoid injury to persons thereon, as might usually be expected of ordinarily prudent persons operating a railroad under like circumstances."—Approved: Louisville & N. R. Co. v. Roth, 130 Ky. 759, 114 S. W. 264.

§ 4324. Circumstances Requiring more than Statutory Signals.

(a) "The jury are instructed that it was the duty of defendant and the employes in charge of the engine and train that struck and killed

Wm. B. L—, to sound the engine whistles or ring the engine bell at a point not less than 50 rods east of the crossing at which he was struck and killed, and to sound the whistle or ring the bell continuously or alternately from that point to the crossing, and if the jury believe from the evidence that the location of the crossing at which L— was killed, and the amount of public travel thereon, and the building or other structures of the defendant company in proximity to the crossing obstructed the view and hearing of approaching trains, and that, for these reasons, the crossing was unusually dangerous to travelers, and that the sounding of the whistles and ringing the bell as directed was not sufficient to give reasonable notice of the approach of trains to the traveling public at said crossing, and this was known to defendant, or, by the exercise of ordinary care, could have been known by it, then it was the further duty of defendant, and the persons in charge of its train, to use such other means to prevent injury to travelers at said crossing as, in the exercise of a reasonable judgment by ordinarily prudent persons operating the railroad, might be considered necessary, and if the jury believe from the evidence that the defendant and the employes in charge of the train that struck L— failed to discharge the duty imposed by ringing the bell or sounding the whistle, as herein set out, or to provide the other methods herein set out, if considered necessary for the reasons herein stated, by the persons operating the said road, and further believe that deceased lost his life by the negligence and carelessness of defendant and said employes, if any has been proven, then they should find for plaintiff, unless they believe the state of facts existed that are set out in instruction No. 3."—Approved: Louisville & N. R. Co. v. Lucas, Adm'r (Ky.), 98 S. W. 308 (not reported in state reports).

(b) "The court instructs the jury that if they shall believe from the evidence that the crossing at Hemlock street was used by many persons, and that it was more than ordinarily dangerous to persons using it, then it was the duty of the defendant, running its trains over the said crossing, in addition to the usual and ordinary signals, to provide such signals as were reasonably necessary to give notice of the train's approach to the crossing; and if it failed to provide such signals as were reasonably necessary at that crossing, and by reason of such failure the said W— received the injuries complained of, and he did not help to cause or bring about his injuries by negligence on his part, but for which he would not have been injured, then the law is for the plaintiff, and they should so find."—Approved: Southern Ry. Co. v. Winchester's Ex'x, 127 Ky. 144, 105 S. W. 167.

(c) "The court instructs the jury that it was the duty of the defendant's employes in charge of the train which struck Clark A. W— at the time and place mentioned in the petition to have the engine under reasonable control when it approaches the crossing at Hemlock street, to keep a lookout ahead for the persons who were using the crossing, to give timely notice of the approach of the train by ringing the bell of the engine, to have the headlight burning, and to exercise ordinary care to prevent injury to persons using the crossing; and if

the jury shall believe from the evidence that the said employes failed to perform any of these duties, and that by reason thereof the said Clark W— was struck by the engine and killed, then the law is for the plaintiff, and they should so find, unless they shall further believe from the evidence that the said W— was negligent, and thereby helped to cause or bring about his injuries, and that he would not have been injured but for his contributory negligence, if any there was."—Approved: Southern Ry. Co. v. Winchester's Ex'x, 127 Ky. 144, 105 S. W. 167.

§ 4325. Giving Signals, Limiting Speed and Keeping Look-out at Street Crossing.

(a) "If the jury believe from the evidence that, as the train of defendant, the Louisville & Nashville Railroad Company, approached said crossing, in the proof described, said defendant's agents and employes in charge thereof negligently failed to give such notice of the approach of said train to said crossing, or negligently failed to run its train at such speed, or negligently failed to keep such lookout, or negligently failed to use such care, as might usually be expected of ordinarily prudent persons operating a railroad under like circumstances, in order to avoid injury to persons on or about to pass over said crossing, and that by reason of such negligent failure, if any, on the part of said defendant or its employes to so act or manage said train, the train collided with the wagon driven by plaintiff, and that by reason of such collision, and by reason of such negligent acts or omission of said defendant's employes, if any, plaintiff was injured, and if they further believe that plaintiff, when he drove on said track in front of said train, was himself in the exercise of ordinary care on his part, as hereinafter defined, the jury will find a verdict for plaintiff; otherwise, they will find a verdict for the defendant, the Louisville & Nashville Railroad Company."—Approved: Louisville & N. R. Co. v. Roth, 130 Ky. 759, 114 S. W. 264.

(b) "The court instructs the jury that it was the duty of defendant's agents and servants in charge of its train to use ordinary care to prevent collisions with and injury to persons traveling the street where it crosses the railroad track at the place appellant was struck by keeping a lookout in approaching said crossing, and in giving reasonably sufficient signals, by ringing the engine bell to warn travelers of the approach of the train, and by running at such rate of speed as was reasonably consistent with the safety of persons traveling the street. And if the jury believe from the evidence that on the occasion in controversy the defendant's agents and servants in charge of its train failed in the performance of all or any of these duties, and by reason of such failure the collision occurred, then the jury will find for the plaintiff, unless they believe from the evidence that plaintiff failed to exercise ordinary care for his own safety."—Approved: Cross v. Illinois Cent. R. Co. (Ky.), 110 S. W. 290 (not reported in state reports).

§ 4326. And Provide Other Means Reasonably Required as Notice.

(a) "It was the duty of the employes of the defendant company in charge of the train that struck and killed Estill A— to sound the whistle or ring the bell at a point not less than 50 rods west of the crossing at which he was struck and killed, and to sound the whistle or ring the bell continuously or alternately from that point to the crossing, and, if the jury believe from the evidence that this crossing was in a populous community and on a much traveled thoroughfare, and because of its location and surroundings unusually dangerous to travelers, and that the sounding of the whistle and ringing of the bell as directed was not sufficient to give reasonable notice of the approach of trains at said crossing, and that this fact was known to the defendant, or by the exercise of ordinary care could have been known by it, then it was the further duty of the defendant and its servants in charge of the train to use such other means to prevent injury to travelers at said crossing as in the exercise of a reasonable judgment might be considered necessary by ordinarily prudent persons operating a train. And if you believe from the evidence that the defendant and its employes in charge of the train that killed deceased failed to so ring the bell or sound the whistle as herein set out, or to provide other means or methods to warn the traveling public of its approach to said crossing, if the facts in this case required the defendant and its employes to employ other means, and by reason of such negligence and carelessness, if any, on the part of the defendant and its employes deceased lost his life, then you should find for the plaintiff, unless you shall believe that his death was due to his own neglect, as defined in instruction No. 3."—Approved: Adkisson's Adm'r v. Louisville, H. & St. L. Ry. Co. (Ky.), 110 S. W. 284 (not reported in state reports).

(b) "If you believe and find from the evidence that on or about the 27th day of May, 1907, plaintiff was driving in a wagon along North Second street within the corporate limits of the city of Ft. Worth, and that an agent or servant of the defendant, who was operating a locomotive of the defendant, which was approaching the place where plaintiff was, ran the same at a greater rate of speed than six miles per hour, or failed to ring the bell attached to such locomotive of the defendant while said locomotive was in motion, and if you further believe and find from the evidence that, as a result of such act or failure upon the part of such agent or employe of the defendant, the said locomotive collided with the wagon upon which plaintiff was, and inflicted upon him injuries, or if you believe and find from the evidence that the agents and employes of the defendant in charge of its aforesaid locomotive failed to exercise such care in the operation of the same as ought to have been expected of a reasonably prudent person under such circumstances, and that such conduct constituted negligence on the part of such agents or employes of the defendant, and that thereby they caused the said locomotive to collide with the wagon upon which plaintiff was and to inflict upon him injuries, then

you will find for the plaintiff, unless you find for the defendant under the next succeeding clause in this charge."—Approved: St. Louis Southwestern Ry. Co. v. Shelton, 52 Tex. Civ. App. 437, 115 S. W. 877.

§ 4327. Sounding Whistle—No Liability Unless Employe Knows Injury will Ensue.

"The law requires the defendant to ring the bell or sound the whistle 80 rods before reaching a public crossing, and to continue doing one or the other until the crossing is passed. Under this statute, the sounding of the whistle at any point required by the law will not make the defendant liable for any injury that may ensue from it, unless the operatives of the engine who sound the whistle know, as reasonable men, by so doing, injury will necessarily and proximately ensue."—Approved: Choctaw, O. & G. R. Co. v. Coker, 89 Ark. 270, 116 S. W. 216.

§ 4328. Gates—Failure to Lower.

"The court instructs the jury that it was the duty of the defendant, Louisville & Nashville Railroad Company, at the intersection of its tracks with Seventh and Magnolia streets to lower the gates which it maintained at said intersection on the approach of a train, so as to give to those attempting to use the crossing a reasonable opportunity to avoid injury from the train, and, if the jury believe from the evidence that at the time and place complained of by the plaintiff, Carl W—, the defendant negligently failed to discharge this duty, and that the plaintiff was injured thereby while attempting to cross said intersection, and that the plaintiff was not at said time and place himself guilty of contributory negligence, but for which he would not have been injured, then the law is for the plaintiff, and the jury shall so find."—Approved: Louisville & N. R. Co. v. Wilson, 124 Ky. 836, 100 S. W. 302.

§ 4329. Gates—Raising as Invitation to Cross.

"By the term 'contributory negligence,' as used in these instructions, is meant a failure on the part of the plaintiff to use ordinary care for his own protection and safety, under the facts and circumstances in evidence preceding and attending his injury; and in this connection the court instructs the jury that, if they believe from the evidence that the gates were raised or were up at the time the plaintiff entered upon the intersection for the purpose of crossing it, then this circumstance was an invitation on the part of the defendant to the plaintiff and the public to cross, and an assurance that the track could be crossed in safety, and the plaintiff cannot be found guilty of contributory negligence in attempting to make the said crossing unless the jury believe from the evidence that he failed to use ordinary care for his own safety and protection under these circumstances; but, if the jury believe that the gates were raised or were up at the said time and the plaintiff did fail under the circumstances to use ordinary care, or if the jury believe that the plaintiff entered upon said crossing while the gates were down or were being lowered, then the law is for

the defendant and the jury should so find, notwithstanding the jury may believe that the defendant was also guilty of negligence at the same time and place."—Approved: Louisville & N. R. Co. v. Wilson, 124 Ky. 836, 100 S. W. 302.

§ 4330. Where Train was Backed while Gates were Raised.

"If you believe from the evidence that on or about the —— day of ————, plaintiff was riding in a one-horse wagon or cart, with a horse attached, and proceeded to cross over defendant's railroad tracks at the point where the tracks intersect B. street, and if you further believe from the evidence that the defendant maintained crossing gates on said B. street crossing, and that the gates on said B. street crossing were opened and raised by defendant, and if you further believe from the evidence that the plaintiff proceeded to cross over defendant's tracks at said B. street crossing, and that while doing so, if he did so, the defendant moved and backed a car against plaintiff's wagon, and injured him, as alleged in plaintiff's petition; and if you further believe from the evidence that said car came to a stop, and then was moved forward, and that plaintiff's vehicle was dragged with plaintiff in it, and that plaintiff was thereby injured as alleged in plaintiff's petition; and if you further believe from the evidence that it was negligence on the part of the defendant, under all the facts and circumstances in evidence before you, to move said car against plaintiff's wagon, if it did so, and then to move said car forward and drag plaintiff's said vehicle with plaintiff in it, if it did so, and that such negligence, if any, was the direct cause of plaintiff's injuries, if any, and that plaintiff was not guilty of contributory negligence, then your verdict must be for the plaintiff."—Approved: Galv. H. & S. A. Ry. Co. v. Fry, 37 Tex. Civ. App. 552, 84 S. W. 664.

§ 4331. Public Highway Crossing Greatly Frequented—Duty of Engineer.

"If you find from the evidence that the crossing upon which the deceased was killed was a public highway, and had been used as such for a long number of years prior to the accident, and if you further find that a large number of teams and persons passed over said crossing each day, and at all hours of the day, then I charge you that it was the duty of the engineer of the train, when approaching the crossing, to have been on the lookout for teams and persons on the crossing, or in such close proximity thereto as to be in danger of colliding with the train, then to use all reasonable care and diligence and make use of all the appliances at his command to have the train under control, and stop if necessary to avoid a collision with and injury to such team or persons; and if you further find that the engineer was negligent in not keeping such lookout, and in not discovering the peril of the deceased in time to have avoided the accident, and that he did or could have discovered him, and the peril he was in, in time to avoid the collision, if he had been on the lookout, then I charge you that the defendant is liable for the killing of O—, and the plain-

tiffs are entitled to recover in this action."—Approved: Olson v. Oregon Short Line R. Co., 24 Utah, 460, 68 Pac. 148.

§ 4332. And where Crossing is in Sparsely-Populated District.

"The court instructs the jury that, in determining the question as to whether the defendant's servants and employes were guilty of negligence in the present case, the jury are authorized to and should take into consideration the place at which the accident occurred, the manner in which the trains were being propelled; the number of dwelling houses in that vicinity; their distance from the track; and the probability of pedestrians being on the track at that time and place, if any. What would be ordinary care and prudence in running a train of cars in a sparsely-populated locality might be negligence in a more populous district, and it is for the jury to determine, in view of all the facts and circumstances of the case, whether defendant's servants did exercise ordinary care and prudence in the management of said train at the time and place mentioned in the evidence in this case."—Approved: Schmitt v. Mo. Pac. Ry. Co., 160 Mo. 43, 60 S. W. 1043.

§ 4333. Flagman not at Customary Place—Presumption of Safety in Crossing.

"The court further instructs you that, if you believe from the evidence that the flagman so stationed at said crossing at the time plaintiff approached the same was not in his customary place of duty, then the plaintiff had a right to presume, in the absence of reasonable and timely warning to the contrary, that he would not be exposed to danger from approaching trains in driving near or crossing said track."—Approved: Louisville & N. R. Co. v. Sights, 121 Ky. 203, 89 S. W. 132.

§ 4334. Failure to Provide Flagman or Gates in City as Evidence of Negligence.

"The second matter of negligence that is alleged is a failure to provide a switchman or flagman at this crossing, or to provide gates which should be closed and opened, so as to prevent passengers upon the highway from being exposed to danger. The plaintiffs claim that under the facts and circumstances developed in this case, that this became a duty which the defendants owed to the traveling public. . . . The terms 'neglect,' 'negligence,' 'negligent,' 'negligently,' import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. Now, just simply apply that rule, gentlemen, to the facts in this case, and you can by that determine whether or not the defendants have been guilty of negligence in this matter. Did their conduct in operating this railroad track crossing, this highway, under all the circumstances and facts that have been detailed in evidence, import a want of such attention to the nature and probable consequences of their acts as a prudent man ordinarily bestows in his own concern? If it does, if there was such a want, then there is negligence, and it constitutes a ground of complaint on behalf of any person who

is injured by reason of it. As to what a prudent man would do under the circumstances, gentlemen, it is for you to determine, and you are to determine it for yourselves."—Approved: English v. So. Pac. R. Co., 13 Utah, 407, 45 Pac. 47, 57 Am. St. 772, 35 L. R. A. 155.

§ 4335. But such Failure will not Excuse Traveler from Exercising Care.

"The court instructs the jury that, though you may believe from the evidence that an ordinance of the city of D. required the defendant to have a gate at the C. street crossing, with a man in charge of the same, and to lower said gate whenever a train attempted to cross said street, and though you may believe from the evidence that the defendant company failed to provide said gate-keeper at the crossing in question, or to have said gate lowered on the occasion of the accident, and though you may believe that the defendant company failed to have at the front of the train as it approached said crossing a light, or to signal its approach by bell or otherwise, yet the said failures on the part of the company did not relieve the plaintiff's intestate, R—, from exercising care and caution in attempting to avoid injury from the approaching train; that it was the duty of said R—, before attempting to cross said track, or while standing on or near said track, to look in both directions, and to listen for approaching trains; and that if said R— stepped upon said track without looking and listening, or stood in such close proximity to said track, without looking and listening, as to be struck by said train, then said R— was guilty of such contributory negligence as precludes any recovery, and the jury must therefore find for the defendant."—Approved: Rangeley's Adm'r v. So. Ry. Co., 95 Va. 715, 30 S. E. 386.

§ 4336. Flagman—No Warning Given to One Approaching Track.

(a) "The court instructs the jury that it was the duty of the flagman at the intersection of the railroad track with Broadway street to give persons approaching said crossing warning of the approach of trains, so as to give them a reasonable opportunity to avoid being injured in crossing the track; and if the jury believe from the evidence that at the time and place complained of by plaintiff the defendant company through its flagman failed to discharge this duty, and by reason thereof the plaintiff, while exercising ordinary care for his own safety, was injured in his person or property in attempting to cross the track, the jury should find for the plaintiff."—Approved: Cross v. Illinois Cent. R. Co. (Ky.), 110 S. W. 290 (not reported in state reports).

(b) "If you find from the evidence that defendant's flagman at Broadway crossing failed to notify plaintiff of the approach of the engine on defendant's road in time for plaintiff to have prevented the collision between his horse and said engine, that such failure was negligence and was a proximate cause of the collision, and that plaintiff was not guilty of negligence directly contributing to the said collision, you will find for plaintiff."—Approved: Buchanan v. Missouri K. & T. Ry. Co., 48 Tex. Civ. App. 299, 107 S. W. 552.

(c) "They are further instructed that, if they believe from the evidence that the flagman signalled the plaintiff to cross the track, then this circumstance was an invitation on the part of the defendant to plaintiff and the public to cross, and an assurance that the track could be crossed in safety, and the plaintiff was not guilty of negligence in attempting to cross, unless the jury believe from the evidence that he failed to use ordinary care for his own safety and protection. And, if the jury believe that the defendant's flagman did signal plaintiff to cross, yet, if they further believe that plaintiff failed to exercise ordinary care for his own safety, then the law is for the defendant, and the jury should so find."—Approved: Cross v. Illinois Cent. R. Co. (Ky.), 110 S. W. 290 (not reported in state reports).

§ 4337. Watchman at Bridge—Failure to Warn.

"If the jury believe from the evidence that the defendant, the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company, or its employe or agent in charge of said crossing, operating the gates at same, negligently failed to give reasonable and timely warning to plaintiff of the approach of said train to said crossing, and that by reason of such negligent failure, if any there was, plaintiff, while in the exercise of ordinary care on his part, drove on said crossing, was injured by reason of the collision and said injury, if any injury there was to plaintiff, was the result of such negligent failure, if any, on the part of the defendant bridge company or its employes to give such warning to plaintiff, the jury will find a verdict for the plaintiff against the defendant, the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company; otherwise they will find a verdict for said defendant."—Approved: Louisville & N. R. Co. v. Roth, 130 Ky. 759, 114 S. W. 264.

§ 4338. Brakeman on Train Pushed Backward—Care Required.

"In determining whether the defendant's employes have been guilty of actionable negligence, as hereinbefore defined, you should take into consideration the fact that the defendant was pushing its train backward, and also the fact that the defendant had no flagman at its crossing at Fourteenth street. You should also consider whether the bell was rung and the whistle sounded; whether there was a brakeman on the rear end of defendant's train. You should also take into consideration the amount of travel across defendant's track at Fourteenth street, and all the other facts and circumstances shown in the evidence bearing upon this question. And you are instructed that while it was the duty of the defendants' employes to comply with the ordinances of the city relating to the ringing of the bell of the engine, and to the stationing of a flagman at the Fourteenth street crossing, yet a failure on the part of the defendant's employes to comply with said ordinances in either or both of these respects, while that may be considered by you as evidence tending to prove the actionable negligence of the defendant's employes, does not necessarily demand an inference of negligence."—Approved: Riley v. Missouri Pac. Ry. Co., 69 Neb. 82, 95 N. W. 20.

§ 4339. Obstruction to View of Traveler—Additional Precautions to Warn.

(a) "If the crossing where the collision occurred was rendered dangerous, and the view of the railroad track was obstructed, so that travelers on the public highway could not see the railroad track in the direction from which the train was approaching because of the tool house or blacksmith shop kept and permitted to stand so near defendant's track, then the company must use such care and take such precautions to warn travelers on the public highway that, notwithstanding such obstructions, they, by the use of ordinary care, can avoid injury."—Approved: Weaver v. Columbus, S. & H. Ry. Co., 76 Ohio St. 164, 81 N. E. 180.

(b) "The court instructs the jury that a railroad company running and operating its trains upon and across the streets of a city must use greater care and diligence to prevent accidents to persons who may be upon or crossing said streets than is required of it in less frequented and populous localities; that in certain localities in a city greater precautions may be necessary than in others by reason of the existence in such localities of conditions or particular surroundings, making the danger of accidents there greater than in those places at which such conditions and particular surroundings do not exist; and that if a train is running upon or across a highway, or street, at a place where, by reason of the existence of special conditions and particular surroundings, there is greater danger of accidents to persons upon or crossing the street than in places where such special conditions and particular surroundings do not exist, it is the duty of the railroad company and its employes in charge of the train to exercise greater precautions, to be on the lookout, and to give warning of the approach of the train of a character depending upon the particular locality and circumstances to avoid accidents than would be required in other localities where such conditions and particular surroundings do not exist, and any neglect of such precautions to be on the lookout and to give warning of the approach of the train as are proper under the peculiar surroundings and circumstances of the locality constitutes negligence for which the railroad company is liable in damages if the jury believe that said negligence was the proximate cause of the accident, unless the injured person, by the exercise of such care on his part as would be used by an ordinarily prudent person under the same circumstances, could have avoided the accident."—Approved: Norfolk & W. Ry. Co. v. Munsell's Adm'r, 109 Va. 417, 64 S. E. 50.

§ 4340. Look-out for Persons Traveling on Street.

(a) "The jury are instructed that, in approaching the crossing of Warren street with its passenger train mentioned in evidence, it was the duty of defendant's engineer in charge of said train, and the law required him, to be watchful and on the lookout for persons traveling on the street, so as to avoid injuring them."—Approved: Holmes v. Missouri Pac. Ry. Co., 207 Mo. 149, 105 S. W. 624.

(b) "It was the duty of the defendant's servants to exercise ordinary

care to observe travelers about to cross the railroad upon the highway, and in the running and handling of said switch engine to have exercised that degree of care and prudence which an ordinarily careful and prudent person engaged in like business would have exercised under like circumstances; and a failure to exercise such degree of care and prudence would render the defendant guilty of negligence in that respect."—Approved: Louisiana & A. Ry. Co. v. Ratcliffe, 88 Ark. 524, 115 S. W. 396.

§ 4341. Violating Ordinance as to Speed Limit—Negligence Per Se.

"If you find from the evidence that the view of the approaching train was obstructed by buildings, trees, and cars on defendant's railroad at such crossing to a traveler on such street from the north, and at the time of the injury a valid ordinance of the city of W— was in force limiting the rate of speed of defendant's trains to five miles an hour in said city, and that the train which injured plaintiff was at the time of the injury running at the rate of ten or fifteen miles an hour, then the defendant was guilty of negligence; and if you find that such negligence produced the plaintiff's injury without any negligence on the plaintiff's part which contributed to the injury, then your verdict should be for the plaintiff."—Approved: Penn. Co. v. Horton, 132 Ind. 189, 31 N. E. 45.

§ 4342. Making Crossing Reasonably Safe for Public Travel.

"You are also instructed, gentlemen, that it was the duty of this defendant when it built the road across the public highway to restore the highway to its former condition, as near as might be; that it was defendant's duty to put and keep plank each side of the rails of its railroad, and also between the rails of its railroad, in a good condition, and one-half inch above the rails. Further, you are instructed that, in constructing and maintaining this crossing so that it should be reasonably safe for public travel, the defendant is not obliged to anticipate that some one might come over that crossing with a bob sleigh with a short tongue dragging upon the ground, and that such short tongue might catch in one of its rails and upset the sleigh, and therefore defendant would not be negligent because it did not anticipate such an occurrence. * * * And it is for you to say whether or not this crossing was in reasonable repair, so that it was reasonably safe for public travel, on the 15th day of January, 1905, and, if not in reasonable repair, whether or not such want of reasonable repair caused this accident. If it was in reasonable repair, then plaintiff would not be entitled to recover. Or if it was not in reasonable repair, but such want of reasonable repair did not cause the sleigh to upset and produce the accident, then plaintiff would not be entitled to recover. But if it was not in reasonable repair, and such want of reasonable repair did cause this sleigh to upset and produce the accident, then plaintiff would be entitled to recover, if she and her driver were not guilty of any negligence which contributed to this injury."—Approved: Logan v. Lake Shore & M. S. Ry. Co., 148 Mich. 603, 112 N. W. 506.

§ 4343. Seriatim Statement of Circumstances for Consideration by the Jury on the Question of the Exercise of Ordinary Care.

"You are instructed that you must not find defendant guilty of negligence from the mere fact that the locomotive was backing over Beach Street crossing following the freight train. Safe railroading is often a matter of minutes, sometimes seconds, and it is not for juries or courts to determine what good or bad railroading requires from their own opinion, or from the fact that an accident has happened under certain conditions; but it is for you to determine, under all the circumstances, surroundings, and conditions as they existed at and near the crossing, the fact that the Pere Marquette Railroad was in close proximity, the fact that Saginaw Street bridge was not in use for teams, the increase of travel, if any, over the Beach Street crossing, and the amount of travel over the same, the fact that there were no flagman or gates at such crossing, the obstructions, if any, which may have obstructed the view of the track to the east of the crossing in respect to persons approaching the crossing from the north, the passing of the freight train, the following of the backing engine, its speed, and the proximity to the train, whether or not the brakeman was on the tender in position to signal the engineer in case of danger to persons making Beach Street crossing, and, under all the other facts in the case, whether the defendant railroad was exercising such ordinary and reasonable care and caution as ordinary prudence would dictate in running its engine and tender, backing the same, following the freight train that had just passed Beach street going in the same direction and on the same track. If you find that the defendant railroad was not exercising such ordinary and reasonable care and caution in its conduct as ordinary prudence would dictate, then I charge you that defendant railroad would be guilty of negligence, and plaintiff would be entitled to a judgment, if you find that such negligence of the railroad was the proximate cause of the injury, provided you further find that Mr. N— was exercising such ordinary and reasonable care and caution as an ordinarily prudent man would exercise under the same circumstances, surroundings, and conditions as you will find they appeared to him at that time."—Approved: Barnum v. Grand Trunk Western Ry. Co., 148 Mich. 370, 111 N. W. 1036.

§ 4344. Train Because of Momentum has Right of Way Over Pedestrian or Vehicle.

(a) "You are instructed that if a railroad crosses a common road on the same level, or practically so, those traveling on either have a legal right to pass over the point of crossing, and to require reasonable care and caution of those traveling on the other road to avoid a collision; that while a passing train, from its force and momentum, will have the preference in crossing first, yet those in charge of it are bound to give reasonable warning, so that a person about to cross with a team and wagon may stop and allow the train to pass, and such warning must be reasonable and timely, taking into consideration the location, situation and surroundings existing at such crossing."—Approved: C. C. C. & St. L. Ry. Co. v. Baker, 106 Ill. App. 500.

(b) "Because of the character and momentum of the defendant's train, the law would not require it to stop its train and give precedence to Mrs. M—, who was on foot, to make the crossing first. It was the duty of Mrs. M— to wait for the train to pass before she attempted to cross, and if she could, by the exercise of due diligence, have discovered the approach of defendant's train, and if she attempted to cross in front of defendant's train knowing of its approach, or if by the exercise of due diligence she could have discovered its approach, she would be the author of her own misfortunes, and could not recover in this action, unless the jury should believe from the evidence that, upon the manifestation of Mrs. M—'s peril, those who controlled defendant's train failed to use due diligence to prevent the injury, or that they wantonly or intentionally injured her."—Approved: Memphis & C. R. Co. v. Martin, 117 Ala. 367, 23 South. 231.

§ 4345. Presumption Mutual as to the Exercise of Ordinary Care.

"A street railway crossing is a place of danger, and every one who uses it is presumed to know such fact, and is required to use the senses with which he is invested by nature to avoid accident. While the plaintiff, in the absence of knowledge to the contrary, had a right to assume that the defendant would exercise ordinary care, the defendant also, in the absence of knowledge to the contrary, had a right to presume that the plaintiff would exercise ordinary care."—Approved: Doherty v. Des Moines City Ry. Co., 144 Iowa, 26, 121 N. W. 690.

§ 4346. And Obligation to do so Mutual and Reciprocal.

"The court instructs the jury that railroad companies, under their charters, have the same right to use that portion of the public highways over which their track passes as other people have to use the same. Their rights and those of the people as to the use of the highway at such points of intersection are mutual, coextensive, and reciprocal; and in the exercise of such rights all parties will be held to a due regard for the safety of others, and to the use of every reasonable effort to avoid injury to others."—Approved: Ind. & St. L. R. Co. v. Stables, 62 Ill. 313.

§ 4347. Burden on Plaintiff to Prove Every Condition Necessary for Recovery.

"To recover damages from the defendant for the killing of W. H. S— by the defendant's train, all the following matters must appear from the evidence: First, that the defendant was negligent in some one or more of the particulars complained of in plaintiff's petition; second, that such negligence on defendant's part caused the death of W. H. S—; third, that W. H. S— was not guilty of negligence on his part that contributed to the injury; fourth, that the estate of W. H. S— suffered injury by reason of his death. The burden rests with the plaintiff to show all of said matters by the greater weight or preponderance of evidence."—Approved: Pratt v. Chicago, R. I. & P. Ry. Co., 107 Iowa, 287, 77 N. W. 1064.

§ 4348: Track Along Public Street—Not Presumed that Way is Clear.

"The court instructs the jury that the place where the accident happened was a public street, and that defendant did not have an exclusive right for the purpose of making up its trains or switching its cars, and that the public, including plaintiff's child, had the same right to use the highway as the defendant had, and that defendant's servants in the movement of its cars upon said street had no right to assume that the way was clear, but were bound to exercise ordinary care before moving such cars to ascertain and discover whether any person upon the street might be injured by such movement, but was not required to guard against persons under or between its cars."—Approved: Jaffi v. Missouri Pac. Ry. Co., 205 Mo. 450, 103 S. W. 1026.

§ 4349. Railroad must not Run at Dangerous Speed in Incorporated Town.

"The general statutes of our state do not regulate the rate of speed that a railroad company shall run its cars; yet the failure of the law to regulate the rate of speed does not authorize a railroad company to run its trains at a wanton, reckless, and dangerous rate of speed over a public crossing in an incorporated town or village, a point where the people cross and recross the public crossing in numbers and frequently."—Approved: Memphis & C. R. Co. v. Martin, 117 Ala. 367, 23 South. 231.

§ 4350. If Crossing Known to be Unsafe, Question of Negligence for Jury.

"But if you find from the evidence that the said crossing was in an unsafe condition, as alleged and claimed by plaintiff's petition, and you further find that its unsafe condition was known to the plaintiff or his wife at the time he attempted to drive over the same, and if you further believe that a person of ordinary prudence, situated as plaintiff was, and with such knowledge as he or his wife had, would not have attempted to drive over said crossing, then you will find for the defendant."—Approved: St. Louis Southwestern Ry. Co. v. Hawkins, 49 Tex. Civ. App. 545, 108 S. W. 736.

§ 4351. A Railroad Track is Itself Notice of Danger.

"While it is the duty of the defendant receivers to give notice of the approach of its trains to a crossing, by the ringing of its bell, the blowing of the whistle, or otherwise, and that its failure to give such notice is negligence, that there are also reciprocal duties imposed on the plaintiff's intestate; that a traveler cannot go upon the track, even at a public crossing, without exercising ordinary care and caution; that the track itself is a proclamation of danger, and that it is the duty of anyone going upon it to use his eyes and ears. He should both look in either direction from which the train could come and listen to ascertain if it is approaching, and, if his faculties warn him of the near approach of a train it is his duty to keep off the track; and that if a traveler fails to so look and listen, as duty requires of him, and attempts to cross the track in front of a moving train, and is caught before he

can get across, and killed, his own act, and his own negligence so contributed to the injury that a recovery therefor cannot be sustained, and the jury must find for the defendant."—Approved: Kimball v. Friend's Adm'x, 95 Va. 125, 27 S. E. 901.

§ 4352. One Intending to Cross Must Use Care in Approaching Track.

(a) "It was the duty of plaintiff, Phillip B. R—, in approaching the railroad crossing at Twelfth and Washington streets, in the proof described, to use such care as an ordinarily prudent person would exercise under the same or similar circumstances to discover the approach of trains and to keep out of the way."—Approved: Louisville & N. R. Co. v. Roth, 130 Ky. 759, 114 S. W. 264.

(b) "The court instructs the jury that if they believe from the evidence that at the time and place plaintiff claims to have been injured he failed to exercise ordinary care in crossing the railroad track, and but for such failure upon his part the injury would not have occurred, then the law is for the defendant, and you should so find, although you may believe from the evidence that the persons in charge of the train as well as the flagman were, each or both, guilty of negligence."—Approved: Cross v. Illinois Cent. R. Co. (Ky.), 110 S. W. 290 (not reported in state reports).

(c) "The court instructs the jury that every person is bound to know that a railroad crossing is a dangerous place, and he is guilty of negligence unless he approaches it as if it were dangerous. And if the jury believe, from the evidence, that the safety gates at the crossing in question were down and the deceased went upon the tracks underneath the gates, and in so doing failed to exercise due care for his personal safety, and in consequence thereof was struck by an engine and killed, then his administratrix cannot recover in this action, and your verdict should find the defendant not guilty."—Approved: Carlin v. Grand Trunk Western Ry. Co., 243 Ill. 64, 90 N. E. 201.

§ 4353. Attempting to Cross in Covered Wagon.

"The court instructs the jury that it is the duty of a person approaching a railway crossing to look along the line of the railroad to see if a train is coming, or to listen, or to use any other reasonable means of informing himself of an approaching train, before going on such crossing; and, if the jury believe, from the evidence in this case, that the deceased, approached the crossing in question in this case in a covered milk wagon which had the sides thereof closed, and that he did not look or listen for the approaching train, and that if he had looked or listened for the approach of said train he might have seen or heard said train before driving or going on said crossing, and that in so doing he failed to exercise ordinary care to avoid the injury which he received, then the plaintiff cannot recover, even though the jury may further believe from the evidence that the defendant's servants or employees failed to ring the bell or sound the whistle as required by law, and were running said train at a greater rate of speed than ten miles an hour."—Approved: Terre H. & I. R. Co. v. Voelker, 129 Ill. 540, 22 N. E. 20.

§ 4354. Failure to Stop, Look and Listen Absolute Negligence.

(a) "If you find and believe from the evidence that the plaintiff herein, as he approached the scene of the accident complained of herein, failed to look and listen for the approach of defendant's car, and that such failure on his part contributed to the accident complained of herein, and that a person of ordinary prudence would not have so acted under the same or similar circumstances, then you are instructed that this would constitute contributory negligence on the part of the plaintiff."—Approved: Dallas Consol. Electric St. Ry. Co. v. English, 42 Tex. Civ. App. 393, 93 S. W. 1096.

(b) "As the plaintiff drove along said avenue, approaching said crossing, it was his duty to realize and have in mind that he was approaching a place of danger, to be on the alert and use his sense of sight, looking both ways, and use his sense of hearing, and, if necessary, to stop, look both ways, and listen to ascertain for himself whether or not a train was approaching, and whether or not he could safely cross the tracks. If his view was obstructed so that he could not see to the east, then it was his duty to all the more carefully use his sense of hearing to look out and listen for any and all warnings that would notify him of the approaching train, and for the purpose of determining whether he could cross the tracks. The law says it was his duty to use care and caution in proportion to the known danger. The law required him to use that degree of care and caution that a person similar to him, of ordinary prudence, would be presumed to use under similar circumstances. If he failed to do this, and that failure contributed in the slightest degree to the injury complained of, then he cannot recover in this action, no matter how careless or negligent the defendant may have been."—Approved: Cleveland, C., C. & St. L. Ry. Co. v. Wuest, 41 Ind. App. 210, 83 N. E. 620.

(c) "The jury are instructed that it is the duty of any one before crossing, or attempting to cross, a railway track to exercise due care, which is ordinarily the duty to stop and look and listen for any approaching train, and the same duty rests upon any one in crossing a railroad track where a car or engine is being properly switched back and forth upon said track at a crossing, and if the jury believe from a preponderance of the evidence that the plaintiff saw the car or engine of defendant being switched back and forth upon its track at a crossing, and negligently attempted to cross said track or tracks of defendant company upon which said car or engine was being switched back and forth, then such attempt to cross said track or tracks was contributory negligence on the part of the plaintiff, and at his own peril, and your verdict must be for the defendant."—Approved: Louisiana & A. Ry. Co. v. Ratcliffe, 88 Ark. 524, 115 S. W. 396.

(d) "Contributory negligence is the want of that care which the law requires of a plaintiff under the circumstances, and which causes or contributes to the injury sued for. Now, the question for you is, what care for his own safety did the law require of the plaintiff? On that subject I tell you that the law required of him that he should,

before attempting to cross the railroad track, listen and look both ways, up and down the track, for approaching trains, and to continue to so look and listen until the crossing was passed, and if he failed to do so, and such failure caused or contributed to his injury, he cannot recover. By the requirement of looking up and down the track for all approaching trains, it is intended that the traveler, as far as an ordinarily prudent and careful man can do, shall have constantly under his eye the whole track, as far as his powers of vision will permit, in order that he may avoid going upon the track at a time when there is danger of his being injured; and the law required the plaintiff in this case to do that, as well as to constantly listen for trains, and, if the plaintiff from the proof did not do so, then he cannot recover; otherwise, he can."—Approved: St. Louis, I. M. & S. Ry. Co. v. Dilliard, 78 Ark. 520, 94 S. W. 617.

(e) "You are also instructed that the plaintiffs are not entitled to recover in this case simply because there was an accident which resulted in the death of Mr. P—, for whom the plaintiffs claim to act as administrators. The fact that Mr. P— was killed at this crossing is of itself no evidence whatever of any negligence on the part of defendant, or of any liability on its part to respond in damages. While it is true that, simply because an accident had occurred, negligence is not to be presumed, still, in determining the question of negligence, the fact that an accident has occurred may and should be taken into consideration, in connection with all the other facts and circumstances in the case, for the purpose of determining whether, in fact, there was negligence; and if you find from the evidence that when Mr. P— and his companion, Mr. W—, had reached a point in the highway which was somewhere in the neighborhood of fifty feet or six or seven rods from the track, as estimated by various witnesses, he stopped his horse and looked and listened for the train, then started up again, and, as he started, Mr. W— looked out of the glass at the back of the buggy, where he could only see a few rods of the track, and the parties then passed onto the track, without any further looking in the direction of the approaching train, or any further attempt to find whether there was an approaching train, then such acts constituted contributory negligence, and plaintiffs could not recover."—Approved: Proper v. Lake Shore & M. S. Ry. Co., 136 Mich. 352, 99 N. W. 283.

(f) "The duty of a traveler upon a highway at a railroad crossing to look and listen, and to use care for the purpose of discovering the approach of the train, before undertaking to pass over the railroad, exists upon every occasion of his approaching such crossing. He is not relieved or excused from exercising the care required of him for the reason that he approaches such crossings at the time when no regular train is due. The railroad track itself is an admonition of danger, and the railroad company has a right to run its trains over the track at regular periods, or as special or extra trains, or in event of their being behind time, the same as upon the regular schedule, and the obligation to look and listen is one from which the traveler

is at no time excused upon approaching and proposing to cross a railroad at grade."—Approved: Holland v. Oregon Short Line R. Co., 26 Utah, 209, 72 Pac. 940.

§ 4355. Plaintiff Misled by Conduct of Defendant's Servants Switching Cars.

"The court instructs the jury that, if you should find from a preponderance of evidence that the plaintiff was in a wagon upon the streets or highways at the crossing of defendant's railway track in question, and that defendant's switch engine, which had been blocking the crossing, moved down the track and onto another track, the switch of which had been thrown for its entry thereon, and which was seen by the plaintiff, and while said engine was distant about 60 feet, and to plaintiff it appeared, from the conduct of the engine crew and other surrounding facts and circumstances, that the engine would not immediately return, and that he would have time to cross, he had a right to go upon said crossing, unless you should further believe that plaintiff in so acting upon such appearances was exposing himself to a danger that was obvious, such that a person of ordinary intelligence and prudence would not have acted upon in similar circumstances."—Approved: Louisiana & A. Ry. Co. v. Ratcliffe, 88 Ark. 524, 115 S. W. 396.

§ 4356. He may give Greater Attention in the Direction Train is More Likely to Come.

"You are instructed that while it is the duty of a person about to cross a railway track to look both up and down the track, and listen for trains from each direction, yet if it appears to him before crossing, as a reasonably prudent person, under the surrounding circumstances, that greater danger is to be apprehended from one end of the track than the other, he may give more attention to that end of the track from which he as a reasonably prudent person under all the circumstances apprehends the greater danger."—Approved: St. Louis, I. M. & S. Ry. Co. v. Tomlinson, 78 Ark. 251, 94 S. W. 613.

§ 4357. Failure to Look and Listen as Negligence a Question for the Jury.

(a) "If you find that the plaintiff, before going on the track of the defendant, or while on said track, failed to look and listen for approaching trains, and if you believe such failure to look and listen for trains was negligence on the part of the plaintiff, or if you believe the plaintiff was guilty of negligence in going or being upon the track at the time and place he was hurt, and if you believe that such negligence on the part of the plaintiff caused or contributed proximately to his injury, you will find for the defendant, even though you should find that the agent and employees of the defendant in charge of the train were themselves guilty of negligence, and in determining whether or not the plaintiff was guilty of negligence you should consider his age, intelligence, experience, if any, and the knowledge or information, if any, he had of the danger of being hurt or injured by being

on the track, together with all the other facts and circumstances in evidence, if any, that throw light on the question."—Approved: Ft. Worth & D. C. Ry. Co. v. Poteet, 53 Tex. Civ. App. 44, 115 S. W. 883.

(b) "It was the plaintiff's duty, in approaching and being about to cross the railroad, to exercise ordinary care and caution, not only to know of the approach of trains, but also to stop, if there was one, in time to avoid injury. Care necessarily imports the use of the senses, and the adoption of means and expedients adapted to the end in view. If you find from the evidence that at the time of the alleged injury the ground was frozen, and the plaintiff's wagon, while in motion, more or less noisy, and that he had not a clear, open view of the railroad for a sufficient distance to make the crossing reasonably safe for him, the rule, as a matter of law, required him to stop, and look and listen for approaching trains, and that, although no signals were given by the train men, if he failed to do so, and he was in consequence injured, or if, by doing so, he could have prevented his injury, he cannot recover, and your verdict should be for the defendant.

"But while the law has determined that, under the more frequent circumstances and conditions which attend like transactions, persons of common and ordinary prudence usually adopt such means and expedients for the ascertainment of the facts sought, it has not determined that they must do so always under all conditions and circumstances. And if you shall find from the evidence that the crossing where plaintiff alleges he was injured was in the country, where the track was single, away from depots and switches; that it was one which, under their instructions, imposed the duty of signaling upon approaching it; that at the crossing the highway approached through a cut four to six rods long; that upon coming into this cut the plaintiff found there N—, waiting to cross, and the regular passenger train just going by at from 30 to 35 miles per hour; that the usual distance between trains following each other on the defendant's road at that time was not less than one mile; that at the point of time when the plaintiff came up to N—'s wagon and was about to stop, or had but barely done so, N—, immediately after the passenger train drove over the crossing in safety; that plaintiff's attention was upon the movements of N— and the passenger train, and that from all these circumstances and facts his belief was that no other train was approaching; that thereupon he was following N— over the crossing in the same time and distance from him and behind the passenger train that an ordinarily prudent man would have done who had stopped and been waiting with N—; and that the approaching wild train did not signal for the crossing in due time, and the plaintiff had no knowledge or suspicion of its approach,—he was not bound to have stopped, and looked and listened for it, and his failure so to do, if he did fail, will not defeat his recovery."—Approved: Funston v. Chicago, R. I. & P. R. Co., 61 Iowa, 452, 16 N. W. 518.

§ 4358. Contributory Negligence in going upon Track for the Jury.

"You are instructed that the plaintiff has alleged in her petition, and has given evidence tending to show, that on the morning of the

accident in question, and just prior to its occurrence, she was walking north on the sidewalk on the west side of Thirteenth street, proceeding in the direction of the railroad in question; that at a point on said sidewalk from 35 to 37 feet south of the center of defendant's track on said crossing she looked and listened for approaching trains on defendant's road, but neither saw nor heard any. You are likewise instructed that the undisputed evidence, as well as the admissions of counsel for both parties in open court, establish conclusively the following facts: (a) That at the point last above stated where plaintiff claimed she looked and listened for approaching trains, the same being from 35 to 37 feet south of the center of defendant's track, plaintiff had a clear, unobstructed view of defendant's track to the southwestward for a distance of 400 feet. (b) That the clear, unobstructed view of defendant's track in the direction named increased in proportion as the plaintiff proceeded northward, and that at a point 3 or 4 feet south of defendant's track, as it entered upon said crossing, there was a clear and unobstructed view of defendant's track to the southwestward 600 feet. (c) That plaintiff did not look again for approaching trains after the occasion above referred to (at a point from 35 to 37 feet south of defendant's track), but proceeded north, until she had stepped upon, or was about to step upon, defendant's track at said crossing, when she collided with, or was struck by, defendant's engine attached to a freight train coming from the southwestward, and was injured. And it is now for you to say, under these admitted facts and all the other evidence in the case and these instructions, whether or not plaintiff was guilty of contributory negligence as the same has been above defined to you. To aid you in determining this question, you are also at liberty to take into consideration the situation of the crossing, the general surroundings and conditions in the immediate vicinity of the same, and southwestward along and adjacent to defendant's track, as disclosed by the evidence, the manner in and the speed with which the trains of defendant were accustomed to being run or operated at and near that point, if such appears from the evidence, and all other attendant facts and circumstances bearing on the question, as shown by the evidence, including, in your consideration, the knowledge or lack of knowledge of said plaintiff as to these matters. And in this connection you are further instructed that, on the one hand, plaintiff was bound to know that a railroad crossing is a dangerous place, and that she should approach it accordingly, having in view such dangers as a person of ordinary prudence would have reason to apprehend; and that, on the other hand, she was not required to anticipate, in view of the public character of the crossing in question, that an approaching train of the defendant would proceed at an unusual or dangerous rate of speed at that point, and that it would give such warning of its approach by sounding of whistle or ringing of bell as the law required. Having, then, in view all of the foregoing conditions and the evidence, probably a fair test to the solution of the point in question is: Estimating the distance at which the track seemed to be clear when plaintiff claimed to have observed the

same as above stated, the time it would take a train to travel that distance, proceeding at a reasonable rate of speed, considering the nature of the locality, and the time it would require the plaintiff to cross the track in safety, proceeding northward from the point from which she observed defendant's track as above stated, would a person of ordinary care and prudence, under the same circumstance, have considered it safe to cross, without again looking for approaching trains? In other words, was her act in this respect, in view of all of the conditions, facts, and circumstances in the case, as shown by the evidence, such as ordinarily would have been taken by a prudent person? If it was, then it might fairly be said that the plaintiff was not guilty of contributory negligence; but if you should find, from a preponderance of the evidence, that it was not, and that such act directly contributed to the accident in question, then it might fairly be said that plaintiff was guilty of contributory negligence, and, in that event, she cannot recover in this action."—Approved: Wallenburg v. Missouri Pac. Ry. Co., 86 Neb. 642, 126 N. W. 289.

§ 4359. Failure to Give Signals does not Excuse Failure to Look and Listen.

(a) "The jury are instructed that the sole purpose of signals at crossings or on trains, such as the ringing of bells or the sounding of whistles or the presence of lights or of the presence of gates or of flagman or of the stationing of employees at any particular portion of the track or train, so far as the same relates to persons approaching a railroad crossing for the purpose of crossing the same, is to warn such person of the presence of a railroad track and of an approaching train. And the jury are instructed in this connection that if they believe from the evidence that, even if defendant was negligent in failing to provide any or all of the foregoing modes of warning at any of the times mentioned in the complaint herein to Catherine M— while she was approaching defendant's track on Scramento Street for the purpose of crossing the same, still if you further believe from the evidence that at any time while Catherine M— was on Channel street approaching said track, and while she was still in a position of safety, she could by listening have heard defendant's approaching train, or by looking have seen it, and without so doing attempted to cross defendant's track and was injured, then your verdict must be for the defendant."—Approved: Matteson v. Southern Pac. Co., 6 Cal. App. 318, 92 Pac. 101.

(b) "If the decedent, J. R. U—, was approaching the crossing in question, it was his duty to exercise such care as persons of ordinary prudence usually exercise under similar circumstances to avoid being struck by any train that might be approaching; and the jury believe from the evidence that he either knew, or, by the exercise of reasonable and ordinary care, could have known of the train's approach, and notwithstanding this went upon the crossing, and was in consequence thereof struck by the train, and that but for such conduct the accident would not have occurred, he was guilty of contributory neglect, and the defendant is not liable, even if the jury should also be-

lieve that the persons in charge of the train failed to give sufficient warning of its approach."—Approved: Louisville & N. R. Co. v. Ueltschi's Ex'rs (Ky.), 97 S. W. 14 (not reported in state reports).

(c) "Even if the jury should believe from the evidence that the engine bell was not rung nor the whistle sounded at a distance of at least 50 rods from the crossing, nor such bell rung nor whistle sounded continuously or alternately until the engine reached the crossing, yet if such warning of the train's approach to the crossing was given that the decedent, in the exercise of ordinary care, could have known of its coming, then the defendant is not liable, and the jury should so find."—Approved: Louisville & N. R. Co. v. Ueltschi's Ex'rs (Ky.), 97 S. W. 14 (not reported in state reports).

(d) "You are charged that it was the duty of the deceased, as he approached the said crossing just before the time of the accident which resulted in his death, to both listen for and look in the direction from which the train approached, to ascertain if any train was approaching, and it was his duty to continue to so listen and look until he had crossed said railroad. The failure of the company, if it did, to ring the bell, sound its whistle, or give any alarm of its approach, did not relieve the deceased from the obligations to perform the said duty of listening and looking, and if the said deceased, as he approached said crossing, by the use of his senses of sight and hearing in looking and listening for the approach of the said train, could have discovered that it was approaching, and have avoided said collision, then the plaintiffs cannot recover in this case.

"If, without so looking and listening for an approaching train, a person attempts to cross a railroad track, and is injured by a passing train, his own careless conduct is deemed, in law, to have assisted in bringing about the injury, and he cannot complain of the other party concerned in the transaction, even though such other party may have also been negligent."—Approved: Olson v. Oregon Short Line R. Co., 24 Utah, 460, 68 Pac. 148.

§ 4360. Assumption as to Ordinance Requiring Bell to be Rung.

"In the absence of some warning or evidence to the contrary, the plaintiff had the right to assume that defendant would obey said ordinance, and cause the bell attached to said locomotive to be rung to give warning of the movement of its train. Whether or not the bell was so rung in compliance with said ordinance is a question of fact for you to determine from all the facts and circumstances shown by the evidence. If you find from the evidence that the bell was not rung, then I instruct you that, in determining the question, whether the plaintiff was or was not guilty of contributory negligence, you may, in connection with all other facts and circumstances shown by the evidence, consider that plaintiff had a right to assume that, if said train should be moved backward, some warning of such movement would be given him by the ringing of the bell, as required by said ordinance."—Approved: P. C. C. & St. L. Ry. Co. v. McNeil, 34 Ind. App. 310, 69 N. E. 471.

§ 4361. Plaintiff's Negligence Causing Injury Precludes Recovery.

(a) "And upon the part of the deceased, Jacob N—, it is competent to consider his opportunities for discovering and avoiding the dangers to which he might be exposed, his conduct in the matter, precautions or lack of precaution as to whether he looked when passing upon the defendant's tracks or listened in order to apprise himself of the approaching danger and avoid it, and, in short, all the facts and circumstances shown in the testimony bearing upon the conduct of the plaintiff and defendant, and if, upon a consideration of the whole testimony, you find that the injury which caused the death of Jacob N— was the proximate result of negligence of the defendant railroad company or defendant's employees, and you do not find that the deceased, Jacob N—, by his failure to do that which an ordinarily prudent man should have done under the circumstances to protect himself—that is, by his negligence contributed to the injury—then you should find for the plaintiff. On the other hand, even if you find the defendants were negligent, yet if you further find that the deceased, Jacob N—, by his negligence contributed to the injury that caused his death—that is, that by the exercise of ordinary care and prudence he would have avoided injury—then the plaintiff cannot recover, and you should find for all the defendants."—Approved: Nilson v. Chicago, B. & Q. R. Co., 84 Neb. 595, 121 N. W. 1128.

(b) "The court instructs the jury that the plaintiff had no right to rely exclusively upon the operatives of the gates or the railroad train in looking out for his safety and giving him notice of danger, but that the plaintiff was required to use ordinary care for his own safety; and, if he did rely exclusively upon the operatives of the gates or of the railroad train, without using ordinary care for his own safety, then he was guilty of contributory negligence, and your verdict must be for the defendants."—Approved: Louisville & N. R. Co. v. Roth, 130 Ky. 759, 114 S. W. 264.

(c) "If the jury shall believe that the defendant, the Louisville & Nashville Railroad Company, was negligent in the operation of its train at the time when and the place where plaintiff was injured, and they shall also believe that the plaintiff himself was negligent in the manner in which he approached and drove upon said railroad tracks, and that the collision and subsequent injury to plaintiff would not have happened to him except for such negligence on his part, if he was negligent, then the jury shall find for the defendant, the Louisville & Nashville Railroad Company."—Approved: Louisville & N. R. Co. v. Roth, 130 Ky. 759, 114 S. W. 264.

§ 4362. Hearing Train and Assuming Risk in Crossing.

"If the jury believe from the evidence that Mrs. M— approached the railroad crossing, wishing to cross, and that she saw or heard the train approaching, and that she for herself measured the distance and time it would take to cross, and acting upon her own judgment, undertook to cross, then I charge you that she assumed the risk, and her administrator cannot hold the railroad company responsible, unless

Mrs. M—'s intention was apparent to the employese of defendant operating the train, and after her perilous intention and conduct became apparent, by the exercise of due care and diligence, the injury could have been avoided."—Approved: Memphis & C. R. Co. v. Martin, 117 Ala. 367, 23 South. 231.

§ 4363. Warning to be Given Where one is Seen About to Place Himself in Peril.

"And if the jury believe from the evidence that Freeborn G. H— was traveling on said Warren street and approaching defendant's track where the same crosses said street, and that he was at the time of and just preceding the injury in the exercise of such care and caution as a person of his age, discretion, and experience would naturally and ordinarily use under similar circumstances, and that defendant's said engine and train approached said Freeborn G. H— at said crossing along its said track, and he was, or was about to place himself, in danger of being struck by said engine and train and injured, and that defendant's said engineer in charge of said train saw, or by the exercise of ordinary care could have seen his said danger, or that he was about to place himself in a position of danger, in time by the exercise of ordinary care to have sounded the whistle on said engine, or to have stopped said train, or checked the speed of said train, and prevented injury to said Freeborn G. H—, and that defendant's said engineer in charge of said train failed to exercise such ordinary care and failed to sound said whistle, or failed to stop said train, or failed to check the speed of said train, and that by reason of such failure to exercise such ordinary care said whistle was not sounded, or said train was not stopped, or the speed of said train was not checked, and by reason thereof the said Freeborn G. H—was struck by said engine and train and killed, then you must find for the plaintiffs on the second count in their petition."—Approved: Holmes v. Missouri Pac. Ry. Co., 207 Mo. 149, 105 S. W. 624.

§ 4364. Sounding Whistle Only Within Statutory Distance of Crossing.

"If the jury find from the evidence that the defendant's servants in charge of the train that killed said A. B— gave signals by whistling once, and no more, at such distance, if it exceeded 100 rods from G. street, that said A. B— would naturally think that he could safely cross before the train arrived at G. street if he heard such a whistle, and that he did hear it, and should further find that no bell was rung, and that said train was going at a greater rate of speed than men of ordinary care and prudence in like employment would have run it under like circumstances and conditions, and that said A. B—, as a reasonable man, was thereby deceived and led to believe that he could cross the tracks of said defendant's railroad in safety, and that if, attempting under these circumstances to cross said tracks, without fault or negligence on his part, he was, on account of carelessness upon the part of the servants of said defendant in operating said train at an unusual and dangerous rate of speed, struck and killed, then plaintiff would be entitled to recover, if such carelessness was the sole cause

of his injuries."—Approved: Schweinfurth v. C. C. C. & St. L. Ry. Co., 60 Ohio St. 215, 54 N. E. 89.

§ 4365. Flying or Running Switch as Requiring Additional Care.

"If the jury believe from the evidence that the car which struck and injured Freda L— was being run at the time of the injury on a running or flying switch, and that such manner of handling said car was more dangerous to and more likely to injure persons who might be on the track or attempting to cross the track than the ordinary and usual manner of switching cars, as shown by the evidence, then the defendant's servants were bound to use more than ordinary care and caution in making such switch, and, if you believe from the evidence that the injury to Freda L— was the result of any want of care and caution on the part of the defendant's servants in making such running or flying switch, you should find for the plaintiff."—Approved: Lange v. Missouri Pac. Ry. Co., 208 Mo. 458, 106 S. W. 660.

§ 4366. Private Crossing Built by Railroad to be Kept in Passable Condition.

(a) "If the jury believe from the evidence that the defendant built a fence along its track and across a road not a highway; that defendant erected, or caused steps to be erected at the crossing of the fence and road, and by its continued course of conduct invited the public to cross its steps, then they are instructed that it was the duty of the defendant to erect and maintain the steps in a passable condition, and if it failed to do this, and plaintiff was injured by reason of such failure, and while she was in the exercise of due caution on her part, then you will find in her favor."—Approved: St. Louis, I. M. & S. Ry. Co. v. Dooley, 77 Ark. 561, 92 S. W. 789.

(b) "If the jury believe from the evidence that the defendant built a fence along the side of its tracks, and that their said fence crossed a road not a highway; the defendant built and maintained steps over said fence, and permitted the public to use the same in crossing said fence then they are instructed that the building of said steps was an implied invitation to the public to use the same as a highway, and in that event it became the duty of the defendant to use reasonable skill and diligence in building and maintaining the same, and if you further find that the defendant failed to use such skill and diligence in the building and maintaining, and that by reason of such failure, and without fault on her part, plaintiff was, while passing over the said steps thrown down and injured, you will find in her favor."—Approved: St. Louis, I. M. & S. Ry. Co. v. Dooley, 77 Ark. 561, 92 S. W. 789.

§ 4367. Generally Required—Not Required to Give Signals when Approaching Private Crossing.

"The jury are further instructed that the statutes of this State do not regulate or prescribe the speed at which trains may be run, nor do they require any whistle to be sounded or bell rung on trains approaching private crossings, and within the enclosed right of way of the railroad company. While it is true that even at such a place cir-

cumstances may exist which would render it the duty of the engineer or person in charge of such train to ring the bell or sound the whistle or stop the train, yet such duty would only arise when such facts and circumstances are averred and proven as would make it a duty to do so, and to show that a failure to do so would be negligence; and in this case, unless you believe, from the evidence, that such facts and circumstances are proven, there was no duty to make any signal or stop the train."—Approved: Chicago & A. R. R. Co. v. Sanders, 154 Ill. 531, aff'g 55 Ill. App. 87, 39 N. E. 481.

§ 4368. But a Crossing May Become Public After General use for a Series of Years.

"The jury are instructed that it is admitted that plaintiff is the widow of E—, deceased, and that suit was begun within six months after his death; and if the jury believe from the evidence that said E— was, on or about the ——— day of ————, 19—, struck by a locomotive engine then being run on defendant's railroad by its servants and employes, and that he was thereby so injured that his death resulted therefrom, and that at the place where said E— was struck many people were at that time, and had been for several years prior thereto, accustomed to use said track as a footpath to and from points in the southern part of the city of B. and beyond, and that said track had been used in this way continuously for many years, and that defendant's servants and agents in charge of said train could reasonably have expected to find persons on said track at that place, on account of the frequent and continuous use thereof by footmen, and that no signal or warning was given by defendant's servants and agents in charge of its engine as it approached the deceased, and no efforts were made by them to prevent said injury, and that said E— was not conscious that said train was coming towards him, and if the jury shall further find that defendant's servants and agents could, by the exercise of reasonable care and diligence, have seen said E— upon said track a sufficient distance ahead of said train, so that by giving such signals or warnings, or taking such other action as a reasonably prudent man would have done under the circumstances, said accident could have been avoided, but that defendant's agents and servants in charge of said train through their carelessness and negligence either failed to observe said E— upon said track, or failed to give proper signals or warnings, or to take such other action as a reasonably prudent man would have done to avoid said injury, then the jury should find the issues for the plaintiff, notwithstanding they may believe from the evidence that said E— was on said railroad track without legal right, and was himself guilty of negligence in being there."—Approved: Eppstein v. Mo. Pac. Ry. Co., 197 Mo. 720, 94 S. W. 967.

§ 4369. Series of Instructions in a Crossing Case.

"It was the duty of the defendant's agents in charge of its engine and cars on the occasion in question to give reasonable warning of the approach of the train by blowing the whistle or ringing the bell, and to keep a reasonable lookout in front of the train as it was moved. It was the duty of the plaintiff to exercise reasonable care to watch for

the approaching train and keep out of its way. If you believe from the evidence that a reasonable warning of the approach of the train was not given or a reasonable lookout was not kept, and that by reason of this plaintiff was struck and injured by one of defendant's cars, while exercising ordinary care for his own safety, you will find for the plaintiff. Unless you so believe, you will find for the defendant.

"Although you may believe from the evidence that defendant's agents in charge of said train failed to give reasonable warning of its approach and failed to keep a reasonable lookout, yet if you believe from the evidence that the plaintiff himself failed to exercise ordinary care to discover the approach of the train and to keep out of its way, and that such failure on his part, if any, so contributed to his injury that but for said failure his injury, if any, would not have been received, you will find for defendant.

"If you believe from the evidence that a reasonable lookout was kept, and that reasonable warning of the approach of the train was given, and that plaintiff went upon the track so close to the approaching train that the injury to him could not be avoided by the exercise of ordinary care upon the part of those in charge of the train after they perceived his danger, or could have perceived it by the exercise of ordinary care, you will find for the defendant."—Approved: West Ky. Coal Co. v. Davis (Ky.), 128 S. W. 1074. These instructions were directed to be given upon the retrial to be had, meaning, of course, if the facts were the same. See also Cumberland Tel. & Tel. Co. v. Maxberry, 134 Ky. 642, where similar direction was given.

B. Injuries to Trespassers and Licensees.

§ 4370. Right to Expect Clear Track.
4371. Nevertheless there is the Duty to Keep a Look Out.
4372. Footway Habitually used by the Public.
4373. Private Crossing used by Pedestrians for Years.
4374. But Track is Generally not to be Used as Foot Path.
4375. Persons Walking on Track Should Watch for Trains.
4376. Temporary Passway for Public on Track to be Kept in Good Condition.
4377. Failure to Fence Track—Injury to Child.
4378. Injury to Stockmen at Stockyards.
4379. License to Pass Over Track is not to Pass Under Cars Standing Thereon.
4380. Persons Permitted to use Track Considerable Time for Certain Purpose—Licensees.
4381. Backing Train under Shed Without Light on End of Leading Car.
4382. Person at Station to Greet Friend on Arrival.
4383. Persons Unloading Cars Placed upon Side Track.
4384. Persons Lawfully Resorting to, or Being on Railroad Platform.

4385. Negligent Throwing of Freight from Car Against Person on Platform.
4386. Trespasser—Reckless Disregard of his Safety.
4387. Pushing Trespasser from Train Going at High Rate of Speed.
4388. Compelling Trespasser to Leave Train While in Rapid Motion.

§ 4370. Right to Expect Clear Track.

"The court instructs the jury that as to the plaintiff, Opal H—, the engineer in charge of defendant's engine that backed the cars over said plaintiff's foot was not required to be on the lookout for stop signals, and was not required to stop his engine until he actually saw said signals; and, if you believe and find from the evidence that as soon as said engineer saw said stop signals he did all he could to stop his engine and cars, and stopped them, your verdict must be for the defendant."—Approved: Hufft v. St. Louis & San Francisco R. Co., 222 Mo. 286, 121 S. W. 120.

§ 4371. Nevertheless There is the Duty to Keep a Lookout.

(a) "The defendant company was entitled to its railway track for its trains to run upon, and its servants and agents in charge of running the train had the right to act upon the presumption that the right of way for trains would be respected by persons thereon. This, however, would not excuse the running upon or over persons upon the track. It was the duty of the servants and agents of the defendant, running trains upon its track, at all times to keep a lookout; and, if persons were seen upon the track, and in danger, to check up, halt, or stop the train, if it could be done by the exercise of ordinary care, and by the use of ordinary means, to avoid inflicting injury upon such persons."—Approved: Parham v. Ft. Worth & D. C. Ry. Co., 51 Tex. Civ. App. 511, 113 S. W. 154.

(b) "The jury are instructed that it was the duty of the employes in charge of said engine to keep a constant lookout for persons on the track, and, while it was not required that every employe upon said engine shall be constantly upon the lookout, it is sufficient that the lookout be kept by one person, unless by reason of a curving track or other obstruction a careful lookout cannot be kept by one person only. And, if you find from all the evidence that such constant lookout was not kept by either the fireman or conductor or engineer on said engine at the time and place of the injury complained of, and that, had such lookout been kept, said child could have been seen in time to have avoided the alleged injury by the use of ordinary care, and that by reason of such neglect to keep such lookout, if any, the said child Viola May N— was injured, your verdict will be for the plaintiff."—Approved: St. Louis I. M. & S. Ry. Co. v. Flinn, 88 Ark. 484, 115 S. W. 142.

§ 4372. Footway Habitually Used by the Public.

(a) "The court instructs the jury that if they believe from the evidence that the track of the defendant in the town of Barnsley at and about the pathway shown by the testimony frequently and habitually used by the public as a footway, with the knowledge and ac-

quiescence of the defendant, was a place where the presence of persons on the track was to be anticipated, then it was the duty of the defendant's agents, when moving cars on that part of the track, to keep a lookout for persons using it as a footway and to give reasonable signals and warnings of the movements of its cars when approaching said place, and to run its cars and trains at such speed as ordinary care for the safety of such persons required; and if the jury believe from the evidence that the defendant's agents in charge of its train mentioned by the witnesses negligently failed to perform any of these duties in the movement of said train of cars, and that by reason thereof the plaintiff's intestate, Mary McN—, while so upon the track at said place, was run upon and killed by said train and that she was at the time using ordinary care for her own safety the law is for the plaintiff, and the jury will so find. If they find for the plaintiff, they will award such a sum in damages as they believe from the evidence will reasonably compensate the estate of Mary McN— for the destruction of her power to earn money."—Louisville & N. R. Co. v. McNary's Adm'r, 128 Ky. 408, 108 S. W. 898.

(b) "It is the undisputed evidence in this case that, at and before the time complained of by plaintiff, persons, and the public generally were in the habit of using the tracks and yard of the defendant Nashville, Chattanooga & St. Louis Railway, between Sixth and Eighth streets in the city of Paducah, with the knowledge of said defendant, and the court now instructs you that it was the duty of said defendant's engineer, George W—, and other employes of said railroad, in charge of said engine, at the time and place complained of by plaintiff, to keep a lookout for persons using said track and yard, and on or so near its said track between said streets as to be liable to collide with, or be struck by, said engine, and to give notice of the movements and approach of said engine by ringing the bell or blowing the whistle of said engine, and to have said engine under reasonable control, and to exercise ordinary care to avoid striking and injuring persons so using said tracks and yard between said two streets. And if you shall believe from the evidence that defendant and its said engineer failed to do any of these things, and by reason of such failure and as the direct and proximate cause thereof, said engine was caused to be run against the plaintiff, and she was thereby injured, then defendants are chargeable with negligence, and the law in this case is for the plaintiff, and you will find for her."—Approved: Shrader v. Nashville, C. & St. L. Ry. Co. (Ky.), 114 S. W. 788.

§ 4373. Private Crossing for Pedestrains used for Years.

"The court instructs the jury that if they shall believe from the evidence that the place on defendant's track where deceased was struck by defendant's train was near a private crossing on defendant's track, used as a private or farm crossing over said track, and that the track at the time was in such a condition and position for a distance of eight hundred feet or more west from the point of the catastrophe that a person walking thereon could have been seen by the persons in charge of said train, had they been at their proper posts, and on the lookout

ahead of them, and that said track, at the place where M— was killed, and for some distance west thereof, had, for years prior thereto, and was at about the time said M— was struck and killed, frequently used by pedestrians in going to and from ———— and the ———— crossing, and points between the said places, and that M—, while walking upon defendant's track, became in imminent peril of being struck by defendant's train, and defendant's employees in charge of said train become aware of his peril of being struck in time to have enabled them, by the exercise of ordinary care, to have stopped said train and averted the injury to said deceased, or if the jury believe from the evidence that said employees, in charge of said train, by the exercise of ordinary care, could have become aware of his peril in time to have stopped said train and to have averted said injury to said deceased, and they failed to exercise such care and stop said train, and that by reason of such failure to exercise such ordinary care the said train was not stopped, and said M— was struck, and killed,—then the jury must find for the plaintiff, though the jury may find that the deceased, M—, was guilty of negligence in walking on defendant's track at the time. And by (ordinary care), is meant such care as an ordinarily careful and prudent person would exercise under the same or similar circumstances."—Approved: Morgan v. Wabash Ry. Co., 159 Mo. 262, 60 S. S. 195.

§ 4374. But Track is Generally not to be Used as Footpath.

"Every person of ordinary intelligence is bound to know that a crossing of a railroad track over a public highway, when cars are frequently passing, is a place of more than ordinary danger, and it becomes his legal duty at such place to use corresponding care and caution to avoid injury; and while it is true that the public have a right to be upon a railroad track, at the crossing of a public highway, for the purpose of crossing over such track, it is the duty of all persons crossing over such track, to do so with all convenient dispatch; and if the jury believe, from the evidence, that in this case the deceased, Jacob B—, was upon the track of the defendant railroad, not for the purpose of crossing over the same, but for the purpose of employing the same as a foot path from his place of labor to his residence, it was negligence on his part to employ such railroad track for such a purpose, even though the jury should believe from the evidence, that, at the time he was so injured by defendant's cars, he had actually proceeded to, and arrived at, a point within the boundaries of a public highway."—Approved: Illinois Central R. Co. v. Baches, 55 Ill. 386.

§ 4375. Persons Walking on Tracks Should Watch for Trains.

(a) "It was the duty of the plaintiff in going upon and walking along defendant's tracks to exercise such care as may be usually expected of an ordinarily prudent person to learn of the approach of defendant's cars, on hand car, and keep out of their way; and, if he failed to exercise such care, and but for this would not have been injured, the law is for the defendant, and the jury should so find."—Approved: Louisville & N. R. Co. v. Berry (Ky.), 111 S. W. 370 (not reported in state reports).

(b) "If the jury believe from the evidence that ordinary care on the part of Cordie L. W— for his own safety required him, before stepping upon the track where he was fatally injured, at the time and place in question and under all the circumstances in evidence, to look for the purpose of ascertaining whether a train was approaching along said track and not to advance upon said track without so looking; and if the jury believe, from the evidence, that said W—, if he had looked, could by the exercise of ordinary care have ascertained the approach of said train along said track in time to have avoided injury; and if the jury believe from the evidence that said W— did not so look to ascertain the approach of said train, and that he was struck and killed in consequence and because of such failure, if he did so fail to look and ascertain—in such case the court instructs the jury to find the defendant not guilty."—Approved: Fowler v. Chicago & E. I. R. Co., 234 Ill. 619, 85 N. E. 298.

(c) "The deceased being deaf and unable to hear, it was his duty to exercise great care and caution in the use of his remaining senses to avoid danger from the train."—Approved: Hummer's Ex'x v. Louisville & N. R. Co., 128 Ky. 486, 108 S. W. 885.

(d) "You are instructed that a railroad track is in itself a warning of danger, and if you find that deceased went upon the side track of defendant and stopped on said side track to wait for a train on the main line to pass, and that while on said side track he was backed over by a freight train, and by looking in the direction from which said freight train came could have seen it and failed to do so and thereby have avoided being injured, and such failure contributed to the injury, then he was guilty of negligence, as a matter of law, and your verdict will be for the defendant, notwithstanding you may find that defendant was also guilty of negligence."—Approved: Choctaw, O. & G. R. Co. v. Baskins, 78 Ark. 355, 93 S. W. 757.

§ 4376. Temporary Passway for Public over Track to be Kept in Good Condition.

"Now, therefore, if you shall believe, from a preponderance of the evidence, that there was a board or plank passageway laid between the rails of defendant's tracks, from the east side of Montgomery street to the west side thereof, over an excavation being made in the process of constructing the said tunnel, and you believe that the said passageway was commonly and habitually used by the public in passing from one side of the street to the other, with the knowledge and acquiescence of said defendant; and you believe that while plaintiff was crossing over the same a plank thereon gave way at one end, and caused plaintiff to fall and be injured, substantially in any of the respects alleged in her petition, and you believe that the plank, in the condition in which it was, rendered the said passageway unsafe for use by foot passengers, under the circumstances plaintiff was using the same; and that defendant, in permitting the plank to be in such condition, was guilty of negligence as that term has been heretofore defined, and you believe that such negligence, if any, was the direct cause of plaintiff's injury, if any, and you do not believe that plaintiff was herself guilty

of negligence in using the said passageway—you will return a verdict for plaintiff, without regard to whether you believe the said tunnel was being constructed by defendant or by an independent contractor, but unless you so find you will return a verdict for defendant."—Approved: Galveston, H. & S. A. Ry. Co. v. Schuessler (Tex. Civ. App.), 120 S. W. 1147.

§ 4377. Failure to Fence Track—Injury to Child.

"And if you are satisfied from the evidence that by reason of or on account of its failure to so erect and maintain such fence at the point where you may conclude it is reasonable to infer that the child went upon the track, and if you are convinced from the evidence that the plaintiff got upon the track at the time he was hurt on account of the fence not being there,—in other words, that he would not have done so if such fence had existed to impede his progress; and, furthermore, if you believe that he got upon the track without fault on the part of those who should be held accountable for his care and custody, in consequence of the neglect of the railroad company, as above stated, to erect and maintain the requisite fence, you would be warranted in finding that there was such negligence on the part of the defendant in this particular as would afford the plaintiff a remedy for the injuries received by him."—Approved: Keyser v. Chicago & G. T. Ry. Co., 66 Mich. 390, 33 N. W. 867.

§ 4378. Injury to Stockmen at Stockyards.

"The court instructs the jury that in the admission of freight trains into defendant's yards for the discharge and delivery of cattle therein, it was the duty of defendant to stockmen who might be on said cars while moving and in transit on the railway tracks in the yards of defendant to exercise ordinary care to see that its gates were not left open and extended out to said cars, so that they might strike or cause injuries to such stockmen in the discharge of their duties while going up and down the ladders on said cars in the exercise of ordinary care thereon."—Approved: Crawford v. Kansas City Stock Yards Co., 215 Mo. 394, 114 S. W. 1057.

§ 4379. License to Pass Over Track is Not to Pass Under Cars Standing Thereon.

(a) "You are instructed that at and just prior to the time of the accident in question defendant was in the actual use and occupancy of its scale tracks, where its cars were standing, and that such use and occupancy, while it lasted, amounted to a suspension and revocation of any right, if such you find there was or had been, in the public to cross said track when so occupied; and if you find from the evidence that plaintiff's child attempted so to do by crawling under defendant's cars, and was killed, while so doing, by the movement of the cars, defendant would not be liable, and your verdict should be for the defendant."—Approved: Wagner v. Chicago & N. W. Ry. Co., 122 Iowa, 360, 98 N. W. 141.

(b) "You are instructed that if you should find from the evidence that the general public, with the knowledge of the railway company,

had been using certain spaces between the tracks from Locust street to Grand avenue as driveways and footways at and prior to the time of the accident in question, yet such finding would not authorize plaintiff's child to be at any other place or places than those named, or to be under defendant's cars or south of its cars between the rails of the scale track; and if you find from the evidence that it was under the defendant's cars, or at or near the south end of them, between the rails of the scale track, at and just prior to its injury, and the defendant's employes did not see it in time to prevent the accident, then it was a trespasser, and plaintiff is not entitled to recover, and your verdict must be for defendant."—Approved: Wagner v. Chicago & N. W. Ry. Co., 122 Iowa, 360, 98 N. W. 141.

§ 4380. Persons Permitted to Use Track Considerable Time for Certain Purpose—Licensees.

"If you find from the evidence that the deceased and other employes of the St. Louis, Keokuk & Northwestern Railway Company had, for a considerable time prior to the accident, been accustomed to use the track of the defendant railroad company, at and near the place where the accident occurred, for the purpose of using the same for giving signals by the acquiescence of the company, then the deceased was not a trespasser upon the track, and such permission may be implied if the deceased and other employes of said St. Louis, Keokuk & Northwestern Railway Company were in the habit of so using the railroad of the defendant without objections on its part; and it is for you to determine, from all the facts in evidence before you, whether or not deceased had such permission."—Approved: McMarshall v. Chicago, R. I. & P. Ry., 80 Iowa, 757, 45 N. W. 1065.

§ 4381. Backing Train Under Shed Without Light on End of Leading Car.

"If the train was backing under the shed without displaying the light from the front end of the leading car, and without having a flagman stationed thereon, and was backing without due care, and the intestate knew it, and placed himself in a position of danger, his negligence was the proximate cause of the injury (he had the last chance to avoid the injury); and, this being so, he, and not the defendant, would be responsible for his death. On the contrary, if P— was standing on or near the track, he was not called upon to look out for a backing train which displayed no light and had no flagman, if you should so find, on the front of the leading car, for it was the duty of the defendant, as before explained, to display the light, and have a flagman at his post, he not being bound to expect a violation of duty. If, therefore, he (P—) was standing on or near the track, and the defendant backed its train under the shed without the light on the front end of the leading car, or in a conspicuous place thereon, or without a flagman thereon, and if the jury should further find that P— did not discover the train in time to escape, then the defendant was negligent, and such negligence was the cause of the injury."—Approved: Purnell v. R. & G. R. Co., 122 N. C. 832, 29 S. E. 953.

§ 4382. Person at Station to Greet Friend on Arrival.

"If you believe, from the evidence, that the plaintiff on the day in question did not intend to become a passenger on defendant's railroad, yet, if you believe the plaintiff was in good faith there waiting to see a person out of mere friendship,whom he expected to be a passenger on defendant's railroad, the plaintiff had a right to be upon said platform, although the person whom he expected did not in fact arrive. And if you further believe, from the evidence, that the plaintiff while so waiting and using due care and caution for his own safety, was injured by the defendant's servant's gross negligence or recklessness (if shown by the evidence) in manner and form as charged in plaintiff's declaration, then you should find for the plaintiff."—Approved: Ill. C. R. R. Co. v. Wall, 53 Ill. App. 588.

§ 4383. Persons Unloading Cars Placed Upon Side Track.

(a) "When a railroad company puts unloaded cars upon the side track for the purpose of being loaded by the owners of the freight, and such owners, their agents or servants, with the express or implied consent of the company, proceed to load the car, the company in such case has no right, without reasonable notice of warning, to run or back a train upon the side track while the cars are being loaded. And while in such case those engaged in the work of loading are not permitted to close their eyes or ears to what comes within the range of their senses, yet they may give their undivided attention to their work, and are justified in assuming that the company will not molest them or render their position hazardous without such notice or warning."—Approved: Copley v. Union Pac. Ry. Co., 26 Utah, 361, 73 Pac. 517.

(b) "If you believe from the evidence that the defendant, at the time of the alleged injury complained of, was a common carrier of freight and passengers, and had placed a car loaded with coal on one of its switches alongside of the coal bins of E— Bros. to be unloaded into said bins, as alleged in the complaint, and that at said time the plaintiff, with the express or implied consent of the defendant, was engaged in unloading said coal from said car in said bins for E— Bros., and that defendant, knowing or by the exercise of reasonable care ought to have known or could have learned that he was so unloading said car, then I instruct you that the defendant had no right, while switching cars in the vicinity of said car to be so unloaded, to run another car so as to violently and suddenly move the same in such manner as might reasonably be expected to cause injury to the plaintiff, without notice or warning to the plaintiff while engaged in so unloading said car."—Approved: Toledo, St. L. & W. R. Co. v. Miller, 44 Ind. App. 227, 88 N. E. 968.

§ 4384. Persons Lawfully Resorting to or Being on Railroad Platform.

"A railroad company is bound to keep its platform and walk around and leading to and from its station, and used by persons having lawful occasion to go there, reasonably safe and convenient for such use and free from obstruction, and persons lawfully there have a right

to assume that such duty has been fulfilled, and that the platform and way is reasonably safe, unless they have knowledge to the contrary. If you should find from the evidence in the case, and all the surrounding circumstances as shown by the evidence, that the plaintiff at the time she stepped to the side upon the lawn to avoid the truck, and in so doing she came in contact with the wires which tripped and injured her, and that she at that time was exercising ordinary care and prudence herself, and that it was because of no light or insufficient light that she walked into said wires, and that the same were not seen by her, and that at said time and place she conducted herself in an ordinarily careful and prudent manner, and as ordinarily careful and prudent persons would have done if placed in the same position as was plaintiff, then it cannot be said that want of ordinary care and prudence on her part contributed to produce the injury; and if such be the facts, and you so find them to be from the testimony in this case, then you should answer this question No. 8 'No.' "—Approved: Banderob v. Wisconsin Cent. Ry. Co., 133 Wis. 249, 113 N. W. 738.

§ 4385. Negligent Throwing of Freight from Car Against Person on Platform.

"The court instructs the jury that, if they believe, from the evidence, that at the time of the alleged injury to the plaintiff, said plaintiff was legally and rightfully upon the passenger platform of the defendant at ————, for the purpose of ascertaining the time of departure of a train, and while passing along on said platform, the agent or servants of the defendant, without any notice or warning to passengers, threw out of a box car, on the said passenger platform, a large and heavy stick of timber on his forehead, and thereby knocked said plaintiff down and seriously injured him; and if they further find, from the testimony that said plaintiff, at that time, was using ordinary care, and did not cause the infliction of said alleged injury by his negligence, and that the agents of the defendant did not use reasonable care in discharging said timber, then the defendant is liable in this case for whatever injury resulted to the plaintiff from said alleged injury, not to exceed the sum claimed in the declaration in the case."—Approved: Toledo, W. & W. R. Co. v. Maine, 67 Ill. 298.

§ 4386. Trespasser—Reckless Disregard of His Safety.

"If the jury believe from the evidence in the case that the plaintiff had no legal right to be where he was on the premises of the Southern Pacific Company at the time of the alleged injury, still no one would be justified in willfully or recklessly injuring him; and I therefore charge you that if you believe from the evidence that the person or persons having charge or control of the engine in question, while so in the employ of the defendant company, acted in such a careless and reckless manner as would indicate a disregard of the consequences of his or their acts, and by reason of such negligence the plaintiff was injured, as alleged in his complaint, and without any negligence of the plaintiff proximately contributing thereto, then the plaintiff would be entitled to recover in this action for the injuries sustained."—Approved: Hern v. Southern Pac. Co., 29 Utah, 127, 81 Pac. 902.

§ 4387. Pushing Trespasser from Train Going at High Rate of Speed.

"And if you find from a preponderance of the evidence that the head brakeman upon said railway train, acting in the discharge of his duties, and within the scope of his employment as such, violently and forcibly pushed the plaintiff from said train while the same was moving at such a high or dangerous rate of speed that a person falling or attempting to alight therefrom would be liable to be thrown beneath the wheels and injured, and that said brakeman knew, or should, in the exercise of ordinary care, have known, that it would greatly endanger the life or limb of the plaintiff to be so forced or pushed from said train, then you will find that the defendant railway company was guilty of the negligence charged and complained of. And if you so find, and you further find from the evidence that, by reason of being so pushed from said train, the plaintiff fell or was thrown under the wheels of the same, and received the injuries in question, and that, after discovering the purpose of said brakeman, and the peril to which he was then subjected, he could not, in the exercise of ordinary care, have prevented said injuries, and did not by any negligence on his part directly contribute to produce the same, then he will be entitled to recover herein, and your verdict will be in his favor."—Approved: Johnson v. Chicago, St. P., M. & O. Ry. Co., 123 Iowa, 224, 98 N. W. 642.

§ 4388. Compelling Trespasser to Leave Train While in Rapid Motion.

"The court instructs the jury that, although they may believe that A—, the plaintiff, had no business or right to be on defendant's train, and was a trespasser thereon, yet if they further believe that he was given no reasonable opportunity, without exposing himself to danger, but was forced to leave the train while the same was in motion, by reason of force exercised by the employees of said company, or any of them, within the scope of their employment, and that in so leaving he received the injuries complained of, they must find a verdict for the plaintiff."—Approved: Chesapeake & O. Ry. Co. v. Anderson, 93 Va. 650, 25 S. E. 947.

C. Injuries to Servants.

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4459. Or Where for the Duty Required no Other Means for its Performance are Provided.
4460. Employee Injuring Third Person not in Course of Employment.

§ 4390. Employee Bound to Ordinary Care to Avoid Injury to Himself.

"It is the duty of one who enters the employ of another to use reasonable and ordinary care to avoid injury to himself, and in every case the care which he is bound to exercise is in proportion to the dangers which obviously surround; and, if you believe from the preponderance of the evidence that the deceased failed to use such ordinary care, and such failure proximately contributed to the happening of an injury to him, the defendant is not liable in damages resulting therefrom."—Approved: Condie v. Rio Grande Western Ry. Co., 34 Utah, 237, 97 Pac. 120.

§ 4391. Negligent Order of Foreman Causing Injury.

"If the jury shall believe from the evidence that the injury to plaintiff, if any, resulted from the negligent orders, if any, of the foreman of the construction crew with which plaintiff was working, such foreman being then in the service of the defendant, and that plaintiff at the time was bound to conform and did conform to the orders or directions of such foreman, and the plaintiff himself was at the time an employee of the defendant, in its service, and was himself at the time in the exercise of due care and diligence, then the law is for the plain-

tiff, and the jury will so find."—Approved: Louisville & N. R. Co. v. Melton, 127 Ky. 276, 105 S. W. 366.

§ 4392. Latent Danger Known to Foreman but Unknown to Plaintiff.

"Now, therefore, if you shall believe from a preponderance of the evidence that plaintiff, while at work for defendant on certain of its boilers at Austin, Texas, was sent for by Charles G—, foreman of defendant's roundhouse at Austin, and ordered by said G— to strike with a sledge hammer with great force upon the end or face of the axle or journal of a locomotive, and believe there was lead in a hole in the end of the said axle or journal, and that the striking by plaintiff caused a portion of the lead to fly or spurt out and strike plaintiff in his right eye, and injure the eye so that the same had to be and was thereafter removed; and you further believe from a preponderance of the evidence that the said G—, as foreman of defendant's roundhouse, had authority to order plaintiff to strike upon the axle or journal, and you believe that plaintiff was caused to strike thereupon by the order of said G—, and that in so doing he did that which a man of ordinary prudence would have done under the circumstances, and you believe that the flying or spurting out of the lead under the blows delivered by plaintiff and striking him in the eye, if it did that, was a latent or secret danger incident to the said work of striking, and believe that the said danger, if any, was known to the defendant and the said G— before the said striking, and believe that the said danger, if any, was unknown to plaintiff at the time of the said striking, and would not have been known to him in the exercise of ordinary care at said time, and believe that the said G—, in ordering plaintiff to strike upon the said axle or journal, if he did that, rested under a duty to plaintiff to warn him of the said danger, if you find there was such danger, and believe he failed to give him such warning, and that in so failing he was guilty of negligence as that term has been hereinbefore defined to you, and you believe that such negligence, if any, was the proximate cause of plaintiff's injury, and you do not find that plaintiff assumed the risk of injury, or was himself guilty of contributory negligence, as hereinafter explained to you—you will return a verdict for plaintiff, but, unless you so find, you will return a verdict for defendant."—Approved: Houston & T. C. R. Co. v. Malloy (Tex. Civ. App.), 118 S. W. 721.

§ 4393. Injured in Course of Employment by Act of Vice-principal.

"If you find for the plaintiff upon both the issues stated above, namely, that the said K— was guilty of negligence which contributed to the injury complained of, you will then determine from the testimony whether or not plaintiff was, at the time he received the injury, in the discharge of his duty, and in the line of his employment; and, upon this question also, the plaintiff is required to produce the burden or preponderance of proof. If you find that the witness, Mr. K—, was employed as superintendent of construction or repair of defendant's bridges and similar work on its line of road, and as such superintendent he had control of, and authority over, a gang or company of men, including plaintiff, with authority to employ and discharge men in the

name of the defendant, then the acts of the said K— towards said men, while acting within the line of his duties, would be the acts of the defendant company, for which it would be responsible. And, in such case, should you find that the plaintiff and others on the hand-car took hold of the caboose on the freight train by order of, or under the direction of, said K—, for the purpose of towing said hand-car from the river to Blair, then, in obeying said order and in carrying out the instructions of said K—, the plaintiff should be said to be in the discharge of his duty, and acting in the line of his employment; and if said K— negligently applied the brake to said hand-car while plaintiff was still holding onto the freight train, and plaintiff received the injury complained of as the natural and direct result of said negligence, without fault or negligence on his part, as already explained, the defendant would be liable, and you should so find."—Approved: Sioux City & P. R. Co. v. Smith, 22 Neb. 775, 36 N. W. 285.

§ 4394. Foreman's Negligent Order Causing Rear End Collision of Hand-cars.

"If the jury believe from the evidence that at the time J. J— was killed, he was in the employ of the A. M. R. Company, and that B. S— was the foreman or section boss, and that the deceased was on a hand-car at the time of the accident; and if they further believe that said hand-cars were operated under the direction of said B. S—, and that said B. S— told the deceased and the other hands to go over the C. river bridge as fast as they could, and that in compliance with said orders the hands started across the bridge at a great rate of speed, and that they were running about fifteen or twenty feet apart, and that, just after they passed the iron part of the bridge, the said B. S— waved his hand to those on the front car to slow up, and that J. W— at once placed his foot on the brake of the front car, and checked it up; and if they further believe that L. B—, as soon as J. W— put his foot on the brake, waved to the hindmost car to check up, and that G— at once placed his foot on the brake; and if they further believe that the placing of G—'s foot on the brake suddenly checked the speed of the car, jerked the handle of the lever out of J. J—'s hands; and if they further believe that before he could recover and get hold of the handle the hindmost car ran into the front car and threw J. J— off, and he was killed,—then the plaintiff is entitled to damages."—Approved: Jones v. Ala. M. R. Co., 107 Ala. 400, 18 South. 30.

§ 4395. Injured by Act of Foreman—Assumption of Risk.

"The court instructs the jury that, if you believe and find from the evidence that on or about the 14th day of October, 1902, plaintiff was required in the course of his employment to go between the cars mentioned in evidence in the yards of the defendant for the purpose of uncoupling the same, and while between said cars and in the act of uncoupling the same and while said cars were in motion the witness F— carelessly and negligently drew the coupling pin connecting said cars, allowing the said cars to part, thus causing Mr. B—, the plaintiff, to

fall upon the track between said cars; that said F— at the time knew, or by the exercise of ordinary care and caution would have known, that plaintiff was in a position of peril between said cars in the act of endeavoring to uncouple the same; that on account thereof the wheels of said cars were caused to run upon and over the body of plaintiff, mashing and crushing his leg,—then your verdict must be for the plaintiff, unless you further believe and find from the evidence that the plaintiff was guilty of contributory negligence, or that he assumed the risk of being so injured, as defined by the other instructions."—Approved: Brady v. Kansas City, St. Louis & Chicago R. Co., 206 Mo. 509, 102 S. W. 978, 105 S. W. 1195.

§ 4396. Safe Place to Work—Ordinary Care to Provide.

(a) "Railway companies in this state are required to exercise ordinary care to provide for their employees reasonably safe places in which to work, and reasonably safe tools and appliances with which to perform their work, and a failure to do so renders them liable for such damages as proximately result from such failure."—Approved: Missouri, K. & T. Ry. Co. v. Snow, 53 Tex. Civ. App. 184, 115 S. W. 631.

(b) "It was the duty of the defendant to furnish the plaintiff a reasonably safe place for the plaintiff to work, and, if the jury believe from all the evidence that the defendant failed to furnish to the plaintiff at the time and place mentioned in the proof a reasonably safe place to work, and that by reason of such failure, if failure there was, the plaintiff while at work injured himself, while himself in the exercise of ordinary care, then the jury will find for the plaintiff, unless the defective and dangerous condition of said platform, if such there were, was so obvious and certain that the plaintiff knew, or by the exercise of ordinary care should have known, of said dangerous condition, if dangerous condition there were, in which case, you will find for the defendant."—Approved: Louisville & N. R. Co. v. Carter (Ky.), 112 S. W. 904 (not reported in state reports).

(c) "The jury is instructed that it is the duty of the master to furnish the servant with a reasonably safe place in which to perform the work assigned to him, and a reasonably safe means of ingress and egress to and from such place, and, if the jury believe from all the evidence that the lid of the box described in the proof was so constructed and maintained that it did not afford reasonable protection at the place and for the purpose for which said box was designed and used to the plaintiff and other employees required by their employment to be near or about said box, and if they further believe from the evidence that such construction or maintenance of said lid was not such as ordinarily careful and prudent men in the same or similar circumstances would use, and if the jury further believe that the plaintiff was injured by reason of the unsafe construction or maintenance of said box, if either there was, and the plaintiff himself was in the exercise of ordinary care for his own safety, then they shall find for the plaintiff; otherwise, for the defendant."—Approved: Cincinnati, N. O. & T. P. Ry. Co. v. Fortner (Ky.), 113 S. W. 847.

§ 4397. And upon this the Servant May Rely without Making Inspection.

(a) "It is the duty of a railroad company to exercise ordinary care to furnish its servants and employees a reasonably safe place in which to perform the duties required of them, and when a person enters the employment of a railroad company, or when he is called upon or undertakes the discharge of his duties, he has a right to rely upon the assumption that the place, which he is to occupy while in the discharge of his duties, is reasonably safe, and he is not required to make inspection to ascertain whether such place is reasonably safe or not, and he does not assume the risk arising from the failure, if any, of the railroad company, to do its duty in this respect, unless he knows of the failure and the attendant risk, or, in the ordinary discharge of his duties, he must necessarily acquire such knowledge."—Approved: Missouri, K. & T. Ry. Co. v. Steele, 50 Tex. Civ. App. 634, 110 S. W. 171.

(b) "It is the duty of a railway company to exercise ordinary care to furnish its servants and employees a reasonably safe place or premises in which to perform their work, and, when a person enters the employment of a railway company, he has a right to rely upon the assumption that the place where he is called upon or required to work is reasonably safe, and he is not required to use ordinary care to see whether the company has done its duty in this respect, and he does not assume the risk arising from the failure of the railroad company to do its duty in this respect, if there is a failure, unless he knows of the failure and the attendant risks, or unless, in the ordinary discharge of his duties, he must necessarily have acquired such knowledge."—Approved: Missouri, K. & T. Ry. Co. v. Romans (Tex. Civ. App.), 114 S. W. 157.

(c) "Now, bearing in mind the foregoing instructions, if you believe from the evidence that on the occasion in question plaintiff and his co-employees were directed by their foreman to move some ties from one part of defendant's premises in the said town of Pilot Point to another part, and if you further believe from the evidence that while plaintiff and his co-employees were engaged in carrying a switch tie, which was a long and heavy piece of timber, one or more of his said co-employees stumbled over some railroad rails, and were not guilty of negligence in so stumbling, and if you further believe from the evidence that by reason thereof the end of said railroad tie was thrown against the plaintiff whereby he was injured, and if you further believe from the evidence that said railroad rails were hid from view by being overgrown with Burmuda grass, and if you further believe from the evidence that the defendant in permitting said railroad rails to become overgrown with grass and hid from view of its employees, whose duty under their employment required them to pass over and along the place where said rails were situated, if you should find that they were thus hid from view, and that it was the duty of its employees to pass over and along said place, was guilty of negligence, as that term has been hereinbefore defined to you, and that such negligence, if any, was the proximate cause of plaintiff's injury—then you will find for plaintiff, and assess his damages as hereinafter directed, unless you should find for defendant

under other instructions given you."—Approved: Texas & P. Ry. Co. v. Tuck (Tex.), 116 S. W. 620.

(d) "Plaintiff had the right to assume that the defendant had exercised ordinary care to furnish cars reasonably safe and properly equipped and supplied with appliances reasonably necessary and proper to enable him to perform the duties required of him with a reasonable degree of safety, and he was not required under the law while engaged in the capacity of brakeman to inspect the cars and appliances thereon while engaged in the discharge of his duties for the purpose of ascertaining their condition."—Approved: Missouri, K. & T. Ry. Co. v. Blachley, 50 Tex. Civ. App. 141, 109 S. W. 995.

§ 4398. Employee without Means Equal to Employer's for Knowing of Defect.

"You are instructed that an employer, under the law, owes to its employees the duty of using reasonable and ordinary care to provide a suitable and safe place for them to work; and if you find, from a preponderance of the evidence, that plaintiff was on the 11th day of September, 1904, in the employment of defendant as a switchman in its yards at Chicago, Ill., and that defendant carelessly and negligently permitted a hole or depression to be and remain at or near its side track No. 2 in its yard D, and that the same was dangerous to switchmen, and that defendant had knowledge of the existence of said hole or depression, or by the exercise of ordinary care might have known it, and that plaintiff did not know of said defect, if any such there was, and had not equal means of knowing with the defendant, and that, while plaintiff was in the usual course of his employment and in the exercise of due care and caution for his own safety, he, by reason of the said hole or depression, if any, caught his foot therein and stumbled, and unavoidably threw his right hand and arm between two cars, crushing the same, then you should find the defendant guilty."—Approved: Illinois Cent. R. Co. v. Heath, 228 Ill. 312, 81 N. E. 1022.

§ 4399. Keeping Cars Placed so that Work in Yards May be Safely Performed.

"Gentleman of the jury: If you shall believe from the evidence that the defendant, by its agents and servants, placed a car or cars on its yard at Corbin, Ky., upon track No. 3 so close to track No. 4, and so close to the point of intersection of track No. 3 with track No. 4, and in such a position on track No. 3 as that cars moving on track No. 4 and passing the cars aforesaid on track No. 3 would not 'clear,' or would not leave sufficient space for one to work beside said car or cars on track No. 3 while oiling the journals of said cars with reasonable safety from said moving cars on track No. 4, as aforesaid, and that the plaintiff's intestate, William J—, while in the performance of his duty as car oiler, and while at work in oiling the car or cars on track No. 3, or in going from one car to another for the purpose of prosecuting his work as oiler, as aforesaid, was caught between the moving cars on track No. 4 and the car or cars so placed as above set out on track No. 3, if any, and his head so crushed as that he died thereby, then the law is

for the plaintiff, and you should so find; unless you shall further believe from the evidence that the plaintiff's intestate could have prevented his being caught and crushed between the cars by the exercise of ordinary care and prudence on his part after he discovered his danger therefrom, if he did discover it."—Approved: Jones' Adm'r v. Louisville & N. R. Co. (Ky.), 108 S. W. 865 (not reported in state reports).

§ 4400. Keep Look-out where Employees Commonly Pass in Their Work.

"The court instructs the jury that it is the duty of a railway company's servants, who operate its engines along a portion of its track that is commonly used by its employees, or over and about which its employees commonly pass in the discharge of their duties, to exercise 'ordinary care' in keeping a look-out to discover the presence of such employees on or in close proximity to the track at such point, and to use all the means in their power, consistent with safety of the engine and its operatives, to stop the engine to prevent a collision with or injury to such employees."—Approved: Missouri, K. & T. Ry. Co. v. Jones, 35 Tex. Civ. App. 584, 80 S. W. 852.

§ 4401. And Give Proper Warning of Approach of Engine and Cars.

(a) "The jury are instructed that if the defendant undertook through its employees to give any warning of the approach of the engine and cars into the shed room, it was its duty to give such warning as might have been heard by a person of ordinary hearing, considering the distance between the person giving the warning and the plaintiff at the time; and although the jury may believe that the defendant, upon the approach of the engine, gave warning thereof, yet if they believe that it was not such warning as could have been heard by a person of ordinary hearing, at the distance where plaintiff was working, then such warning does not avail defendant anything in this suit."—Approved: Miss. C.-O. M. Co. v. Ellis, 72 Miss. 191, 17 South. 214.

(b) "If the jury believe from the evidence that the plaintiff, who was in the employ of the defendant as a telegraph operator at the U station, was directed by the train dispatcher of the defendant to leave his office and go out and deliver to the officers of train No. 244, going east, a clearance order, then you are charged that the defendant company owed the plaintiff the duty to exercise ordinary care to prevent injury to him while so engaged in the performance of such duty, if any; and if the jury further believe from the evidence that the plaintiff, in obedience to said order, if he was so ordered, without negligence on his part, left his office to hand to the engineer of the train No. 244 said clearance order, and that he, after having done so, as he was backing in the direction of the depot, train No. 243 came in from the east, without sounding the whistle or giving warning of its approach, and did strike and run over the plaintiff, and inflict on him the injuries which terminated in the loss of his leg; and the jury further find that the defendant was negligent in so operating its said train, and that said negligence, if you find it was negligence, was the proximate cause of the plaintiff's injuries,—then you should find for the plaintiff."—Approved: Galveston, H. & S. A. Ry. Co. v. Jenkins, 29 Tex. Civ. App. 440, 69 S. W. 233.

§ 4402. Kicking Cars without Lights Thereon.

"If you believe, from a preponderance of the evidence,—that certain of the servants of the defendant Texas & New Orleans Railroad Company, in the nighttime, set in rapid motion certain cars through a portion of defendant's yards,—where other of its servants, including William B—, were engaged in the work of switching cars, without any engine attached thereto, and without any lights thereon, and without any servant thereon to control the movement of said cars and to give warning of their approach to any switchman in its employ who might be endangered thereby while in the discharge of his duty, if any such there were, and that said cars ran against said B— and injured him so that as a result of the injury he thereafter died; and you further believe, from a preponderance of the evidence, that the setting said cars in motion was negligence under the circumstances, and that the injury and death of said B— was a natural and probable consequence of such negligence, if any, and was a result so manifest under the circumstances as that defendant and said servants, in the exercise under the circumstances of ordinary care, should have anticipated and provided against same, you will return a verdict for plaintiffs."—Approved: Galveston, H. & S. A. Ry. Co. v. Berry, 47 Tex. Civ. App. 327, 105 S. W. 1019.

§ 4403. Or at Great Force and Speed.

"If you find from the evidence that on or about the ——— day of ———, ———, the plaintiff, while in the employ of the defendant company, was engaged in the performance of his duty in the work of watering a train of passenger coaches, and that, while he was stooping over a water hydrant in the performance of his duty, he was struck by a moving coal car on the track of defendant known as Davis No. 2, and that he was thereby injured as alleged in his petition, and you further find that said car was kicked and propelled upon said track at a high and dangerous rate of speed under the circumstances, and that there was no warning nor notice given to plaintiff of the approach of said car, and that, in so kicking and propelling said car at said time and place, if you find it was so kicked and propelled, defendant company was guilty of negligence, and that such negligence, if any, was the proximate cause of plaintiff's injury, if any; and if you further find that plaintiff was not guilty of any negligence which either caused or contributed to his injury, if any, and that plaintiff's injuries, if any, did not result from the risks ordinarily incident to his employment, then you will find for plaintiff."—Approved: Galveston, H. & S. A. Ry. Co. v. Pendelton, 30 Tex. Civ. App. 431, 70 S. W. 996.

§ 4404. Defective Switches Permitting Cars to Escape.

"The court instructs the jury that it was the duty of the defendants to furnish the plaintiff a reasonably safe place in which to perform his work, regard being had to the nature and character of his employment and the kind of work he was engaged in, and it was also the duty of the defendant to keep its tracks, switches and cars in a reasonably safe condition so that plaintiff could perform his labor about them in reasonable safety, regard being had, as above stated, to the nature of his

employment. And if the jury believe from the evidence that on the twenty-third day of October, 1899, and for some time prior thereto, the defendants had a switch leading from the main line of their road, near the station at Joplin, out to a place known as the Bankers Mine, and that cars left standing on said switch by the defendants, their agents or employees, were liable to escape from the persons moving the same, with the knowledge and consent of the defendants, and run down said switch, and out on the main line of said road and other switches, at said station, then it was the duty of the defendants to have taken ordinary care and precaution to have so fixed its switch and cars on the same, if the same could be done by exercising reasonable care, so that if a car did escape on said switch at said mine, or get away from those in charge of it, that it could not roll down said switch, and out on the main line and other switches of the defendant, if the jury believes by so doing it would probably endanger persons rightfully on said track or switches, and if the jury believe from the evidence in this case that the plaintiff, under the direction of the conductor in charge of a freight train belonging to the defendants, and standing on a switch at the station at Joplin, went under said train for the purpose of repairing a car therein, and that in so doing he was exercising ordinary care and caution, and that prior thereto the defendants, while operating said railroad through their servants or employees, had left a car standing on said switch, at said mine, and that said car was left there without the brake being set, or so loaded that the brake could not be set or used in moving said cars, and that the defendants knew that the employees at said mine were liable to attempt to move said car, and that the defendants carelessly and negligently left said car standing in such condition and at such a point on said switch that if it started or was started by the employees at said mine, that it could not be controlled, and that the defendants carelessly failed to put in a derailing switch, or use any other means to prevent cars while so being moved from rolling out on said main line, in case they escaped, and that while plaintiff was at work at car, which had been standing at said mine, and which had been left standing as aforesaid, and without the brake being in such a condition that it could be used, got away from the persons moving it and started and run down said switch, and out onto the main line, and then onto the switch where plaintiff was working, and thereby caused said car to run over the arm of the plaintiff and injure him, and that said injury was caused by the carelessness and negligence of the defendant in leaving said car standing on said track in such a condition, and by their carelessness and negligence in failing to put in a derailing switch, or using other means to prevent cars from rolling down said switch, then the finding should be in favor of said plaintiff."—Approved: Smith v. Fordyce, 190 Mo. 1, 88 S. W. 679.

§ 4405. Brakes to be set while Couplings are made.

"If the jury believe from the evidence that plaintiff, while in the employment of defendant, in the exercise of his duties under such employment, was engaged in inspecting a train of defendant at T., Texas, on the ——— day of ———, ———, and securing and adjust-

ing the couplings and coupling attachments thereof, and if you believe that the defendant, in the exercise of ordinary care for the safety of plaintiff and its other employees engaged in work of the same nature, should have set or caused to be set the brakes on each and every car thereof before attaching any other car thereto while making up said train, and that defendant failed to set said brakes or have the same set in this manner, and by reason of such failure plaintiff was injured, and if you further believe from the evidence that it was usual and customary to set said brakes in making up defendant's passenger train at said time and place, and you further believe defendant was guilty of negligence in not setting said brakes, as negligence is hereinbefore explained to you, and you further believe from the evidence that plaintiff was exercising such care for his own safety as a man of ordinary prudence would have exercised under like circumstances, then in either of these events you will find for the plaintiff, unless you should find for the defendant under succeeding instructions."—Approved: St. L. S. W. Ry. Co. v. Rea (Tex. Civ. App.), 84 S. W. 428 (430) (not reported in state reports).

§ 4406. Obstructions Causing Accident to Employee in the Course of Duty.

"Now, if you find from the evidence that the plaintiff, L. G—, was in the employ of the defendant as foreman of a switching crew in the yards at Ennis, and you further believe from the evidence that the defendant Houston & Texas Central Railroad Company allowed or permitted obstructions along near the west side of what is called the 'Midland transfer track' in the Ennis yards, said obstructions, if any, consisting of clinkers, or cinders or coal, or mound, pile or heap, and you further believe that to so allow or permit said obstructions, if any, constituted negligence, as that term has been herein defined, and that the presence of said obstructions, if any, made said place one that was not reasonably safe for plaintiff to work, while discharging his duties in his employment, and you further believe from the evidence that plaintiff while so in the discharge of his duties, if he was, struck his foot against said obstructions, or any of them, as named above, without any fault on his part, and that he was thereby caused to stumble and fall, and that, by reason of his stumbling and falling, his foot was caused to go upon the rail of the railroad, resulting in the injury to said foot, so that it became necessary to amputate the same, and you further believe from the evidence that such negligence, if any there was, proximately caused plaintiff's injury, then you will find for plaintiff, unless you find for the defendant under the other instructions hereinafter given you."—Approved: Houston & T. C. R. Co. v. Grych, 46 Tex. Civ. App. 439, 103 S. W. 703.

§ 4407. Railroad Bridge—Ordinary Care in Inspection.

"A railroad company is not an insurer of the safety of its track bridges, nor is it required to see that such are absolutely safe, but it is under duty towards its employees, such as one serving it as a con-

ductor, to exercise ordinary care to see that the bridges over which he is required to run the train in his charge are in a reasonably safe condition for the purpose; and, if it knows, or by the exercise of ordinary care in the way of inspection would have known, that a bridge on or over which such train is required to be run is in a condition not reasonably safe for the purpose, but nevertheless fails, through negligence, to inform such employee thereof, so as to avert injury therefrom, then if such negligence is a proximate cause of injuries to such employee, it will be liable therefor, unless the employee by his own negligence has contributed to the injuries, or unless he has assumed, as explained below, the risk or danger thereof."—Approved: Beaumont, S. L. & W. R. Co. v. Olmstead (Tex. Civ. App.), 120 S. W. 596.

§ 4408. Same—Duty to Inform Employee of its not being Reasonably Safe.

"If you believe from the evidence that plaintiff was injured substantially in the manner alleged, and that he was at the time in the employment of defendant, and in the ordinary discharge of the duties of his service for it as conductor of the train in question, and that the bridge over San Jacinto river, on which such train was moved, was in a condition not reasonably safe for the running of the train on or over it, and that defendant knew this, or by the exercise of ordinary care or diligence in the way of inspection would have known of it in time to have informed plaintiff and averted injury to him, and that it failed to do so, and that such failure was a want of ordinary care, and that such want of ordinary care was a proximate cause, as before defined, of plaintiff's alleged injuries, if sustained, then let the verdict be for the plaintiff, unless you find for defendant on other issue, or issues, submitted by the court."—Approved: Beaumont, S. L. & W. R. Co. v. Olmstead (Tex. Civ. App.), 120 S. W. 596.

§ 4409. Defective Track—Derailment from Unsound Crossties.

(a) "And the court further instructs you that if you find from the evidence that Ida H—, the plaintiff in this cause, was the wife of William H—, and that he was killed on the 25th day of February, 1904, while in the discharge of his duty as a locomotive engineer, for defendant, by the derailment and overturning of his engine and that such derailment and overturning of his engine was caused by the breaking of one of the rails of said railroad, and you shall further find from the evidence that the defendant railroad company failed to use ordinary care to keep its road bed and track in a reasonably safe condition for the operation of trains, and that at the time and place of the accident said railroad was out of repair and was unsafe, by reason of there being unsound and decayed ties under the rail which broke, and you further find from the evidence that the defendant knew, or by the exercise of ordinary care, might have known these facts, then if you find from the evidence that the breaking of said rail and the derailment of said engine were due to such condition of the road and such unsound and decayed ties, your verdict should be for the plain-

tiff."—Approved: Hach v. St. Louis, I. M. & S. Ry. Co., 208 Mo. 581, 106 S. W. 525.

(b) "The court instructs the jury that if they believe from the evidence in this case that the defendant railway company employed the plaintiff's intestate, William V—, as engineer upon its line of railway, it assumed a duty to him to construct and maintain its road-bed and road-way in a reasonably safe condition, so as not to unnecessarily enhance the dangers attending upon the employment; that said William V—, in entering such service, assumed the natural risks of this employment, but did not assume that character of risk that might arise from the negligence of the railway company, if there was any, in constructing or maintaining a defective road-bed; and, if the jury believe from the evidence in this case that the plaintiff's intestate was, without any fault or contributory negligence on his part, killed at the time and in the manner charged in the plaintiff's complaint, and that said death was caused by the defective condition of defendant's road-bed or road-way, and that such defective condition was known, or by the exercise of reasonable care and diligence on its part could have been known, to defendant, the jury should find for the plaintiff."—Approved: Little Rock & Ft. S. Ry. Co. v. Voss (Ark.), 18 S. W. 172 (not reported in state reports).

§ 4410. Dangerous Rate of Speed on Unsafe Track.

"If you believe from the evidence in this case that the roadway, or any part of same, at the time and place of the injuries complained of to said S—, was an unsafe condition for the passage of said train over same, and said unsafe condition was due to, or caused by, the failure of defendant company's employees, who were charged with the duty of keeping same in said reasonably safe condition, to use ordinary care to have same in such reasonably safe condition for the passage of said train over same, and said unsafe condition was known, or by the use of ordinary care could have been known, to them, and because of said unsafe condition aforesaid a portion of said train was thrown from or caused to leave said track and roadway, thereby inflicting injuries upon said S— of which he died, you should find for the plaintiff; or, if you believe from the evidence that defendant's employees in charge of the engine drawing said train upon which said S— was located at the time and place he received the injuries resulting in his death ran said train at a too high and dangerous or unsafe rate of speed over said roadway and track at said time and place, and because of said too high and dangerous or unsafe rate of speed over same a portion of said train was thrown from or caused to leave said track or roadway, thereby inflicting the injuries from which said S— thereafter died, you should find for the plaintiff; or, if you further believe from the evidence that a portion of said train was thrown from or caused to leave said track and roadway, because of both the unsafe condition of same as above set out, and of the too high and dangerous or unsafe rate of speed of said train, as above set out,

combined, then you will find for the plaintiff, and if you do not so believe, you will find for defendant."—Approved: Louisville & N. R. Co. v. Stewart's Adm'x, 131 Ky. 665, 115 S. W. 775.

§ 4411. Contents of Moving Cars Falling Therefrom.

(a) "In this case, if you find from a preponderance of the evidence that the car from which the timber fell which struck the plaintiff was received by the defendant and the doors of said car were open at the time said car was received and at the time the plaintiff undertook to remove the same, and that an ordinarily prudent person acting in the place of the railway company would have anticipated an injury to an employee like or similar to the one in this case, and if you further find that said injury was caused by a failure to keep the door closed or to close the same before or at the time the car was removed, then you may find for the plaintiff, if you further find that said plaintiff was acting with the care of an ordinarily prudent person at the time he undertook to have the engine coupled to said car for the purpose of removing it."—Approved: St. Louis, I. M. & S. Ry. Co. v. Birch, 89 Ark. 424, 117 S. W. 243.

(b) "The court instructs the jury that if you believe from the evidence that on or about the 19th day of February, 1902, the plaintiff was in the employ and service of the Chicago & Alton Railway Company, as a common laborer, and was, on that day, engaged in repairing the track of the defendant's road at a point on said road, about one and one-half miles west of Bates city, Lafayette county, Missouri, and that the Chicago & Alton Railway Company, its agents and servants running and operating its cars and trains along and over said road at said point, knew or by the exercise of ordinary care could have known, that the plaintiff was so engaged, and the plaintiff, while in the exercise of ordinary care on his part, was injured by a lump of coal thrown and hurled from a passing train managed, operated and controlled by the Chicago & Alton Railway Company, its agents and servants, and that the Chicago & Alton Railway Company, its agents and servants, negligently and carelessly had piled, placed, heaped and permitted lumps and quantities of coal to be and remain in unsafe, insecure, defective and dangerous places, positions and receptacles in and about its said engine and train of cars, if you find and believe from the evidence that such places, positions, and receptacles were unsafe, insecure, defective and dangerous, and negligently and carelessly ran and operated its said engine and train of cars at a high and excessive rate of speed, if you find and believe from the evidence that the rate of speed, under the circumstances, was high and excessive, along, upon and over a rough, uneven track, if you believe from the evidence that said track at said point was rough, and uneven, and shall further believe from the evidence that such acts and conduct were, under the circumstances, careless and negligent, and shall further find and believe from the evidence that the Chicago & Alton Railway Company, its agents and servants in charge of said train, knew or by the exercise of ordinary care, could have known that the plaintiff by reason and in conse-

quence of such acts and conduct, was likely to suffer harm and injury, and that, by reason and in consequence of such acts and conduct the lump of coal aforesaid was thrown and hurled from the passing engine and train aforesaid, and that plaintiff by reason and in consequence thereof, was injured as aforesaid, and shall further find from the evidence that his injury, under the facts and circumstances, was not a risk which he assumed when he entered the service and employment of the said Chicago & Alton Railway Company, then your verdict should be for the plaintiff in this case."—Approved: Dean v. Kansas City, St. Louis & Chicago R. Co., 199 Mo. 386, 97 S. W. 910.

§ 4412. Snow Slides—Precautions to Keep Roadway Safe.

(a) "The company should have used all reasonable precaution and ordinary care to secure the safety of its employees by keeping a sufficient force at command, and of sufficient capacity, to keep its roadway reasonably safe for the passage of its trains and the employees in charge thereof. It cannot, for want of watchfulness, expose its employees to unreasonable risk and escape liability, but the duty imposed is that of ordinary care. The ordinary care required must be measured by the danger of the service and proportioned by it."—Approved: Denver & R. G. R. Co. v. Warring, 37 Colo. 122, 86 Pac. 305.

(b) "It seems by the testimony that the defendant met with his death on the 9th day of March, 1901. If you find from the evidence that this was a season of the year when the defendant company knew, or by the exercise of ordinary care, prudence, and foresight it should have known, that freezing and thawing of the earth and snow on the south slope of the mountain was going on, and that by reason thereof boulders and rocks were more liable to become loosened and slide or roll down the mountain side onto the track at or in the vicinity of the place where W— was killed, then it was the duty of the defendant company to be more watchful and careful to see that its roadway and track were safe for the passage of trains and its employees in charge thereof. And if you find from the evidence that the character of the country was such at and in the vicinity of the point in question that it was necessary to have track walkers at night in order to reasonably protect the passage of its trains and employees in charge thereof from danger, then it was the duty of the defendant company to provide such night inspectors or track walkers, and if it failed in this particular, and did not use reasonable and ordinary care and prudence in protecting the passage of its trains and the employees in charge thereof against such dangers as caused W—'s death, and did not so protect the train upon which W— was riding, and W— was killed by reason thereof, then your verdict should be for the plaintiff, unless you further find from all the evidence that he was guilty of contributory negligence which materially contributed to his death, or that he assumed the risk."—Approved: Denver & R. G. R. Co. v. Warring, 37 Colo 122, 86 Pac. 305.

§ 4413. Failure to Furnish Adequate Help.

"The court instructs the jury that if you believe from the evidence in the case that the defendant failed to furnish a sufficient number of men to do, with reasonable safety, the work in which plaintiff was engaged at the time of the accident in question, taking into consideration the kind of work in which he was then engaged, and the kind of appliances which were furnished by defendant with which to do said work, and if you further believe from the evidence in the case that such failure upon the part of the defendant was negligence, within the meaning of that term, as hereinafter defined, and if you further believe from the evidence in the case that the accident occurred and plaintiff was injured by reason of such negligence, then plaintiff is entitled to recover, and it is your duty as jurors to return a verdict in his favor, provided you find that at the time of said accident he was not himself guilty of negligence which directly contributed thereto."—Approved: Meily v. St. Louis & San Francisco R. Co., 215 Mo. 567, 114 S. W. 1013.

§ 4414. Safe Appliances—Duty of Master to Search for Defects.

"I instruct you that the railway company owed to the plaintiff only the duty to search for any hidden defect that might have been in that part of the hand car that broke and caused the injury to the plaintiff, and, before you would be authorized to find for the plaintiff in any sum, you must find from a preponderance of the evidence that defendant or its employees failed to use ordinary care to search for or discover any defect that might have existed."—Approved: St. Louis, I. M. & S. Ry. Co. v. Reed, 88 Ark. 458, 115 S. W. 150.

§ 4415. But not to Resort to Unusual or Impractical Tests.

"The jury is instructed that the defendant's duty to plaintiff's intestate did not require it to resort to unusual or impractical tests, and, if the jury finds from the evidence in this case that the defendant railway company, in the inspections, examinations, etc., used by it to discover defects and weakness in its locomotive boilers, used all the ordinary tests usually applied by prudent railroad companies, then and in that event their verdict should be for the defendant."—Approved: Ultima Thule, A. & M. Ry. Co. v. Calhoun, 83 Ark. 318, 103 S. W. 726.

(b) "I instruct you that a railway company fulfills its duty to its servants in regard to the inspection of its machinery if it adopts such tests as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances."—Approved: St. Louis, I. M. & S. Ry. Co. v. Reed, 88 Ark. 458, 115 S. W. 150.

§ 4416. Or to Furnish Appliances Absolutely Safe.

(a) "An employer, such as a railroad company, is not required to furnish absolutely safe appliances, but owes to an employee the duty of exercising ordinary care to maintain the appliances with which he is called upon to work in a reasonably safe condition for the use of which they are designated; and negligence of any employee or servant charged with the performance of that duty, no matter what his rank

or grade, is deemed in law the negligence of the employer."—Approved: Texas & N. O. R. Co. v. Jackson, 51 Tex. Civ. App. 646, 113 S. W. 628.

(b) "If you find from the evidence that at the time of plaintiff's injury there existed among skillful and competent railroad men, charged with the duty of protecting water glasses on engines, a difference of opinion as to the safest mode of protecting such glasses consistent with their efficient use as such, and that the defendant company in the exercise of its best judgment selected the kind of protection that was upon the engine and around the glass at the time of plaintiff's injury, then the defendant would not be liable to the plaintiff, even though the jury may conclude from the evidence that the kind of protection selected and used by the defendant was not the kind best calculated to prevent injury to the employees of defendant in case of the bursting of the water glasses, provided it used ordinary care in making the selection."—Approved: El Paso & S. W. R. Co. v. Foth, 101 Tex. 133, 105 S. W. 322.

§ 4417. Employee not under Duty to Inspect Appliances for Defects.

"You are instructed that it was not the duty of an employee to inspect the appliances of the business in which he is engaged, to see whether or not there are any latent defects that render their use more than ordinarily dangerous; but is only required to take notice of such defects or hazards as are patent or obvious to the senses. The fact that he might have known of defects, or that he had the means and opportunity of knowing of them, will not prevent him from a recovery, unless he did in fact know of them, or in the exercise of ordinary care ought to have known of them."—Approved: St. Louis, I. M. & S. Ry. Co. v. Reed, 88 Ark. 458, 115 S. W. 150.

§ 4418. Injury from Defect which Employer should have Discovered.

(a) "The court instructs the jury that if they believe from the evidence that the injury received by plaintiff, if any, was suffered by reason of any defect in the condition of works or tools connected with or in use in the business of the defendant, and that such defect, if any, was the result of negligence on the part of the defendant's foreman of a construction crew with which plaintiff was working, and who was a person intrusted by the defendant with the duty of keeping such tools or works in a proper condition, and that plaintiff was at the time he received such injury in the service of the defendant, and was at the time in the exercise of due care and diligence, then the law is for the plaintiff, and the jury shall so find."—Approved: Louisville & N. R. Co. v. Melton, 127 Ky. 276, 105 S. W. 366.

(b) "Now, bearing in mind the foregoing instruction, if you believe from the evidence that on the occasion in question plaintiff attempted in the usual and proper manner to operate the apparatus furnished by defendant at the city of Osage, Okl., for the purpose of putting water in its engine tanks, and if you further believe from the evidence that while he was so attempting to do such work in such manner, if you

believe he did attempt to so do said work, the spout on said watering apparatus suddenly and with great violence flew up, whereby plaintiff was struck and injured, and if you further believe from the evidence that said spout was caused to so fly up by reason of some part or parts of said apparatus being defective or out of repair, and if you further believe from the evidence that in permitting said part or parts of said apparatus to become defective and out of repair, and to remain in such condition, if you find same was permitted so to become and remain, defendant was guilty of negligence, and that such negligence, if any, was the proximate cause of plaintiff's injuries, if any, you will find for plaintiff and assess his damages as hereinafter directed, unless you should find for defendant under other instructions given you."—Approved: Missouri, K. & T. Ry. Co. v. Bush (Tex. Civ. App.), 120 S. W. 224.

(c) "The court instructs the jury that if you find and believe from the evidence that David W. S— at the time of the alleged injury was in the employ of the defendant Missouri Pacific Railway Company, as a switchman; that in the performance of his duty he was climbing the ladder on the side of a box car and had reached the handhold next to the top of said ladder; that he took hold of said handhold, and said handhold pulled from its fastenings and said S— fell to the ground on his back across an iron rail; that the wood to which said handhold was fastened was rotten and the fastenings of said handhold were rusty so that said handhold was not reasonably secure, and that defendant knew, or by the exercise of ordinary care could have known of said rotten and rusty condition in time to repair same, and negligently failed so to do, and that David S— in consequence thereof, sustained the injuries complained of, and that said injuries were the proximate cause of the death of said David W. S—, you will find for the plaintiffs, provided you find that David W. S— was at the time of said injury in the exercise of ordinary care."—Approved: Sharp v. Missouri Pac. Ry. Co., 213 Mo. 517, 111 S. W. 1154.

(d) "Now, if you believe from a preponderance of the evidence that on or about the 4th day of December, 1905, the plaintiff, Sam H—, was in the discharge of his duties as a brakeman for the defendant, the Missouri, Kansas & Texas Railway Company of Texas, upon one of defendant's freight trains, and that while so in the discharge of his duties as said brakeman it became necessary to, and you believe from a preponderance of the evidence that he did, attempt to mount one of the box cars in said train by using the handhold on the side and the top of said box car, and that in so doing he exercised reasonable care and caution for his own safety, and that in so ascending said car he grasped the handhold on the top thereof and attempted to draw himself up thereby, and that to do so was necessary and proper in the discharge of his duties as brakeman, and that said handhold on the top of said car that he so grasped pulled out from its fastenings and broke and gave way, and that one end thereof pulled loose from its fastenings, and that the same broke and gave away and pulled loose from its fastenings on account of the fact that the wood to which said

handhold was fastened was rotten and decayed and would not hold the bolts or screws or fastenings with which said handhold was attached to the wood, and that the defendant knew of such condition, if defective, or, at the exercise of ordinary care it could have known of the same, and that the furnishing by defendant for plaintiff's use such handhold, if you believe the same was defective, was negligence, and that such negligence, if any, was the proximate cause of the plaintiff's injuries, if any, you will find for the plaintiff, unless you find for the defendant on other issues submitted to you."—Approved: Missouri, K. & T. Ry. Co. v. Harris, 45 Tex. Civ. App. 542, 101 S. W. 506.

(e) "Now, therefore, if you believe from a preponderance of the evidence that plaintiff, while engaged in the discharge of his duty as brakeman on said train, grasped a handhold or grab iron on a car belonging to said defendant, the Continental Fruit Express Company, as alleged by him, and that, as alleged, the said handhold or grab iron gave way, and he was thrown to the ground and injured without contributory negligence on his part; and you further believe from a preponderance of the evidence that the defendant, the Continental Fruit Express, did or omitted to do either one or both of the following acts or things as charged in the petition, viz., that it fastened said grab iron or handhold, which gave way, to the car with a lag screw instead of with a nut and bolt, or that having so fastened said grab iron or handhold to the side of the car with a lag screw instead of with a nut and bolt, it failed to keep the same in a reasonably safe state of repair, but permitted the wood in which the lag screw was embedded to become rotten and soft, and failed to repair the same, and make the same reasonably safe for use by brakemen; and if you further believe that such act or omission, that you find to have been so done or omitted, if any, was or were the proximate cause of said handhold giving way with plaintiff, if it did, and his being thrown from the train, and his hand run over and crushed, and that the said Continental Fruit Express, by reason of such act or failure on its part, or both, was guilty of negligence, and that such negligence, if any, was the proximate cause of said handhold so giving way, and plaintiff's injury—then and in that event you will return a verdict for the plaintiff, but unless you so believe you will return a verdict for the defendant."—Approved: Continental Fruit Express v. Leas, 50 Tex. Civ. App. 584, 110 S. W. 129.

(f) "If you believe from the greater weight of the testimony in this case that the plaintiff, while working as a brakeman for defendant, was injured by a fall from one of defendant's cars, or car hauled by it; that such fall was caused by a handhold or grab iron coming loose at one end; that such grab iron was not properly fastened at both ends, but was wrapped with a string, instead of having a nut; that the condition of such grab iron was known to the defendant railway company, or might have been known by a reasonably careful inspection before the car left Newport—then you may find for plaintiff, unless you further find that he was over the age of 21 years when he signed

the release introduced in evidence."—Approved: St. Louis, I. M. & S. R. Co. v. Holmes, 88 Ark. 181, 114 S. W. 221.

§ 4419. Failure to Provide Proper Couplings for Cars.

(a) "If you believe from the evidence that an ordinarily cautious, careful, and prudent person, under the same circumstances, would have provided a cotter key to prevent the king pin from coming up and permitting the engine and tender to become uncoupled, and if you believe that at the time the deceased was killed the king pin which fastened the drawbar to the tender of the engine was not provided with such cotter key, and if you believe that the failure of the defendant to have such king pin secured by a cotter key was a failure on its part to exercise ordinary care to have a reasonably safe place and reasonably safe appliances for the use of the deceased in the performance of his duties, and if you believe from the evidence that when said engine and tender became uncoupled the deceased, W. I. S—, was thereby caused to and did fall in front of the tender and was run over and killed, and if you further find from the evidence that the failure of the defendant to provide such cotter key to secure such king pin was negligence, and that such negligence was the proximate cause of the death of the deceased, and if you believe from the evidence that the plaintiffs had a reasonable expectation of receiving pecuniary benefits from the deceased, had he lived, you will find for the plaintiffs, unless you find for the defendant under other issues submitted to you by the court."—Approved: Missouri, K. & T. Ry. Co. v. Snow, 53 Tex. Civ. App. 184, 115 S. W. 631.

(b) "If you believe from the evidence that plaintiff, on the occasion in question, was in the employment of defendant as switchman, and as such engaged in the work of operating its trains or cars at Echo, and that, while so employed and engaged, he undertook to adjust the drawbars between two cars, and that he was, in so undertaking, acting in the ordinary discharge of the duties of his service, and that, while so engaged and undertaking, he was injured by the bounding back of one of the cars, substantially as alleged, and that such bounding back was on account of the car striking another in which the knuckle of its coupling appliance was closed, and that defendant had failed to exercise ordinary care to maintain the coupling appliance of which said knuckle was a part in a reasonably safe condition, and that on account thereof such coupling appliance was in a condition that kept the knuckle from being open, or that said knuckle was not in such condition, but that some employe or servant of defendant, in the course of his service for it, left the knuckle closed, instead of open, and that he, in so doing, failed to exercise ordinary care, as before defined, and that in either event such want of ordinary care was a proximate cause, as above explained, of plaintiff's alleged injuries—then let the verdict be for plaintiff, unless you find for defendant on the issue of contributory negligence or on the issue of assumed risk as submitted by the court."—Approved: Texas & N. O. R. Co. v. Jackson, 51 Tex. Civ. App. 646, 113 S. W. 628.

§ 4420. Foreman Knowing of Defect not Informing Servant under him.

"That if defendant company had furnished clamps and bolts suitable to fasten the vise to the table to be drilled, and you further find from a preponderance of the evidence that the said employe, O'L—, was in the direction and superintendence of such work of drilling, specially charged in the performance of the duty thereto by defendant company, and that said O'L— failed to perform his duty in using the clamps and bolts to fasten the vise on the table to be drilled, and in so doing was guilty of negligence as that term has been defined to you, and that plaintiff was ignorant of and not informed as to the use of the drill and worked under the direction and according to instructions of O'L—, and as the proximate result of the negligent failure of O'L—, if any, to use the clamps and bolts to fasten the vise on the table to be drilled, the plaintiff's fingers were caught in the gearing, etc., and that plaintiff was at the time in the exercise of ordinary care, then defendant would be liable."—Approved: Texas & P. Ry. Co. v. Johnston (Tex. Civ. App.), 99 S. W. 738 (not reported in state reports).

§ 4421. Failing to Guard Against Injury from Known Defect.

"Or if you believe from the evidence that the said foreman applied said air at said time with such suddenness as to lift said arm or brace suddenly and with a jerk; and if you further believe from the evidence that the said S—, when said air was so applied, if you have found said air was so applied, discovered, or in the exercise of ordinary care for plaintiff's safety should have discovered, that said arm or brace would go upward and overbalance and probably injure plaintiff; and if you further believe from the evidence that said S—, after he had thus seen the probable result of the application of said air, if you should find that he did so see same, failed and refused to shut off said air; and if you further believe from the evidence that, after the said S— had made said discovery, if you find he did make same, he could have shut off said air; and if you further believe from the evidence that the shutting off of said air at said time would have prevented the injury to plaintiff; and if you further believe from the evidence that in his failure to shut off said air at said time, if you find he did so fail, the said S— was guilty of negligence that proximately contributed to plaintiff's injury, if any,—then in either of these events you will find for the plaintiff and assess his damages as hereinbefore instructed, unless you should find for defendant under other instructions given you."—Approved: Houston & T. C. R. Co. v. Johnson (Tex. Civ. App.), 118 S. W. 1150.

§ 4422. Insecure Doors of Cars Falling upon Employe.

"That if you shall believe from a preponderance of the evidence that the obligation which the defendant was under to use ordinary care to furnish McH— and its other employes engaged in similar service in its yard a reasonably safe place in which to work, required that defendant and its servants and employes intrusted with the duty in that regard should use ordinary care to provide the doors of cars operated

by it in its yard with reasonably safe appliances to hold them in position, and such care to keep them in reasonably safe condition for such purpose; and you believe that the appliances for holding the said door in position were in an unsafe and defective condition, substantially as alleged in plaintiff's petition, and that such condition, if it existed, either alone or together with leaving the door open or unfastened, was the proximate cause of the door falling and striking and killing McH—; and you believe that defendant in permitting the said appliances to be in such condition, if he did, should and would in the exercise of ordinary care have foreseen the injuring or killing of McH— or some other employe engaged in similar service, as a result that might occur from such condition, if any, under the circumstances of the case, and have made provision against such result; and you believe that defendant in permitting such condition of the appliances to exist, if it did, was guilty of 'negligence,' and that such 'negligence' was the proximate cause of McH—'s injury and death; and you do not believe that said McH— was guilty of contributory negligence, or assumed risk, which caused his death, or that his death was the result of accident under succeeding paragraphs of this charge—you will return a verdict for plaintiffs, but, unless you so find, you will return a verdict for defendant."—Approved: Houston E. & W. T. Ry. Co. v. McHale, 47 Tex Civ. App. 360, 105 S. W. 1149.

§ 4423. Engineer May Assume Track is Safe.

"'The court instructs the jury that if they find from the evidence that William H— was a locomotive engineer, and was employed as such by the defendant railroad corporation to run freight trains over the Cairo branch of its road leading from Cairo to Poplar Bluff, then the defendant owed him, as such employe, the duty of using ordinary care to keep the track and roadbed of its said railroad in a reasonably safe and secure condition for the passage of such trains; and the court further instructs you that in the absence of knowledge to the contrary, the servant, while in the performance of his work, has the right to presume that the master has properly discharged his duty, and does not assume risks, which may be shown by the evidence to have resulted from any omission or neglect of duty on part of the master." —Approved: Hach v. St. Louis, I. M. Ry. Co., 208 Mo. 581, 106 S. W. 525.

§ 4424. Special Duty of Engineer to Inspect his Engine and Report.

"You are further charged that, if you find from the testimony that it was the duty of the plaintiff, under the rules and customs governing plaintiff in the discharge of his duty as an engineer in defendant's service, to look over and inspect his engine and make report at the end of his run, in writing, of all the defects in and about his engine, and you further find that plaintiff failed to perform said duty, if any, and that if he had performed such duty he would have discovered the defect, if any, in the fastening of said step, and you further find in failing to discover said defect, if any, in the fastening of said step,

should you find that he did fail to discover it, plaintiff was guilty of negligence, and that such negligence, if any, either proximately caused or contributed to his injury, if any, then plaintiff cannot recover, and you will so find."—Approved: Galveston, H. & S. A. Ry. Co. v. Cherry, 44 Tex. Civ. App. 344, 98 S. W. 898.

§ 4425. Defects not Discoverable by Exercise of Ordinary Care by Servant.

"The court instructs the jury that they cannot in any event find for plaintiff, because they may believe from the evidence that the chain with which the hitch was made was not reasonably safe, if they shall believe from the evidence such condition was unknown to defendant's foreman, W. C. S—, and would not have been discovered by him by the exercise of ordinary care in time to have prevented the injury."—Approved: Louisville & N. R. Co. v. Melton, 127 Ky. 276, 105 S. W. 366.

§ 4426. Assumption of Risk where Defect is Known or Obvious.

(a) "If you believe that the headlight of the engine upon which the plaintiff was employed at the time of the alleged accident was defective, or so defective that it gave an insufficient light, and that the plaintiff knew the same before or at the time of his starting upon his run from El Paso, and that the night was dark and stormy, and that the plaintiff knew, or, in the ordinary discharge of his duty, must necessarily have acquired the knowledge that it was dangerous to run his engine with the headlight in such condition, then he must be held to have assumed the risk and danger of running the engine with such headlight, and, if he was injured under such circumstances in consequence of the headlight being defective, and independently of any other act of negligence, or negligent omission on the part of the defendant, your verdict should be for the defendant."—Approved: Galveston, H. & S. A. Ry. Co. v. Fitzpatrick (Tex. Civ. App.), 91 S. W. 355 (not reported in state reports).

(b) "The plaintiff, B—, had a right to presume that the defendant had exercised ordinary care to furnish a reasonably safe handhold for his use in the manner and for the purpose for which it had been provided, and was not required to inspect such handhold before using it; but if the fact that such handhold was insecurely fastened to the car, as alleged (if it was so fastened), was open and obvious to plaintiff, or if he knew of the same, or must necessarily have discovered the same while engaged in the discharge of the duties of his employment in an ordinarily careful manner, then he would assume the risk of such defect (if any)."—Approved: Missouri, K. & T. Ry. Co. v. Box (Tex. Civ. App.), 93 S. W. 134 (not reported in state reports).

(c) "If you believe from the evidence that, at the time plaintiff is alleged to have been injured, the plaintiff was attempting to turn an engine on the turntable in question, and should further believe that said turntable was defective, and that by reason of any defect in said turntable same was caused suddenly to stop, but should further believe

that the condition of said turntable and the amount of force and strength necessary to turn or move same were known to plaintiff, or, in the ordinary discharge of his duties as an employe of the defendant, must necessarily have been known to him, then and in such an event you will find for the defendant."—Approved: Currie v. Missouri, K. & T. Ry. Co., 101 Tex. 478, 108 S. W. 1167.

§ 4427. Negligence of Master not an Assumed Risk.

(a) "An employe of a railroad company is held in law to assume such risks as are ordinarily incident to the service he engages to perform, and such others as he knows of or must necessarily have known of in the ordinary discharge of the duties of his service; but risks arising from negligence of the company's servants or employes that are chargeable to it are not assumed by an employe, unless he knows of them or must necessarily have known of them in the ordinary discharge of the duties of his service, and until then he has a right to assume that risks arising from such negligence do not exist."—Approved: Texas & N. O. R. Co. v. Jackson, 51 Tex. Civ. App. 646, 113 S. W. 628.

(b) "In determining the issue submitted in the next preceding paragraph, you are instructed that if plaintiff's alleged injury was the result of defendant's negligence, or that of one of its servants or employes, chargeable to it as submitted by the court, then if plaintiff had no knowledge of the danger or risk thence to him arising until he was injured, and if he would not necessarily have known thereof in the ordinary discharge of the duties of his service until injured, the defense of assumed risk is not sustained."—Approved: Texas & N. O. R. Co. v. Jackson, 51 Tex. Civ. App. 646, 113 S. W. 628.

(c) "The court instructs the jury that the plaintiff, B—, in entering upon and continuing in the employment of the said Chicago & Alton Railway Company as a switchman, assumed all the risks ordinarily incident to the work he was called upon to perform; but he did not assume the risks, if there were any such, arising from the negligence of said company or the said witness F—."—Approved: Brady v. Kansas City, St. Louis & Chicago R. Co., 206 Mo. 509, 102 S. W. 978, 105 S. W. 1195.

§ 4428. All Dangers Ordinarily Incident to the Business Assumed.

(a) "You are instructed that railway companies are not to be regarded as insurers of the safety of their employes, for under the law they are not insurers, and one who enters the employment of a railway company assumes all risks that are ordinarily incident to the business, but he may assume that the railway company and its other servants and employes have exercised ordinary care to do their duty, and he does not assume the risk of any danger that may be brought about by the negligence of the railway company, or its other servants or employes, unless he knows of such negligence and the attendant risk, or in the ordinary discharge of his duty must necessarily have acquired the

knowledge."—Approved: El Paso & S. W. R. Co. v. O'Keefe, 50 Tex. Civ. App. 579, 110 S. W. 1002.

(b) "The court instructs the jury that a person engaged in the services of a railroad company as a bridge carpenter assumes all the risk ordinarily incident to the business; but he does not assume the risk of the negligence of the master himself, or of anyone to whom the master may see fit to entrust his superintending authority."—Approved: Choctow, O. & G. R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244.

(c) "When plaintiff entered the service of defendant as a locomotive engineer, he assumed all the risks which are incident to the prosecution of that employment in the usual and ordinary way, and under the circumstances usually surrounding the running of a locomotive engine in the operation of a railway; and he cannot recover for any injury which may have come to him in the usual and ordinary prosecution of that business. But the plaintiff, when he entered such employment, had a right to assume that defendant would use all reasonable care in the keeping of its road and appliances in good order and repair; and if any injury came to him by reason of any negligence of the defendant or its employes, other than his own negligence, this would not be a risk which he assumed as one incident to his employment."—Approved: Knapp v. Sioux City & P. Ry. Co., 71 Iowa, 41, 32 N. W. 18.

(d) "If the jury find from the evidence that, as the train approached the station Juneau, the plaintiff was sitting in the cupola of the caboose, and the conductor attempted to signal the engineer from the window of the cupola of the caboose, and failed, and then went out on the top of the caboose and crossed over to a box car to signal the engineer, and did signal the engineer to stop, then it was the duty of the engineer to stop his train at Juneau, in obedience to the order, and if the jury find from the evidence that the engineer, acting in obedience to the signal of the conductor, applied the brakes to the train in the usual and customary manner, and if the jury find from the evidence that the train was going up a grade, and the application of the brakes and the train going up the grade caused the slack to run out, and this caused a jar or jolt, which threw the conductor off of his feet, and he fell between the cars, this would not be negligence, and you will answer the first issue 'No.' "—Approved: Bull v. Atlanta & C. Air Line Ry. Co., 149 N. C. 427, 63 S. E. 126.

§ 4429. Where Servant Knows of Master's Negligence he Assumes Risk from that.

(a) "When the deceased, Joe A—, entered the employment of the defendant, he assumed all the risks of danger ordinarily incident to such employment, but he did not assume any danger or risk arising from the negligence, if any, of the defendant, unless he knew of such negligence and attendant danger, or, in the ordinary performance of his duties, would have necessarily acquired knowledge thereof, in time to have avoided injury therefrom. Plaintiff had the right to assume that

defendant would perform its duty of exercising ordinary care for the safety of its employes."—Approved: Houston & T. C. R. Co. v. Alexander, 102 Tex. 497, 119 S. W. 1135.

§ 4430. Where by Ordinary Care Servant Should Know of Master's Negligence.

"When plaintiff entered the service of defendant as fireman, he assumed all the risks and dangers ordinarily incident to such employment; but he did not assume any risk of danger that might be caused by the negligence of the defendant, its agents or servants, unless he knew of such negligence, if any, or, in the ordinary performance of his duties, must necessarily have known thereof in time to have avoided injury therefrom."—Approved: Missouri, K. & T. Ry. Co. v. Gray (Tex. Civ. App.), 120 S. W. 527.

§ 4431. Servant's Reliance on Vice Principal to Guard Against Injury.

"If from a preponderance of the evidence you believe that W— was intrusted by the defendant with the power to superintend, direct, control, and manage plaintiff while in the performance of his work, and that in virtue of such power the said W— ordered and directed the plaintiff, while the plaintiff was engaged in removing a tie from a gravel deck, to get down into a trench and lift the tie off the guard rail, and that such order or direction, if such there was, was given in such a way and under such circumstances as to reasonably justify plaintiff in believing, and that he did believe, that said W—, by the exercise of ordinary care, could and would hold the other end of the tie under the rail of the track, so that it would not slide out or turn over and injure him, and if you further believe that said W—, by the exercise of ordinary care, could have held the other end of said tie under the rail of the track, so that it would not slide out or turn over and injure plaintiff, and that, acting in obedience to such direction and belief, that the plaintiff took a position astride of said tie and began lifting the same as directed by said W—, and that, while doing so, the said W— failed to hold the other end of said tie to prevent the tie from sliding out from under the rail, and that it was negligence on the part of said W— to fail to hold the end of said tie, and that such negligence, if any, directly caused plaintiff's injuries, if any, and that the plaintiff has been thereby damaged, you will return a verdict for the plaintiff, unless you further find that plaintiff was guilty of contributory negligence, or that he assumed the risk, or that plaintiff and said W— were fellow servants."—Approved: Reeves v. Galveston H. & S. A. Ry. Co., 44 Tex. Civ. App. 352, 98 S. W. 929.

§ 4432. Section Boss Relied on to Protect Track Men from being Run Over.

"The court instructs the jury that if you believe from the evidence that the plaintiff was a section hand, and M— was a track foreman or section boss in the employment of defendant company, and was a vice principal of the plaintiff, and the duties of the plaintiff and M—

are as set out in the printed rules introduced in evidence, and that M— ordered his hand car put on the track by plaintiff and others, and ordered plaintiff and others to go on said car towards Old Fort—said M— knowing there was a past-due train liable to come along the track, meeting them,— and the said M—, without informing plaintiff of the danger, met the train at a point where it could not be seen by those on the hand car until it was within 510 feet of them, and would reach the point where the hand car was in from nine to ten seconds, and said M— had not sent out a flagman or taken other precaution to protect the plaintiff, this would be negligence on the part of defendant, and the plaintiff would not be guilty of negligence in riding on said hand car.

"It was his duty to listen and look, and, in case danger was reasonably to be apprehended from a belated train or otherwise, to send a flagman in front of the hand car to notify the engineer on the train, so that the train might be stopped or slowed up, or by bell or whistle give notice of its approach, in order that the hand-car crew might save themselves from danger. If you find that there was negligence on the part of the track foreman in his duties, as just defined to you, and find that he was the defendant's agent, as I have described the agency to you, and plaintiff's superior, and further find that the injury occurred, if it did occur, in the performance of the duties conferred on the agent, and that M— negligently ordered plaintiff to go on the track to remove the car, and that the injury was the result of the negligence of M—, then you will answer the first issue, 'Yes.' "—Approved: Allison v. So. Ry. Co., 129 N. C. 336, 40 S. E. 91.

§ 4433. But if they see Danger Imminent they must care for Themselves.

"You are instructed that a member of a section gang rests under no duty or obligation, with knowledge of an impending danger, to continue in the dangerous situation in obedience to the order, direction, or command of the foreman of the section gang. If, therefore, you believe from the evidence that the plaintiff knew of the approach of the train to the push car by or near which he was standing at said time, and the probability of a collision, and the danger to which the same exposed him, and remained in his said position, relying upon the foreman to notify him when to leave the same, and you further believe that said conduct on his part was not such conduct as an ordinarily prudent person would have pursued under the same circumstances, and that, but for such conduct he would not have been hurt, then you will return a verdict for the defendant."—Approved: Intl. & G. N. R. Co. v. Tisdale, 36 Tex. Civ. App. 174, 81 S. W. 347.

§ 4434. And where the Risks are Obvious.

(a) "The said McH— upon entering, and so long as he continued, in the service, assumed the risks which were ordinarily incident to the service in which he was engaged; risks which were obvious, and risks which were known to him, or would necessarily have been known to him, by the exercise of ordinary care in the discharge of his duties. He

did not, however, assume risks which arose from the negligence of defendant until he became aware thereof, or in the exercise of ordinary care in the discharge of his duty would necessarily have become aware thereof; and he had a right to assume that the defendant would use ordinary care in the performance of its duty until he knew, or in the exercise of ordinary care would have known, the contrary."—Approved: Houston, E. & W. T. Ry. Co. v. McHale, 47 Tex. Civ. App. 360, 105 S. W. 1149.

(b) "On the other hand, if you believe from the evidence that the place at which plaintiff was at work at the time he was injured was a reasonably safe place for him to discharge his duties, or if you find from the evidence that stumbling over a clinker, cinders, coal, mound, pile or heap, or any of them, if he did, was not proximate cause of plaintiff's injury, or if you believe that defendant did not know of the presence of said obstructions, if any, and by the exercise of ordinary care would not have known thereof, or if you believe from the evidence that plaintiff's injuries were the result of the risks ordinarily incident to the work in which he was engaged, or if you believe from the evidence that the obstructions above named, if any, or any of them, caused plaintiff to stumble and thereby get injured, but yet you believe that the presence of said obstructions, if any, at the time and place he was injured, were so patent and open to observation that an ordinarily prudent person, performing the duties plaintiff was then discharging, would, in the exercise of ordinary care for his own safety, have discovered and avoided the danger, if any there was, or if you believe from the evidence plaintiff knew of the presence of said obstructions, if any, or if you believe from the evidence that plaintiff's injuries were the result of an accident, by which is meant that neither plaintiff nor defendant has been shown by the evidence to have been guilty of negligence, which was the proximate cause of said injury, or if you fail to find from the evidence that plaintiff stumbled and fell over the obstructions, if any, as herein charged, or any of them, but believe from the evidence that he was upon the incline, if any, between the two tracks, and slipped and fell, or that he attempted to get upon the foot-board of the engine and fell, thereby causing his injuries, or if you find from the evidence and believe that plaintiff's injuries were caused by a failure on his part to exercise such ordinary care for his own safety as a person of ordinary prudence engaged in the same service would have exercised—then, upon your finding any one or more of the events mentioned in the several subdivisions of this clause of the charge, you will return a verdict for the defendant." —Approved: Houston & T. C. R. Co. v. Grych, 46 Tex. Civ. App. 439, 103 S. W. 703.

§ 4435. Where Servant goes on Engine with Engineer Known to be Without Experience.

"If you believe from the evidence that the engineer, S—, was on his first run on the route when the accident occurred, and was unacquainted with the same, and that in consequence of his lack of ac-

quaintance with the road the plaintiff was injured, but if you further believe that when plaintiff commenced the run or trip he knew that the engineer was on his first run and was unacquainted with the road, then the plaintiff assumed the risk and dangers attending his working with said engineer with the knowledge that he was on his first run and unacquainted with the road, and you should find for the defendant."—Approved: Galveston, H. & S. A. Ry. Co. v. Gibson (Tex. Civ. App.), 54 S. W. 779 (not reported in state reports).

§ 4436. Ordinary Loose Joints in Railroad Track are Assumed Risks.

"Another question on the subject of assumed risk is, was the joint in the track in the condition of ordinary loose joints on defendant's line of railroad? Or was it of a more serious or dangerous character than the ordinary loose joint on said railroad? You are instructed that, in assuming all the ordinary risks of danger in his employment, the plaintiff assumed all the risks of danger from ordinary loose joints such as the evidence shows are frequently found in defendant's line of track. If you find a loose joint caused the accident, that it was not known to the plaintiff to have existed there, or would not have been known, had he exercised ordinary care, and that it was not an ordinary loose joint, but was of a more serious and dangerous character than an ordinary loose joint, then the plaintiff did not assume the risk of any danger caused by said joint. You must decide the question of assumed risk from the evidence in the case."—Approved: Mumford v. Chicago, R. I. & P. Ry. Co., 128 Iowa, 685, 104 N. W. 1135.

§ 4437. Assumption of Risk in Manner of Conduct of Business.

(a) "Another rule of law is that if a man engage in a service, and continues in a service, with a full knowledge of the manner in which his employer conducts his business, and without objection, he is deemed, in law, to have assumed and taken upon himself all the risks naturally incident to conducting business in that way, even although it be unsafe. A man is, of course, under no obligation to investigate and examine how his employer conducts his business, for the purpose of ascertaining whether safe or not. In the absence of knowledge to the contrary a servant has a right to presume that his employer will conduct his business safely. But if a man enters and continues in a service, with knowledge of the manner in which the business is conducted, without objection to his employer, or any promise on the part of his employer to change the mode of doing business, he does it with his eyes open, assumes the risks, and cannot recover damages, even although this mode of conducting business be careless.

"The same is true if the mode of conducting the business is open and apparent, and the employee has ample and reasonable means of positive knowledge of the precise danger assumed. Hence, in this case, a material question is whether plaintiff either had positive knowledge of the custom of the railroad company in disposing of the ashes; or if it was open and notorious, and he had ample and reason-

able means of positive knowledge of the fact, he would be deemed in law to have voluntarily assumed all the risks incident to the mode of conducting the business, and cannot recover even although the custom was unsafe."—Approved: Hughes v. W. & St. P. R. Co., 27 Minn. 137, 6 N. W. 79.

(b) "A railroad company is not bound to change its manner of using its side tracks, nor to adopt the most approved ways or appliances in business. And if one of its servants, knowing, or having ample means of knowing from long-continued employment, the way and manner in which the side tracks are used, continues in the employment without complaint, and if from such way and manner is subjected to risks of accident, he is presumed to assume such risks, and, if injured thereby, cannot recover."—Approved: Hewitt v. Flint & P. M. R. Co., 67 Mich. 61, 34 N. W. 659.

(c) "If you believe from the evidence that for more than five years immediately preceding the accident in question the deceased, W—, was employed by defendant as a locomotive engineer, and that he passed Gaffey's switch during said time often enough and under such circumstances as to make him familiar with the situation there, and with the methods of loading which were followed there, and with the fact that defendant kept no loading superintendent there, and kept no depot or loading platform, and had no track walker, and he also knew or should have known the danger and risk to which he was exposed by reason of said facts and such situation, and with full knowledge of said facts and such situation and the said danger and risk to him, he voluntarily elected to continue and did continue in his said employment as locomotive engineer for as long as two years after having become acquainted with said facts, dangers, and risks and said situation, then I instruct you that by so continuing in his employment he assumed said danger and risk."—Approved: Wyckoff v. Pajaro Valley Consol. R. Co., 11 Cal. App. 106, 103 Pac. 1100.

(d) "If you believe from the evidence that plaintiff was injured at the time and place, and in the manner charged in the petition, and if you further believe that plaintiff's said injuries were caused by the rapid movement of the handcar from the toolhouse to the railway track, at a point on the railway track where there was a switch and a guard rail or rails, and if you further believe that it was negligence, as that term has been defined to you, in the section hands to move the said hand car from the toolhouse to the railway tract at that place with the speed it was moved, and if you further believe from the evidence that at the time the plaintiff was injured he was an experienced section hand, and knew, or might have known by the use of ordinary care, the risk and danger of moving the said hand car in the manner it was moved, and if you further believe that the said hand car at that time was moved by the section hands in the manner which theretofore had been usual and customary with them, and if you believe that plaintiff at the time knew the ordinary manner and custom of the section hands theretofore in moving the said hand car

from the toolhouse to the railway track, then plaintiff assumed all risk to himself of injuries by reason of the manner of moving the said car at that place, and defendant is not liable to plaintiff for any injuries received by him, and you will find for the defendant."—Approved: St. Louis Southwestern Ry. Co. v. Brisco, 42 Tex. Civ. App. 321, 100 S. W. 989.

§ 4438. Continuance in Employment where Conditions are Dangerous Without Knowledge.

"The jury are further instructed, as a matter of law, that an employee of a railroad company cannot recover for an injury suffered in the course of the business about which he is employed from defective machinery used therein, or from dangerous condition of the track, or improper manner of running and operating of a train, after he has knowledge of such dangerous conditions, and continues his work without objection; and in this case, if you believe from the evidence that brakeman C— knew that there was no turntable at W., that the engine must back up on return trips, and that there was no regular headlight upon the engine in question, and that there was no pilot upon the tender of such engine, and that he continued in such employment with knowledge of such conditions, without objection, then he assumed the hazards incident to such conditions, and if the injuries in question resulted from any of said conditions, plaintiff cannot recover on those issues, and your verdict should be for the defendant."—Approved: C., B. & Q. R. R. Co. v. Camper, 199 Ill. 569, 65 N. E. 448, rev'g 100 Ill. App. 21.

§ 4439. Promise to Repair Defective Appliance.

(a) "Before the plaintiff can relieve himself from the assumption of the risk in using the defective lifting jack, if you believe from the evidence it was defective, on account of promise to repair the same, or to furnish another one not defective, if there was such a promise on the part of said defendant, you must believe from the evidence that the plaintiff objected to the use of the lifting jack, and must also believe that the same was in fact defective or out of repair, and that the plaintiff continued in service upon the faith of a promise to furnish another one not defective and in good repair, and you must also believe that the defendant had had a reasonable time after the complaint was made, and after the lifting jack was found to be defective, if it was, or out of repair, if it was, in which to have secured another in lieu of the one being used, and unless you believe all these things, you will find for the defendant. Mere complaint by an employee about the condition of tools furnished for his use by his employer is not sufficient to make the employer liable for the results of its use, or to relieve the employee of his assumption of the risk of such use; but there must also be a promise, express or implied, on the part of the employer, to repair the alleged defect, and the subsequent use of the defective tool by the employee must be upon the faith of such promise so made. Therefore, although you may believe there was some defect

in the jack being used, if there was any, on October 29, 1904, and that some complaint has been made on account thereof, there must have been a promise made to repair the defect, if any, or supply another jack; and you must also believe that a reasonable time elapsed after the promise was made, within which to repair or supply another jack; otherwise plaintiff cannot recover. If the promise was made, should you believe any was made, so long before the accident that the length of time elapsing between the promise, if any, and the accident, if any, was an unreasonable length of time for making the repair or furnishing another jack, then the plaintiff had no right to continue to rely on the promise, if any was made, and would not be entitled to recover, and you will find for the defendant."—Approved: St. Louis Southwestern Ry. Co. v. Kern (Tex. Civ. App.), 100 S. W. 971 (not reported in state reports).

§ 4440. Continuing to Use Defective Appliance without Protest.

"When an employee has knowledge, or has the means of acquiring knowledge by the exercise of ordinary care and diligence, of defects or imperfections in the switches or cars about or upon which he is employed, and continues in his employer's service without objection or protest, and continues the use of such imperfect machinery or switches, he will be held to have assumed all the risks incident to the use of such defective machinery or switches. Hence, if you find from the evidence that the switch in use by the defendant in its yard at Muscatine was in fact defective and dangerous, and that S— knew, or by the exercise of ordinary care and prudence would have known, that the switch was so defective and dangerous, and that it was not safe, on account of its defective and dangerous condition, to uncouple cars passing over the switch at the rate of speed you find from the evidence the cars were moving at the time S— entered between the cars to uncouple them, or at the rate they were moving at the time they reached the switch, or to uncouple them at all while on the switch, on your so finding, S—'s attempt to uncouple the cars under such circumstances would be contributory negligence, and would defeat the right of the plaintiff to recover in this action; and your verdict should be for the defendant."—Approved: Quinn v. Chicago, R. I. & P. Ry. Co., 107 Iowa, 710, 77 N. W. 464.

§ 4441. Question for Jury if Person of Ordinary Prudence would Continue in Service.

"If you believe from the evidence that the mail crane by which Robert Lee W— was struck and killed was so near the defendant's railway track as that same was dangerous to the deceased, Robert Lee W—, while he was engaged in operating the engine upon which he was at the time he was killed; and if you further believe from the evidence that a person of ordinary care would have continued in the service of the defendant in the capacity of locomotive engineer with such knowledge of the location of said mail crane and the danger of

operating an engine over defendant's track by where same was located, as you may believe said Robert Lee W— had; and if you further believe from the evidence that in erecting and maintaining said mail crane the distance it was from the track at the time said W— was killed, defendant was guilty of negligence; and if you further believe that such negligence, if any, was the proximate cause of the death of said Robert Lee W—, you will find for plaintiffs and assess their damages under instructions hereinafter given, unless you find for the defendant under other instructions given you."—Approved: Missouri, K. & T. Ry. Co. v. Williams, 50 Tex. Civ. App. 134, 117 S. W. 1043.

§ 4442. Employee Charged with Knowledge of Ordinary Method of Conducting Business.

"The term 'negligence,' as used in this case, means a failure by the defendant to perform some legal duty it owed to the deceased at the time of the accident. It was the defendant's duty, when it determined to move the car on which the deceased was working, and switch it back to the place where it originally stood, if the defendant's agents who had charge of and performed that work knew that deceased was standing on the car during the operation, to do the switching with such care and prudence as a reasonably careful and prudent man would exercise under the circumstances, and to run against the cars, on one of which the deceased was standing, with only such speed and force as was reasonably necessary for that purpose under the circumstances. It must be assumed that it was necessary to use some speed and force, or the result could not be accomplished. The defendant had the right to run against the stone cars with sufficient speed and force to move them into their proper positions. In doing so the defendant was performing an act necessary to be performed in the usual course of its business; and the deceased boy, when he chose to remain on the car during the operation, is chargeable with knowledge that the defendant would and must use such speed and force in running and switching the cars as was reasonably necessary for that purpose, and to have taken the chances of any accident which might result from the use of that amount of speed and force. The use of such speed and force as were reasonably necessary, under the circumstances, to switch the cars, was lawful, and the defendant was not negligent in using it. And if the defendant ran its engine and connecting cars against the stone cars with unnecessary speed and force, the employment of such unnecessary speed and force was a negligent act, and constituted negligence, as charged in the first and third counts of plaintiff's declaration. The question, then, upon this branch of the case, for you to determine, is, did the defendant use unnecessary force and speed, under the circumstances, in running its engine and connecting cars against the stone cars, upon one of which the deceased was standing at the time of the accident? This is a material proposition in the case, and I submit it to you as a question of fact, to be determined from the evidence bearing upon that subject."—Approved: Dolson v. Lake Shore & M. S. Ry. Co., 128 Mich. 444, 87 N. W. 629.

§ 4443. Putting Oneself in Obvious Danger.

"If you find from the evidence that plaintiff's intestate just before the accident which resulted in his death was working in the pit under the defendant's engine, and that the place was reasonably safe in which to perform his work, and if you further find that the engine moved a distance of four or five feet and stopped, and after this move of the engine, and before the second move, he, without warning or notice to those operating the engine, crawled out upon one of the rails of the track between two of the drivers of the engine, and that said place was obviously dangerous under the circumstances, and that in this position he lost his life by being run over by the engine, I charge you as a matter of law the plaintiff cannot recover, and your verdict must be for the defendant, 'No cause of action.' "—Approved: Condie v. Rio Grande Western Ry. Co., 34 Utah, 237, 97 Pac. 120.

§ 4444. Failure to Warn Employee in Dangerous Place of Movement of Cars.

(a) "If you believe from the evidence that the injury to plaintiff occurred as alleged in his petition, and if you further believe from the evidence that the person or persons in charge of said engine and construction train at the time of such injury was guilty of negligence in operating said engine or train, made up as it was and in the manner you believe the same was handled at the time of the injury, or that the defendant, its agents, servants, and employees, did not provide a watchman in the rear of said train to warn the persons working behind said train of the contemplated movements of the same, or if you believe that a code of signals had been established whereby it became the duty of the engineer of the dummy engine to give three blasts of the whistle of his engine, and that it was the duty of the locomotive engineer to repeat the same signal by three blasts of the whistle of his engine for the purpose of warning those working in the rear of said train as to the contemplated movement of said train, and if you further believe that the engineer of the locomotive engine failed to repeat such warning by three blasts of the whistle of his engine just before the backward movement of said train at the time of the injury, and if you further believe that such failure, if any, to provide a watchman in the rear of said train to notify those working in the rear thereof of the contemplated backward movement of the train, or if you believe that said failure, if any, to warn said workmen working behind said train by blasts of the locomotive engine, constituted negligence upon the part of the defendant or its agents, servants, and employees, and if you believe that said negligence, if any, was the proximate cause of said injury to said plaintiff, Grant McL—, then you will return a verdict in favor of the plaintiff, Grant McL—, unless under the instructions hereinafter given, you find, that the said Grant McL— was himself guilty of negligence approximately contributing to his injury."—Approved: Choctaw, O. & T. Ry. Co. v. McLaughlin, 43 Tex. Civ. App. 523, 96 S. W. 1091.

(b) "If you believe from the evidence in this case that on or about November 12, 1904, Steve H— was in the employ of the defendant, and that he, in the discharge of the duties of his employment, went in between some freight cars and received injuries from which he died; and if you further believe from the evidence that Steve H— gave a come ahead slow signal at or about the time that he went in between the cars, if he did; and if you further believe from the evidence that it was the duty of defendant's engineer to obey such 'come ahead,' slow signal, if any was given, and that defendant's engineer did not obey such come ahead slow signal, if any was given, and that he came ahead fast and kicked the cars; and if you further believe from the evidence that such failure, if any, of defendant's engineer to obey such come ahead slow signal, if any was given, and that such kicking of the cars, if he did, and such coming ahead fast with the cars, if he did, was negligence on the part of defendant's engineer, and that such negligence, if any, was the sole, direct, and proximate cause of the injury and death of Steve H—; and if you further believe from the evidence that Steve H— was not guilty of any contributory negligence, and that he did not assume the risk of such kicking of the cars and coming ahead fast, if any, and that he was the husband of plaintiff, and that plaintiff has sustained pecuniary loss by reason of the death of the said Steve H—, then you will return your verdict for the plaintiff."—Approved: Texas Mexican Ry. Co. v. Higgins, 44 Tex. Civ. App. 523, 99 S. W. 200.

(c) "It is established by the undisputed evidence that plaintiff, on the 30th day of August, 1891, was in the employ of the defendant as a brakeman on a freight train; that on said day, at Vinton, Iowa, while switching some cars onto a side track, plaintiff received an injury resulting in an amputation of his leg. And if, in addition thereto, you find from the evidence that the engineer in charge of the engine attached to said freight train negligently ran said engine and two of these box cars upon said track at a high rate of speed; that he then and there, in a quick, violent, and negligent manner, without warning to or signal from the plaintiff, set the air brakes upon said engine; that by reason thereof plaintiff's feet were jerked from off the brake beam where plaintiff, in the line of proper performance of his duties, was standing; that plaintiff, without negligence on his part, was thereby precipitated beneath the wheels of said engine and tender, and received said injury,—then plaintiff will be entitled to recover, and you should find for the plaintiff. If you fail to so find, then plaintiff will not be entitled to recover, and you should find for the defendant."—Approved: Brown v. Burlington, C. R. & N. Ry. Co., 92 Iowa, 408, 60 N. W. 779.

(d) "If you shall find, from a preponderance of the evidence in this case, that the plaintiff, in attempting to make the coupling in question, without any negligence on his part, occupied a position of danger in attempting to make such coupling, with the knowledge of the engineer in control of the engine, then you should further find that it was the

duty of the engineer of said train, having such knowledge, to use all reasonable care and caution to avoid injuring the plaintiff; but if you shall further so find that the plaintiff was not guilty of any negligence that contributed to his injury, but that the injury to the plaintiff was caused by a sudden jerking or starting of the engine at the time he was endeavoring to make such coupling, and that such sudden jerking or starting of the engine was done without any signal from the plaintiff, but was so done by the defendant's engineer with full knowledge of the situation then occupied by the plaintiff, then, and in such case, such act of jerking and starting the engine would constitute negligence on the part of the defendant, and would justify you in returning a verdict for the plaintiff in this case."—Approved: Strong v. Iowa Cent. Ry. Co., 94 Iowa, 380, 62 N. W. 799.

§ 4445. Reasonable Effort to Give Proper Signal.

"If you should believe from the evidence that after the engineer B—, on train extra No. 411, gave the signal for a flag, the conductor on said train got a flag and alighted from said train before it stopped and ran back on the track in the direction in which plaintiff's train was moving, to as great a distance as a reasonably prudent person under the same or similar circumstances would have gone, and that, in alighting from said train and going back said distance under the circumstances, the said conductor acted as a man of ordinary care would have acted under the same or similar circumstances, then you are instructed to find for the defendant, even though you should believe from the evidence that the said conductor did not go back the distance required by defendant's rules, or place torpedoes on defendant's track as required by said rules."—Approved: Missouri, K. & T. Ry. Co. v. Rogers (Tex. Civ. App.), 117 S. W. 939.

§ 4446. Failure of Employee to Station Signal for his own Protection.

"The court instructs the jury that you are not warranted in finding a verdict for the plaintiff in this case from the evidence alone that the plaintiff's husband, while repairing a car on side track number —, received injuries which resulted in his death, and that said injuries were caused by the backing of a string of cars in charge of the servants of the defendant and against the car which the plaintiff's husband was repairing; but the court instructs you further that to entitle the plaintiff to recover the burden rests upon her to prove to your satisfaction that at the time said string of cars were so pushed by the servants of the defendant against the car which plaintiff's husband was repairing there was then a signal flag placed by the husband of the plaintiff in front of said car which he was repairing for the purpose of giving a signal or notice to the servants of the defendant that he or some one was repairing one of said stationary cars, and unless the plaintiff prove this fact to your satisfaction by a preponderance of the evidence, then your verdict must be for the defendant."—Approved: Porter v. St. Joseph Stock Yards Co., 213 Mo. 372, 111 S. W. 1136.

§ 4447. Misunderstanding by Deceased of Signal Given by Engineer.

"If the engineer received a signal from the head brakeman to stop the train and in obedience to this signal, and as required by it he stopped the train in the usual manner where such a signal was given, or if E— was under the impression that the engine had been cut off from the cars, and the accident to him was due to this misunderstanding on his part, and not to the negligence of the engineer as defined in No. 1, or if he was not on the car in the performance of his duty as brakeman, then, in any of these events, the jury should find for the defendant."—Approved: Cincinnati, N. O. & T. P. Ry. Co. v. Evans' Adm'r, 129 Ky. 152, 110 S. W. 844.

§ 4448. Instruction for Defendant where Injury is from Fault of Fellow Servant.

"You are further instructed that all persons who are in the employment of the same master, engaged in the same common enterprise and are employed to perform duties and services tending to accomplish the same general purpose, are fellow servants. Therefore, if you find and believe from the evidence that at the time plaintiff was injured he was engaged in discharging any duty in the capacity of brakeman, you will find that he was a fellow servant with the employees of the defendant in operating said engine and tender, if you so find and believe, you will find for the defendant.

"On the other hand, if you find and believe from the evidence that at the time plaintiff was injured, if you find he was injured by being run over by one of defendant's engines and tenders, the plaintiff was not engaged in the performance of any service or the discharge of any duty as an employee of the defendant railway company, as brakeman, then you will find that he was not a fellow servant with the employees of defendant engaged in operating said engine and tender."—Approved: Missouri, K. & T. Ry. Co. v. Hendricks, 49 Tex. Civ. App. 314, 108 S. W. 745.

§ 4449. Instruction that Injury Caused by Fellow Servant makes Railroad Liable.

(a) "A railroad corporation operating a railroad, the line of which is situated, in whole or in part, in this state, is made liable by statute for all damages sustained by an employee thereof while engaged in the work of operating the trains or cars of any such corporation, by reason of the negligence of any other servant or employee of such corporation." —Approved: Texas & N. O. R. Co. v. Davidson, 49 Tex. Civ. App. 85, 107 S. W. 949.

(b) "A railroad corporation operating a railroad, the line of which is situated in whole or in part in this state, is made liable by a statute for all damages sustained by an employee thereof while engaged in the work of operating the cars or trains of such corporation by reason of the negligence of any other servant or employee of such corporation; and the fact that such servants or employees were fellow servants with

each other would not impair or destroy such liability."—Approved: Texas & N. O. R. Co. v. Jackson, 51 Tex. Civ. App. 646, 113 S. W. 628.

§ 4450. Engineer Injuring Brakeman by Violent Jerking of Cars.

(a) "If the engineer negligently gave the cars a jerk which was unusual, unnecessary, and so violent as to show a want of ordinary care on his part for the safety of the brakeman in charge of the train or on it, and by reason of this E—, while in the performance of his duty as brakeman and exercising ordinary care for his own safety, was thrown from the car and run over and killed, they should find for the plaintiff."—Approved: Cincinnati N. O. & T. P. Ry. Co. v. Evans' Adm'r, 129 Ky. 152, 110 S. W. 844.

(b) "If you believe from the evidence that on or about the 23d day of November, 1903, Charles F. M—was in the employ of the defendant in the capacity of a fireman on one of its freight trains, and that, while said train was near the station of Schulenburg and while the locomotive of said train was backing down the main line to couple on some cars that were standing on the main line, it was the duty of said Charles F. M— to go out upon the running board of the locomotive to blow out the boiler, and if you further believe from the evidence that, while the said Charles F. M— was out upon the running board of said locomotive, he was in the discharge of his duty blowing out the boiler, and if you further believe from the evidence that, while he was so engaged in the discharge of his duty, if he was so engaged, the engineer of said locomotive, without warning, caused said locomotive to move back against said cars with a sudden, violent, and unusual jar or jolt, and you further believe from the evidence that it was negligence, under all the facts and circumstances in evidence before you, to cause said locomotive to come in such contact with said standing cars, if it did come in such contact with them, and if you further believe from the evidence that such negligence, if any, directly caused the said Charles F. M— to be thrown from the running board of said locomotive, if he was so thrown, and if you further believe from the evidence that he was thereby injured as alleged in plaintiff's petition, if he was so injured, and you further believe from the evidence that such injuries, if any, directly caused the death of said Charles F. M—, and if you further believe from the evidence that the said Charles F. M— was not guilty of any negligence which caused or contributed to his injuries, if any, or to his death, and you further believe from the evidence that he did not assume the risk, and if you further believe from the evidence that the plaintiff, Mrs. C. F. M—, is the surviving wife of the said Charles F. M—, and that Maggie M— and Henry M— are the surviving children of the said Charles F. M— and Mrs. C. F. M—, and if you further believe from the evidence that said wife and children have been damaged by reason of the death of the said Charles F. M—, then I charge you that your verdict must be for the plaintiff."—Approved: Galveston, H. & S. A. Ry. Co. v. Mitchell, 48 Tex. Civ. App. 381, 107 S. W. 374.

(c) "The jury are instructed that if they believe from the evidence that in October, 1905, while the plaintiff, Ollie C. B—, was in the employ of the defendant as a brakeman, and was in the discharge of his duties on top of a certain freight car, to operate and set or release the brakes on said car, and while on said car the same came to a full stop and he was directed to get from the top of said car by the conductor, and while obeying said order and descending from the top of said car to the ground, using ordinary care for his own safety, and while in this position the said car was by the gross negligence of the engineer in charge of said train started suddenly, without any warning to this plaintiff, and by reason of the movement of the car the plaintiff was thrown off of said car to the ground, thereby injuring him, they should find for the plaintiff. Unless you so believe, you should find for the defendant."—Approved: Louisville & N. R. Co. v. Barrickman, (Ky.), 104 S. W. 273 (not reported in state reports).

§ 4451. Fellow Servants Negligently Releasing Injured Employee from Dangerous Position.

(a) "Gentlemen of the jury, the court instructs you that the deceased, W. S. M—, in entering the employment of the defendant, assumed all the ordinary risks necessarily incident to the character of work in which he was then engaged at the time of his injury, so you will therefore find for the defendant, unless you shall believe from the evidence that after the deceased, W. S. M—, was thrown or fell under the car at the time and place mentioned in the evidence, and after his dangerous position was known to defendant's employees in charge of the train, they, the said employees so in charge, could by the exercise of ordinary care have released him from his then position and avoided further injury to him, and if you shall further believe from the evidence that, in attempting to and in releasing said deceased at said time, they failed to use such care, and by reason thereof said deceased was injured by defendant's said employees to such an extent that it directly contributed to or caused his death, then and in that event the law is for the plaintiff, and you should so find, and in your verdict award to the plaintiff such an amount in damages as will fairly and reasonably compensate the estate of said M— for the destruction of his power to earn money, not exceeding the sum of $25,000, the amount claimed in the petition."—Approved: Matthews' Adm'r v. Louisville & N. R. Co., 130 Ky. 551, 113 S. W. 459.

(b) "The court further instructs you that unless you shall believe from the evidence that the injury to the deceased, M—, that caused, or that directly contributed to, his death, was caused by defendant's employees in charge of said train failing to use ordinary care in removing or releasing said M— from under said car after discovering his position, then in that event you will find for defendant."—Approved: Matthews' Adm'r v. Louisville & N. R. Co., 130 Ky. 551, 113 S. W. 459.

§ 4452. Co-operation in Work making Employees Fellow Servants.

"The court instructs the jury that to constitute defendant's servants, who were switching the caboose in question, fellow servants of George B—, deceased, so as to exempt the defendant from liability on account of the death of deceased from the negligent acts of defendant's said servants (provided you believe from the evidence deceased's death was caused by the negligent acts of said servants) said servants and deceased should be actually co-operating, just before, and at the time of, the collision which caused deceased's death, in the particular business in hand, or their usual duties should bring them into habitual consociation with each other, so that they might exercise an influence upon each other promotive of proper caution for their personal safety."—Approved: Pittsburg, C., C. & St. L. Ry. Co. v. Bovard, 223 Ill. 176, 79 N. E. 128.

§ 4453. Failure of Master to Warn Inexperienced Employee.

"It was the further duty of the defendant to use 'ordinary care' to instruct or inform an employee of the particular perils of the employment, and how to avoid them, where the employee is inexperienced and in ignorance of such perils and the means of avoiding them, and where the defendant knows, or in the exercise of ordinary care ought to know, that the same are unknown to the employee, and where the means of avoiding them would not be obvious to an inexperienced person of ordinary intelligence, without such instruction or information. In such circumstances, if the defendant fails to use ordinary care so to instruct or inform an inexperienced employee, and such failure is the proximate cause of the injury to the employee, then the defendant is liable, unless the employee has otherwise become informed of such perils, and of how to avoid them, or unless he has in some manner, by his own negligence, contributed to the injuries complained of, in which event he could not recover."—Approved: Texas & N. O. R. Co. v. Geiger (Tex. Civ. App.), 118 S. W. 179.

§ 4454. Wreck Occurrence of—No Presumption of Negligence.

"I charge you that there is no presumption that the company has been guilty of any negligence arising from the fact that a wreck has occurred and an employee has been injured."—Approved: St. Louis & S. F. R. Co. v. Hill, 79 Ark. 76, 94 S. W. 914.

§ 4455. Reasonable Rules—Master's Duty to Establish.

"It is a duty resting upon railroad companies, for the protection of their employees, to adopt reasonable rules, regulations, or methods for conducting their business, such as will, if properly pursued and carried into effect, afford a reasonable degree of safety to its employees, while engaged in the discharge of their duties, against extraordinary or unnecessary dangers. When the company has done this, it is not responsible for an injury that may happen to one of its employees by the failure of another to properly discharge a duty resting upon him under such usages, etc. The company is not held, however, to insure the

safety of its employes, but only to exercise reasonable care and foresight in so providing rules or usages for the doing of its business as to afford reasonable means of protection against unnecessary or unreasonable dangers. Therefore, if you should find that plaintiff was injured while in defendant's employment, and that defendant had failed to exercise reasonable care and foresight in establishing regulations or methods for the protection of its employees, engaged as plaintiff was, and had omitted to provide such reasonable means of protection as is above defined, and that by reason of such omission plaintiff received his injury, and would not have received it but for such failure of duty on defendant's part, then you will find for plaintiff, unless he is precluded by his own negligence from recovering. But if defendant had established or provided such reasonable rules, regulations, etc., plaintiff cannot recover, though he may have been hurt through failure of one or more of his fellow-servants to do what was required of him or them under the rules of that business. In other words, if defendant's established methods of management of that branch of its business were reasonably sufficient, had its employees observed and followed them, to have afforded plaintiff reasonable protection against the danger he incurred when working on the repair track, defendant would not be liable, whether its other employees did their duty or not. The man W—, the switchman, and those with the engine, were fellow-servants of plaintiff, and defendant is not responsible to plaintiff for their negligence, if any on their part is shown. Again, though it should appear that defendant had failed to perform the duty above defined, and that, as a consequence, its employees, engaged as plaintiff was, were left unprotected and exposed to danger, still, if it should also appear that plaintiff knew this, or, by the use of ordinary care, might have known it, and still continued in the employment exposed to such danger, he could not recover. He would be required to exercise ordinary care for his own protection. So, if plaintiff received notice of his danger in time to have escaped, he cannot recover, whether defendant was guilty of negligence or not."—Approved: International & G. N. R. Co. v. Hall, 78 Tex. 657, 15 S. W. 108.

§ 4456. Same—Duty of Employee to Observe.

"Although you may find that defendant was negligent in the particular submitted, and that such negligence was a proximate cause of plaintiff's alleged injuries, yet if you believe from the evidence that plaintiff on the occasion in question, in shoving or attempting to shove the drawhead or drawbar to the car attached to the engine, if he did so, he placed his hand in a dangerous position, and that in either or both particulars such conduct, on account of its being contrary to the rule of defendant in evidence, if it was, or independent of such rule, was a failure on his part to exercise such care for his own safety as an ordinarily prudent person would have exercised under the same or similar circumstances, then let the verdict be for defendant on account of plaintiff's contributory negligence."—Approved: Texas & N. O. R. Co. v. Jackson, 51 Tex. Civ. App. 646, 113 S. W. 628.

§ 4457. Non-Observance Acquiesced In.

(a) "You are instructed that, while S— was presumed to know the rule in evidence and that it was his duty to obey the same so long as it was in force, if you find from the evidence that for a number of years this rule has been openly, continuously, and habitually disregarded by the employees of defendant for such period, and to such an extent as to lead to and justify the belief that the rule had been abrogated by the company, or its nonobservance acquiesced in, then the nonobservance of the rule by S— will not of itself bar a recovery, provided that you find that the nonobservance of the rule was for so long a period and of so frequent occurrence as to cause you to believe that the railway company must have known of and acquiesced in its non-observance; and in determining whether or not the rule had been abrogated, or its nonobservance acquiesced in, by the company, you may take into consideration the period of time, the extent to which and openness with which the rule had been violated by the employees of defendant, if you find from the evidence that the rule had been violated."—Approved: St. Louis, I. M. & S. Ry. Co. v. Caraway, 77 Ark. 405, 91 S. W. 749.

(b) "You are instructed that it would make no difference, if you find that the decedent knew the rule (or that the facts in evidence charged him with notice of it) that other employees frequently and customarily disregarded it. To make this reply avail as an excuse for nonobservance by the deceased, you must find from the evidence that the defendant railway company knew of the practice of the employees in disregarding the rule and acquiesced in such practice in such a way as to sanction it, or to be held practically to have abrogated it."—Approved: St. Louis, I. M. & S. Ry. Co. v. Caraway, 77 Ark. 405, 91 S. W. 749.

§ 4458. Where Rule Against Coupling Moving Cars is Habitually Disregarded.

"I charge you that a rule forbidding railway employees going between railway cars in motion, for the purpose of coupling or uncoupling them, or where attached to an engine, within itself, is a reasonable requirement; but such rule must be taken with the qualification that the company will provide other means for performing the necessary service, and, if it fails to do this, the rule is no protection to the company against liability for damages for injury sustained in doing the work required to be done, and in the performance of which said rule is violated."—Approved: Carson v. So. Ry. Co., 68 S. C. 55, 46 S. E. 525.

§ 4459. Or Where for the Duty Required no Other Means for Its Performance are Provided.

"I charge you that the rule of the railway company with reference to coupling or uncoupling cars with a pin and stick while the cars are attached to an engine or in motion has no application to a case where

the master fails to furnish to the servant a pin and stick sufficient to effect the said coupling."—Approved: Carson v. So. Ry. Co., 68 S. C. 55, 46 S. E. 525.

§ 4460. Employee Injuring Third Person not in Course of Employment.

"If you find from all the evidence that the plaintiff was kicked at the time and place alleged, and that the person who kicked him was an employee of the defendant street car company, you must find in favor of the defendant, unless you also find that such person was at the time acting in the scope of his employment. If you find that such person did the act complained of because of his savage and brutal disposition, or because of a grudge or hatred of the plaintiff and not for the purpose of protecting defendant's property, or carrying out any duty which he owed the defendant by reason of his employment, then such person was not acting within the scope of his employment, and your verdict should be for the defendant."—Approved: Schultz v. La Crosse City Ry. Co., 133 Wis. 420, 113 N. W. 658.

CHAPTER CXIX.

NEGLIGENCE—DISCOVERED PERIL.

§ 4461. Contributory Negligence no Defense if Injury to One in Peril May be Avoided.
4462. Upon Discovery of Peril Everything Consistent with Safety of Train Must be Done to Avoid Injury.
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4466. As to Licensees, Duty to Look Out For, and Stop Train After Discovery.
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4469. Employee—Not Necessary to Attempt to Stop, Until it Appears He Will Probably Remain on Track.
4470. Employee—Duty to Warn of Train's Approach.
4471. Duty to Keep a Look-out for Track Workers.
4472. Discovery of Employee's Peril and Avoiding Injury by Ordinary Care.
4473. Inability to Avoid Injury After Discovery of Peril.
4474. Not Sounding Whistle Not Negligence Where Every Other Reasonable Effort in Engineer's Power was Being Made.
4475. Sudden Appearance on Track—Accident Unavoidable.
4476. Velocipede of Servant Making Regular Trips—Duty of Engineer not to Back Train Without Warning.
4476a. When Threshing Machine Stalled on Track—Duty to Warn Approaching Trains and to Remove Same in Shortest Time Possible.

§ 4461. Contributory Negligence No Defense if Injury to One in Peril May be Avoided.

(a) "The fact that the plaintiff was guilty of contributory negligence by going upon the defendant's railway track will not defeat his recovery if, after he was discovered in a dangerous position, if any, the defendant and its engineer failed to use ordinary care in stopping the train and in preventing the injury to the plaintiff, as hereinafter more fully explained."—Approved: Rutherford v. Iowa Cent. Ry. Co., 142 Iowa, 744, 121 N. W. 703.

(b) "If you should find from the evidence, and under the foregoing instructions, that the plaintiff's intestate, H. P. F—, was negligent, still the defendant could not escape liability if the act which caused the injury was done by the defendant after it discovered said F—'s negligence, if you should find from the evidence that defendant could have avoided the injury in the exercise of reasonable care."—Approved: Ford v. Chicago, R. I. & P. Ry. Co. (Iowa), 71 N. W. 332 (not reported in state reports).

(c) "You are instructed that in occupying the position he did at the time he was hurt plaintiff was as a matter of law guilty of 'contributory negligence,' and you will return your verdict for defendant unless you shall believe from the preponderance of the evidence that defendant's employee, B—, actually saw plaintiff in a position of danger and knew he was in danger should the car be moved, and so saw him in time to have prevented injury to the plaintiff by the use of the means and efforts that a man of ordinary prudence could and would have used under the circumstances, and believing that B— was guilty of 'negligence' under the circumstances and that such 'negligence,' if 'negligence' you find there was, was so directly the cause of plaintiff's injury that but for the same the injury would not have occurred, in which case you will return your verdict for plaintiff."—Approved: Texas & N. O. R. Co. v. McDonald (Tex. Civ. App.), 120 S. W. 494.

(d) "Although it may be deemed an act of negligence on the part of E— to have gone there and performed this duty as a volunteer, because dangerous to any man unaccustomed to perform it, yet if after he assumed to do that act, even though he was negligent, and the conductor, as a matter of fact, saw him in that perilous position, and gave the order knowing that the effect of the order would be to throw him from the car, then his negligence would not prevent a recovery."—Approved: Evarts v. St. Paul, M. & M. Ry. Co., 56 Minn. 141, 57 N. W. 459.

(e) "But if he was himself negligent, and but for this would not have been killed, they should find for the defendant, unless those in charge of the engine, after they discovered, or by ordinary care could have discovered, the peril in which his negligence had placed him, thereafter failed to use ordinary care to avoid injuring him, in which event they should find for the plaintiff."—Approved: Hummer's Ex'x v. Louisville & N. R. Co., 128 Ky. 486, 108 S. W. 885.

§ 4462. Upon Discovery of Peril Everything Consistent with Safety of Train Must be Done to Avoid Injury.

(a) "You are instructed that if you believe from the evidence that plaintiff's wife was guilty of contributory negligence, yet if you further believe that the employees in charge of the engine saw plaintiff's wife's danger in time to have stopped the train, lessened the speed, stopped the noise, or lessened the same, or to have done anything in their power consistent with the safety of their own train, and you believe from the evidence that they failed to do this, and you believe that this was the cause of the injury, then the proximate cause of the injury would be such failure on their part and plaintiff would be entitled to

recover."—Approved: Johnson v. Texas & G. Ry. Co., 45 Tex. Civ. App. 146, 100 S. W. 206.

(b) "If you believe from the evidence that when the engine that killed said team was approaching said crossing on Townsend avenue on said occasion, the employees of defendant operating said train saw David M— near defendant's track at said crossing, driving toward said crossing, and it reasonably appeared to said employees that the said David M— would not probably stop before he reached said track, or would not pass over the same in time to avoid a collision with said train, and if you further believe from the evidence that said employees then failed to use all the means they had at hand, consistent with the safety of said engine to stop the same, and prevent a collision, and if you further believe from the evidence that by the use of all the means they had at hand for stopping said engine, they could have stopped the same, or so reduced the speed thereof, as to avoid a collision with said team, you will find for the plaintiff, even though you may believe that the said David M— was guilty of contributory negligence in the manner in which he approached and drove upon said crossing."—Approved: St. Louis & S. F. R. Co. v. Summers, 51 Tex. Civ. App. 133, 111 S. W. 211.

§ 4463. Duty to Trespasser is to use Reasonable Means to Avoid Injury After Actual Discovery of Peril.

(a) "The court instructs the jury that decedent, at the time he was struck, was a trespasser on the defendant's right of way and those in charge of the train owed him no duty until his peril was actually discovered by them, and if you believe that, after his peril was actually discovered, the defendant's employees used all reasonable means at their command to avoid injuring him, considering the time at their disposal, you should find for the defendant. If you believe from the evidence in this case that, after the engineer in charge of defendant's engine became aware of the fact that decedent was on or so near the track on which said train was running as to render his position dangerous or perilous, he failed to use ordinary care to apprise decedent of the approach of the train and to avoid striking him, and that as a result thereof he was struck and killed, you should find for the plaintiff. On the other hand, unless you do believe from the evidence that the said engineer, after becoming aware of decedent's presence on or so near said track as to render his position dangerous or perilous, did fail to use ordinary care to apprise him of the approach of the train and to avoid striking him, you should find for the defendant; and, in determining the question as to whether said engineer did or not use ordinary care, you should consider the time in which he had to act, and all the circumstances of the situation."—Approved: Johnson's Adm'r v. Louisville & N. R. Co. (Ky.), 118 S. W. 383.

(b) "The court instructs the jury that if you should find and believe from the evidence that Errett H— was on one of the defendant's freight cars on its track in Strasburg and engaged in setting the brake on said car, and while so engaged he became and was in a place of danger and that defendant's agents, servants and employees in charge of

and operating and managing an engine and cars attached thereto saw the said Errett H— and his said peril and danger and became aware thereof in time, by the exercise of ordinary care, to have avoided injuring him, and that the defendant's said agents, servants, and employees in charge of said engine and cars attached thereto failed to exercise such ordinary care, and negligently ran said engine and cars against the car upon which the said Errett H— was, with great and unusual force and violence, and by reason thereof the said Errett H— was thrown from said car to the ground and injured, then you should find for the plaintiff, although you may believe from the evidence that plaintiff, Errett H—, was guilty of negligence in going upon said car and attempting to set said brake, and was a trespasser, unless the jury should further find from the evidence that after he became aware of his own peril, or by the exercise of ordinary care might have become aware of his peril, he could have, by the exercise of ordinary care, avoided the injury."—Approved: Hall v. Missouri Pac. Ry. Co., 219 Mo. 553, 118 S. W. 56.

(c) "If the defendant, by its servants in charge of the engine, knew of Carl B—'s peril in time to have avoided the same, such knowledge imposed upon it the duty of using every means then within its power, consistent with the safety of the engine and cars and the persons thereon, to avoid running him down or striking him, and failure to use such means would render the defendant liable, notwithstanding plaintiff may have been wrongfully on defendant's track. Therefore, if you believe from a preponderance of the evidence that after Carl B— was discovered on the track in front of the approaching engine, defendant's servants in charge of the train negligently failed to use such care, attention, and skill and effort to stop or check up the train and avoid the collision with plaintiff as they reasonably should and could have done after it reasonably became apparent to them that plaintiff would not get off the track, and if plaintiff received some or all of the injuries complained of in his petition through such fault of defendant's said servants, then you will find for the plaintiff."—Approved: Nacogdoches & S. E. R. Co. v. Beene, 47 Tex. Civ. App. 585, 106 S. W. 456.

(d) "You are instructed that John R— was confessedly negligent in being on the grade and railway track of the defendant, he being a trespasser at the time he was struck by the defendant's locomotive, and this negligence contributed to his death; and, under these circumstances, the defendant company owed him no duty, except the exercise of ordinary and reasonable care and diligence, after he was discovered on the track and grade, after his peril, if any, became apparent to the engineer on the train in question, to avoid injury to him."—Approved: Rutherford v. Iowa Cent. Ry. Co., 142 Iowa, 744, 121 N. W. 703.

§ 4464. Seeing One on Track and Having Reasonable Grounds to Believe Him Unconscious of Danger.

(a) "That if they believe from the evidence that those in charge of the engine and tender saw defendant upon the track and had rea-

sonable grounds to believe from his conduct that he was unconscious of the approaching engine and tender, and would not probably leave the track in time to save himself from injury, then in such case it was duty of those in charge of the engine and tender, after they had such notice, to use ordinary care in the exercise of all reasonable means at their command to save him from injury, and if they failed to do this the jury will find for plaintiff; otherwise, for the defendant. Reasonable grounds to believe a thing are such grounds as would induce a person of ordinary prudence to believe it under the circumstances."—Approved: Hovius v. Cincinnati N. O. & T. P. Ry. Co. (Ky.), 107 S. W. 214 (not reported in state reports).

(b) "If you believe from the evidence that the plaintiff started across defendant's tracks on Main street in the city of Denison enroute to the depot of defendant in said city, and that while he was crossing said tracks a train going south passed between him and said depot, which caused him to stop to wait until said train passed, and if you further believe from the evidence that the said employees of the defendant that were riding on the footboard of the engine that struck plaintiff saw plaintiff on the track, and if you further so believe that they had reasonable grounds to believe, and it was apparent to them, that he was not aware of the approach of the engine, and would probably not leave the track before the train would strike him, and if you further believe that by the use of the means they had at hand, said employees, when they discovered the perilous situation of the plaintiff, if you find they did discover it, by the use of the means they had at hand, in the exercise of ordinary care, could have stopped said engine, and thereby avoided striking and injuring plaintiff, and if you further believe from the evidence that said employees negligently failed to use the means they had at hand to stop said engine and avoid striking plaintiff, and if you further so believe that such negligence, if any, on the part of said employees was the direct and proximate cause of plaintiff's injuries, then you will find for the plaintiff, and assess his damages under instructions hereinafter given you."—Approved: Missouri, K. & T. Ry. Co. v. Reynolds (Tex. Civ. App.), 115 S. W. 340.

(c) "And if the jury further believe from the evidence that the engineer or fireman in charge of the train which struck the deceased, if you believe from the evidence its said train struck the deceased then and there, might have seen her by the exercise of ordinary care on their part, and if the jury further believe from the evidence that the deceased was unaware of her peril and was standing upon the defendant's track or along the side of the outer edge thereof, unconscious of the approach of the train of the defendant, then it was the duty of such engineer or fireman to give her such warning by such a signal as was within his power, as could be likely heard and would be likely heard by any person possessing in an ordinary degree the sense of hearing in the position the deceased occupied. And if such signal was given and unheeded, then it was the duty of such engineer or fireman to use the means at his hand to have saved Annie E—, when by the exercise of ordinary care he would have discovered her peril in time to have done so, and unless at the time of the injury the engineer and

fireman in charge of said train used the means at their command to provide for the safety of the deceased, when by the exercise of ordinary care they or either of them would have discovered her peril in time to have saved her from injury, then the jury may find a verdict for the plaintiff in this case, although they may believe that the plaintiff's said wife was guilty of negligence in being upon the track of the defendant or along the side of the outer edge thereof and in permitting herself to be inattentive to the dangers surrounding her."—Approved: Everett v. St. Louis & San Francisco R. Co., 214 Mo. 54, 112 S. W. 486.

§ 4465. Where Reasonably Apparent Person in Peril Will Not or Cannot Get Out of Danger.

(a) "On the other hand, if you find from the evidence that the plaintiff was not negligent in going to the place near the track where he was struck and in the manner of his doing so, or, if negligent, yet if you are satisfied that the plaintiff was discovered near the track by defendant's servants in charge of the engine, and that said servants negligently failed to use ordinary care to stop or check the train and avoid striking the plaintiff after it became reasonably manifest to them that the plaintiff would not move far enough away from the track to keep from being struck, and if the plaintiff received his injuries through the negligence of such servants as above defined, then find for the plaintiff."—Approved: Texas & P. Ry. Co. v. Crawford (Tex. Civ. App.), 117 S. W. 193.

(b) "The court instructs the jury that if you find and believe from the evidence in the cause that the plaintiff, while traveling on defendant's track on October 11, 1899, became fastened in defendant's cattle guard, by having her foot caught therein, and fell on said cattle guard, and that her position was then a perilous one, and that defendant's engineer in charge of its engine saw her fall and became aware of her perilous position, then it became and was the duty of said engineer, immediately and at once upon seeing her fall and becoming aware of her said perilous position, to attempt to stop the train by the use of all the means and appliances at hand, consistent with safety to himself, the train, and those on board of the train. And if the jury further believe from the evidence that the engineer, after he saw plaintiff fall on said cattle guard, if he did so see, and became aware of her perilous position, if he did so become aware thereof, did not immediately and at once use all the means and appliances at hand to attempt to stop the train, consistent with the safety of himself, his train, and those on board the train, and that plaintiff was run over and injured by reason of the failure of said engineer to immediately and at once use all such means and appliances at hand in the manner aforesaid to attempt to stop said train, then the verdict must be for the plaintiff."—Approved: Woods v. Wabash R. Co., 188 Mo. 229, 86 S. W. 1082.

(c) "Now, if you shall find and believe from a preponderance of the evidence before you that C. A. P— and his two sons, Riley P— and Lawrence P—, were on the defendant's railway track at the time and place mentioned in the plaintiff's petition, and that the said P— was

holding his said sons on said track, as alleged in the plaintiff's petition, and you shall find that the said P— and his two sons were run down and over by the engine and train of the defendant, and that C. A. P— or Riley P— were killed, or Lawrence P— injured, and you further find that the engineer of the defendant in charge of said train saw and knew that said parties were on said track, and that he realized from facts within his knowledge that said parties were in peril, and could not, or probably would not, leave the track, and that he did not then use all the means within his power, consistent with the safety of the train, to prevent injuring said parties, and you find that such acts, if any, on the part of the engineer, or his failure to act, if he did so fail, was negligence, which proximately caused the injuries to said parties, or either of them, as aforesaid, then, in case you so find, you should find for the plaintiff, under the rules given you as to the measure of damages. If, however, you shall find that the engineer in charge of said train used all the means within his power, consistent with the safety of his train, to stop or lessen the speed thereof in time to prevent the injuries to the parties, as soon as he realized from the facts within his knowledge the peril of said parties, or that they probably would not, or could not, leave the track, if in fact he did realize the same, or, if you find that he was not negligent, then, you should find for the defendant, and so say by your verdict.'"—Approved: Parham v. Ft. Worth & D. C. Ry. Co., 51 Tex. Civ. App. 511, 113 S. W. 154.

§ 4466. As to Licensees Duty to Look Out and Stop Train After Discovery.

(a) "The court instructs the jury that if you believe from the evidence that Mary W—, at the time that she was struck and injured by defendant's engine and cars, operated by its agents, if you believe from the evidence that she was so struck and injured, was on a cattle guard at or near a public road crossing for the accommodation of the public passing over defendant's road, and that the track was in such a condition for 1200 feet east from the point of the collision that defendant's agents and servants operating its engine and cars could have seen plaintiff on said track between said points; that for about ten years prior thereto and at about the time of the said striking of said Mary W—, with the knowledge of defendant, that part of defendant's railroad track had been and was frequently used by pedestrians in going to and from Point Prairie school house from the east, and that said Point Prairie school house was near said public road crossing and near defendant's track, and that for about ten years prior thereto school children attending said school at said school house had been in the habit of using defendant's said track to walk thereon, and many children had been accustomed to use said crossing at about the hour of the day that the injury is shown by the evidence to have been inflicted on plaintiff, and that defendant had knowledge of such use of its track and said crossing, and that said Mary W—, while traveling upon defendant's track at or near said public road crossing, became fastened in said cattle guard so that she could not extricate herself, and became in imminent peril of

being struck by defendant's train, and defendant's employees in charge of said train became aware of her perilous position at said cattle guard in time to have enabled them, by the exercise of ordinary care, to have stopped said train and to have averted the injury to plaintiff, or if the jury believe from the evidence that said employees in charge of said train, by the exercise of ordinary care, could have become aware of her perilous position, at said cattle guard, if the evidence shows she was in a perilous position, in time to have stopped said train and to have averted said injury to plaintiff, and that they failed to exercise such care to stop said train, and that, by reason of such failure to exercise such ordinary care, the said train was not stopped, and said Mary W— was struck and injured, then the jury must find for the plaintiff, though the jury may believe that Mary W— was guilty of negligence in going up and traveling on defendant's track. And by 'ordinary care,' as used in this instruction, is meant such care as an ordinary, careful, and prudent person or persons would exercise under the same or similar circumstances."—Approved: Woods v. Wabash Ry. Co., 188 Mo. 229, 86 S. W. 1082.

(b) "When with the knowledge and consent or acquiescence or permission of a railway company any portion of its roadbed, bridges, or trestles have been for any considerable length of time, commonly, usually, and customarily used by pedestrians as a footpath, it is the duty of such company by its agents and servants engaged in the operation of its engines and trains over such portions of its roadbed, bridges, and trestles thus used to exercise ordinary prudence to keep a lookout for persons on its track, where people may be expected to be, to avoid injuring them. If, therefore, you believe from the evidence in this case that the roadbed and bridge of the defendant company between the stations of Royse and Burrow where plaintiff was injured, if you find he was injured, was on the 11th day of August, 1905, and for a number of years immediately prior thereto had been, commonly, usually, and customarily used by pedestrians as a footpath, and you believe that such use by the public of its roadbed and bridge was with the knowledge and consent or acquiescence or permission of defendant company and its train employees, and you believe that on the 11th of August, 1905, the plaintiff attempted and did use the defendant's roadbed and bridge as a footpath in traveling from Royse to Burrow, and you believe that at the bridge which crossed Sabine creek he was run upon and struck by one of defendant's engines and was injured, and you believe that the servants of the defendant operating the train in question failed to exercise ordinary prudence to discover the presence of any person who might be using a portion of the roadbed and bridge in question at the time and place and for the purpose plaintiff was using it, and you believe that by the exercise of such degree of care by defendant's servants operating its engine they would have discovered the plaintiff in time to have avoided injuring him, and you find that the acts of defendant's servants operating its engine was negligence, as herein defined, and that the same was the proximate cause of plaintiff's injury, if any, then and in that event you should find for the

plaintiff, unless you find for the defendant under the instructions hereinafter given."—Approved: Missouri K. & T. Ry. Co. v. Malone (Tex. Civ. App.), 110 S. W. 958 (not reported in state reports).

(c) "If you believe from the evidence that the defendant's tracks between Center street and its depot in Corbin, Ky., were habitually used by the public in going to and from Center street to its depot, with the knowledge and acquiescence of the defendant, then it was the duty of the defendant to use ordinary care to discover the presence of such persons on its said tracks, and to use ordinary care to avoid injuring them after discovering their peril. And if, upon the occasion in question, you believe from the evidence that while plaintiff was walking along defendant's said tracks the defendant, its agents, or servants failed to use ordinary care to discover the presence of plaintiff, or failed to use ordinary care to avoid injuring plaintiff after the discovery of his peril, and that by reason of such failure, if any, on the part of the defendant, its hand car was run against plaintiff, and plaintiff was thereby injured, you will find for the plaintiff. If, however, you believe that plaintiff went upon defendant's tracks at a time and place when defendant, by the exercise of ordinary care, could not have discovered plaintiff's peril in time to avoid injuring him, you will find for the defendant."—Approved: Louisville & N. R. Co. v. Berry (Ky.), 111 S. W. 370 (not reported in state reports).

(d) "The plaintiff concedes that, at the time the deceased was struck, he was guilty of contributory negligence, and that for injuries sustained by him up to this time there can be no recovery. If, however, you believe from the evidence that the negligence referred to—that is, the failure to maintain such operative as a lookout, or the failure of those upon the car to look in the direction in which the train was backing—continued after the deceased was knocked under the car, and that his death was caused by this negligence, and, if it had not existed, the defendant would have been enabled to stop the train before the deceased was killed, then your verdict must be for the plaintiff for the death of the said Thomas W. T—."—Approved: Teakle v. San Pedro, L. A. & S. L. Ry. Co., 36 Utah, 29, 102 Pac. 635.

§ 4467. Precaution Against Injuring Person in His Effort to Avoid Danger from Another Direction.

"Bearing in mind the foregoing definitions and general instructions, you are charged as the law applicable to the facts of this case, as you shall find them to be from the evidence, as follows: That if you shall believe, from a preponderance of the evidence, that plaintiff was walking upon defendant's roadbed between two of its tracks, and that while so doing an engine was backing two cars on the south one of said tracks in the direction plaintiff was going, and you believe that during said time a passenger train was approaching on the north one of said tracks from an opposite direction, and that steam was being expelled from the cylinder cocks thereof, and you further believe that the space between the two tracks upon which plaintiff was walking, if he was walking in said space, was then and there, and had been for a long

time, commonly and habitually used by the public as a footpath, with the knowledge and acquiescence of defendant, and believe that when the passenger train got near plaintiff he was unaware of the approach of said cars, and for the purpose of avoiding the said steam, if any, he bore over near the track on which the said engine and cars were moving, and was struck by the end of the forward one of said cars, and knocked down, and injured substantially as alleged by him in his petition, and you further believe from a preponderance of the evidence that it would have been reasonably apparent to a person of ordinary prudence, in the use of ordinary care, that plaintiff was ignorant of the approach of the cars, and would probably bear over in escaping the steam, if any, near enough the said track to be struck by the said cars, and would have been so apparent to those, or some of those, in charge of said engine and cars, in the exercise of such care, under the circumstances, and believe that those in charge of the engine and cars, or any of them, discovered the danger to which plaintiff would be exposed in the case, if any, and that he would probably not escape therefrom, and you further believe that said employees, after making such discovery, if they did, failed to use all reasonable means at their command consistent with their own safety, and the safety of the cars, and to cause the said cars to be stopped, and that had such means been used they would have been stopped before striking plaintiff, you will in such case return a verdict for plaintiff; but, unless you so find, you will return a verdict for defendant."—Approved: Houston & T. C. R. Co. v. Finn (Tex. Civ. App.), 107 S. W. 94 (not reported in state reports).

§ 4468. Failure to Have Headlight on Engine Preventing Discovery of Person on Track.

"The court instructs the jury that if they shall believe from the evidence that Annie E—, at the time she was killed, was the wife of plaintiff, and that this suit was brought within six monhs after her death, and shall further find from the evidence that at the time and place when and where the catastrophe occurred the defendant omitted to have placed in front of the engine drawing said train a headlight lighted up and burning, and that the place on defendant's track where deceased was struck by the defendant's train was about two hundred feet west of a public road crossing over said track, and that the track, at the time, was in such condition and position for a distance from about seven to thirteen hundred feet east of the point of the catastrophe that a person standing thereon or along the side of the outer edge thereof could have been seen by the persons in charge of said train, had they been in their proper posts and on the lookout ahead of them, and that said track at the place where said Annie E— was struck and killed was frequently used by pedestrians in going to and from the City of Pacific, and the sand cut, the chute, and Meramec river, and points between said places, that said Annie E—, while standing upon defendant's track or along the side of the outer edge thereof, became in imminent peril of being struck by defendant's train, and defendant's employees in charge of said train, by the exercise of ordinary care, could have become aware of her peril and used the means at

their command in time to have averted said injury to said deceased, and they failed to exercise such care and use the means at their command so as aforesaid, and that by reason of such failure to exercise such ordinary care said Annie E— was struck and killed, then the jury must find for the plaintiff, though the jury may find the deceased, Annie E—, was guilty of negligence in standing upon defendant's track or along the side of the outer side thereof, and by 'ordinary care' is meant such care as an ordinarily careful and prudent person would exercise under the same or similar circumstances."—Approved: Everett v. St. Louis & San Francisco R. Co., 214 Mo. 54, 112 S. W. 486.

§ 4469. Employee—Not Necessary to Attempt to Stop Until it Appears He Will Probably Remain on Track.

"If you believe from the evidence that after the defendant's fireman on said engine first saw deceased upon the track in front of said car that he discovered deceased would probably not get off the track before the car reached him, and was in imminent peril of being struck by said car, a sufficient length of time before he was struck to have signaled the engineer to stop the engine, and that said engineer (after receiving such signal, had it been given) could then have, by the use of the means at his command, stopped said engine and car after said fireman had discovered that deceased was in such peril, if you so find, before said injuries which caused the death of deceased were inflicted upon him, then you will find for the plaintiffs (although you may believe that the deceased was guilty of negligence himself in not discovering the approach of said car, or getting off said track, as charged above, or was guilty of negligence in any of the respects mentioned in special charges given, or that the danger of being injured thereby was one of the risks which he assumed in accepting employment with the defendant); but if you believe the fireman signaled the engineer to stop as soon as he discoverd that the deceased would probably not get off the track before being struck by the approaching car, and that he was in imminent peril of being struck thereby, and that the engineer could not then, by the use of all the means at his command, stop said car and engine before the injury to deceased was committed, then, if you so find, plaintiffs cannot recover under this paragraph."—Appoved: San Antonio & A. P. Ry. Co. v. Hodges (Tex. Civ. App.), 118 S. W. 767.

§ 4470. Employee—Duty to Warn of Train's Approach.

"The court instructs the jury that if they believe from the evidence that John C. B. J— at the time he was killed was the husband of the plaintiff, and that this suit was brought within one year after a suit was instituted against the defendants, and that the suit that was dismissed was instituted against the defendants within six months after the death of John C. B. J—; and the jury further find from the evidence that the defendant, Atchison, Topeka & Santa Fe Railway Company, was operating a passenger train over and upon the railroad tracks and right of way of the St. Joseph Terminal Railway Company under and by virtue of a traffic arrangement or lease from said St.

Joseph Terminal Railway Company; and the jury further find from the evidence that plaintiff's husband was a section hand in the employ of the St. Joseph Terminal Railway Company, and as such was engaged in the performance of his duties, on or about the track being used by and over which said passenger train was being moved, and that the plaintiff's husband did not see said train or know of said train being operated or moved on said track at the time he was injured; and the jury further find from the evidence that the defendants were moving said train on said track at a rate of speed in excess of five miles per hour, and that said train was moving along said track towards plaintiff's said husband and that the agents and servants in charge of the operation of said train did not warn plaintiff's said husband of its approach by ringing the bell, and that said servants, agents, and employees saw plaintiff's said husband on the track, or by the exercise of ordinary care could have seen him, in time to have stopped said train before it struck him and thereby have avoided the injury, and did not do so, that is, did not stop it, or that said agents, servants, and employees saw plaintiff's said husband, or by the exercise of ordinary care could have seen him, in time to have warned plaintiff's said husband, and thereby have avoided the injury, and did not do so (that is did not so warn him), if you believe plaintiff's said husband was injured, and that said train was being operated within the corporate limits of the city of St. Joseph, then your verdict must be for the plaintiff."—Approved: Johnson v. St. Joseph Terminal Ry. Co. and Atchison, Topeka & Santa Fe Ry. Co., 203 Mo. 381, 101 S. W. 641.

§ 4471. Duty to Keep a Lookout for Track Workers.

"It is the duty of an engineer in charge of a locomotive engine to use ordinary care in discovering the employees rightfully on the track by keeping a reasonable lookout for that purpose, and if you find and believe from the evidence, on the occasion when B— was killed, B—, the engineer in charge of defendant's train, did not discover deceased in time to have prevented the collision by stopping the train, and you further find and believe from the evidence that said engineer in charge of said train did not exercise ordinary care in keeping a proper lookout for employees and objects on the track, and you further find that if he had exercised such care as an ordinarily prudent person would have done, he would have discovered deceased in time to have stopped the train, and thereby prevented the death of B—, and you further believe from the evidence that said engineer's failure to keep a proper lookout, if you find he so failed, was an act of negligence and the proximate cause of B—'s death, you will find for the plaintiffs, and assess their damages as hereinafter instructed, unless you find for the defendant under subsequent instructions."—Approved: Houston & T. C. R. Co. v. Burnett, 49 Tex. Civ. App. 244, 108 S. W. 404.

§ 4472. Discovery of Employee's Peril and Avoiding Injury by Ordinary Care.

"If, under the evidence and foregoing instructions, you find that the plaintiff was negligent in his efforts to make the uncoupling

in question, under all the circumstances in evidence before you, still the defendant cannot avoid liability on that account, if the act which caused the injury was done by defendant's said engineer after he discovered plaintiff's negligence, if you should find from the evidence the engineer could have avoided the injury by the exercise of ordinary and reasonable care."—Approved: Brown v. Burlington, C. R. & N. Ry. Co., 92 Iowa, 408, 60 N. W. 779.

§ 4473. Inability to Avoid Injury After Discovery of Peril.

(a) "You are instructed that when and after the engineer saw the object upon the track, and discovered that the object seen was the deceased, it became his duty to use all the care and diligence that an ordinarily prudent and careful person would have used, under the circumstances in which he was then placed, to stop said train in time to save the life of said Peter B—, Jr.; and, if you shall find that he did use such care and diligence in trying to stop said train, there was no negligence in stopping said train for which the defendant can be held liable."—Approved: Burg v. Chicago, R. I. & P. Ry. Co., 90 Iowa, 106, 57 N. W. 680.

(b) "You are further instructed that if you find from the evidence that the deceased was guilty of contributory negligence in stepping upon the west track without looking for an approaching train, and if you further believe from the evidence that the employees of the company, in charge of the south-bound train, by use of due care and diligence, could not have stopped the said train, after they saw deceased on the track in front of the train, before said train struck him, then the plaintiff cannot recover in this action, and your verdict should be for defendant."—Approved: Omaha St. Ry. Co. v. Loehneisen, 40 Neb. 37, 58 N. W. 535.

§ 4474. Not Sounding Whistle Not Negligence Where Every Other Reasonable Effort in Engineer's Power was Being Made.

"Still, it being the duty of the engineer to use every means in his power to prevent injury to the plaintiff at the crossing in question, if the injury could have been prevented by the blowing of the whistle, and the engineer had time to sound it after he saw the plaintiff was about to pass in front of the engine, and he failed to do so, in consequence of which the plaintiff was injured while in the exercise of ordinary care, then your general verdict should be for the plaintiff. But if you should find that, after the engineer saw the plaintiff was about to attempt to cross the track, he was putting forth other exertions to save the plaintiff from harm, and had not time, on account of putting forth such other exertions, to have the whistle sounded, then his failure to do so would not constitute negligence on his part, and would not furnish a basis for the recovery of damages by the plaintiff. The engineer was only bound to put forth every reasonable effort in his power to save the plaintiff as soon as he discovered that he was about to place himself in a position of peril, and if the engineer did put forth such efforts he would not be guilty of the neglect of any duty."—Approved: Heddles v. Chicago & N. W. Ry. Co., 74 Wis. 239, 42 N. W. 237.

§ 4475. Sudden Appearance on Track—Accident Unavoidable.

"If from the evidence the jury believe that plaintiff's decedent, Charles F. P—, was not upon the track of defendant on the crossing or away from the crossing, immediately prior to the time when he was struck, but that immediately prior thereto, and while the defendant's train was approaching the crossing, he came upon and on the track immediately in front of a rapidly approaching engine and train, at a time when said engine and train could not, by resort to all the appliances and equipments with which the engine and train were equipped, be stopped before running upon and over him, then you are instructed to return a verdict for the defendant."—Approved: International & G. N. R. Co. v. Ploeger (Tex. Civ. App.), 93 S. W. 226 (not reported in state reports).

§ 4476. Velocipede of Servant Making Regular Trips—Duty of Engineer Not to Back Train Without Warning.

"If you believe from the evidence that the defendant was a corporation engaged in operating a railroad between Higginsville and Alma, Missouri; that the deceased John L—, at the time of his death, was in the employ of said defendant, engaged in the work of assisting the defendant in the operation of a railroad; and if you further believe that he was, at the time of his death, unmarried, and under the age of twenty-one years, and that his father was dead, and that the plaintiff herein is his mother; and if you shall further believe that at and for some time before the time John L— was killed, he was employed by the defendant to look after and care for appliances in use by defendant along its road, and that in pursuance of said employment it was his duty to pass over defendant's tracks on a velocipede; and if you further find and believe from the evidence that on the morning of September 1, 1902, immediately after the passing of an east-bound train, the said John L— put his velocipede upon the track at a point near Higginsville and ran said velocipede east after said passenger train along defendant's tracks; and if you further believe that, when about one mile and a quarter from the point where he started the said John L— was struck and killed by an engine backing east on said track; and if you further believe that the deceased had been, for a long time prior to this time, in the habit of passing east along said track between Higginsville and Corder at about this hour of the day; and if you further believe that John L—, while operating said velocipede upon defendant's track, became in imminent peril of being struck by defendant's engine, and defendant's employees in charge of said engine knew of his peril of being struck in time to have stopped said train and to have averted the injury to said deceased; and if you shall further believe that they failed to exercise such care and stop said engine, and that by reason of such failure to exercise such ordinary care the said engine was not stopped, and said John L— was struck and killed, then the jury must find for the plaintiff, though the jury may find that the deceased, John L—, was guilty of negligence in running the velocipede upon defendant's track at the time."—Approved: Lynch v. Chicago & Alton Ry. Co., 208 Mo. 1, 106 S. W. 68.

§ 4476a. Where Threshing Machine Stalled on Railroad Track Duty to Warn Approaching Trains and to Remove Same in Shortest Time Possible.

(a) "The court instructs the jury that as soon as the machinery in question became stalled on the crossing mentioned in the evidence, it was the duty of defendant, its agents and servants in charge thereof, to exercise ordinary prudence and caution to use such means as were then available to them to warn approaching trains of the danger, if any, arising therefrom, and to remove said obstruction from said crossing within the shortest time and space possible with the assistance and means which you may believe, from the evidence to have then been at their command; and the court instructs you that if you believe from the evidence that defendant, its agents and servants in charge of said machinery could by the exercise of ordinary caution and prudence have warned approaching trains of the danger in time to have avoided the collision, and that defendant, its agents or servants failed to do so, or if you believe said defendant failed to exercise such ordinary care and prudence to remove said machinery from said track, as a man of ordinary prudence and caution should have exercised with the assistance and means so available, and if you further believe that with the assistance available and means at its command, it could have warned approaching trains of the danger in time to have avoided the injury, or if you believe that with the means and appliances available defendant, its agents and servants could have removed said machinery from said crossing in time to have avoided the injury complained of, and if you further find that such negligence was the proximate cause of the injury complained of, then your verdict will be for the plaintiff and you will assess his damages as directed in another instruction, unless you find plaintiff was guilty of contributory negligence, as defined in another instruction."—Approved: Butts v. Garr Scott & Co. (Mo. App.), 12806 St. Louis Court of Appeals, October term, 1911 (not reported in official reports).

(b) "The court instructs the jury that when one is placed, by the negligent acts of another, in such a position that he is compelled to choose upon the instant and in the face of apparent great and impending peril between two hazards; and he makes such a choice as a person of ordinary prudence, placed in the same situation, would probably have made, and injury results therefrom, the fact that if he had chosen the other hazard he would have escaped injury, is not proof of negligence on his part, and the court further instructs the jury that if you find from the evidence that the negligence of defendant, its agents or servants placed plaintiff in a position of peril, as in other instructions defined, and if you further find from the evidence that when plaintiff became aware of such danger he became frightened and jumped from the engine, believing his chances better for saving his life by jumping than by remaining on the engine, and if you further so find, that in so doing he acted as an ordinarily prudent person would have acted under like or similar circumstances, then the court instructs you that plaintiff was not guilty of contributory negligence and he is entitled to recover, although the jury may find as a matter of fact, that the jumping

increased his peril and although you may find that he would have sustained little or no injury if he had remained on the engine. On the other hand the court instructs the jury that even if they find from the evidence that defendant was guilty of negligence as defined in the other instructions, yet if they further find from the evidence that the conditions as they appear to plaintiff would not have justified a person of ordinary prudence in reasonably apprehending imminent danger to his life if he remained at his post in the cab of the engine, then his act of jumping from the cab in the manner shown by the evidence was contributory negligence on his part and your verdict must be for the defendant."—Approved: Butts v. Garr Scott & Co. (Mo. App.), 12806, St. Louis Court of Appeals, October term, 1911 (not reported in official reports).

(c) "The court instructs the jury that they can not find against the defendant on the charge that its servants and agents negligently failed to give warnings to approaching trains, if they believe from the evidence that after the separator became lodged upon the railroad track, defendant's agents and servants made such efforts to warn and signal trains as could reasonably be expected from ordinarily prudent persons under all the circumstances shown in this case."—Approved: Butts v. Garr Scott & Co. (Mo. App.), 12806, St. Louis Court of Appeals, October term, 1911 (not reported in official reports).

(d) "The court instructs the jury that if they find from the evidence that the agents and servants of defendant, after the separator became lodged upon the track, made such efforts with the appliances at hand to remove the separator from the track as a reasonably prudent person would have made under the same circumstances, considering all the facts and circumstances shown in evidence, then you cannot find the defendant guilty of negligence in failing to remove the separator from the track."—Approved: Butts v. Garr Scott & Co. (Mo. App.), 12806, St. Louis Court of Appeals, October term, 1911 (not reported in official reports).

CHAPTER CXX.

NEGLIGENCE—AUTOMOBILES AND MOTORCYCLES.

§ 4477. Automobiles and Motorcycles Bound by Same Rules of the Road.
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4488. Imputed Negligence of Chauffeur.
4489. Bicycle Without Bell or Light—Contributory Negligence.

§ 4477. Automobiles and Motorcycles Bound by Same Rules of the Road.

"I charge you that the plaintiff in operating his motorcycle on the day in question was bound to observe the same rules of the road as was the defendant in charge of his automobile; that the plaintiff had the right to operate his motorcycle only in compliance with the law and the burden of proof is on him to show that he was lawfully operating his vehicle on Woodward avenue."—Approved: Scott v. Dow, 162 Mich. 636, 127 N. W. 712.

§ 4477a. Automobile to be Kept under Control at Street Intersections.

"It (the automobile) entails on the man or woman who runs it the duty of keeping it under control, especially at the street intersections, and not to run it at a rate of speed which would be dangerous or which would contribute to its getting from under his control. * * * He (defendant) was bound to use just such ordinary care, prudence, and caution as the ordinarily prudent man would have used under such circumstances. This duty includes the duty of having his automobile under control when approaching and passing street intersections, and of operating it at such a speed as is reasonable and proper, having regard to the traffic conditions of the street and the safety of the peo-

ple."—Approved: Ketchum v. Fillingham, 162 Mich. 704, 706, 127 N. W. 702.

§ 4478. Right to Use Highway When Exercising Reasonable Care.

"The court instructs the jury that an owner of an automobile has the right to use the highway of this state, providing in using it he uses reasonable care and caution for the safety of others and does not violate the law of the state."—Approved: Christy v. Elliott, 216 Ill. 31, 48, 74 N. E. 1035, 1 L. R. A. (N. S.), 215, 108 Am. St. Rep. 196.

§ 4479. Reciprocal Rights and Duties of Pedestrian and Automobilist.

"I instruct you that both the plaintiff and the defendant with his automobile had a right to the use of the streets of the city at the time and place in question; plaintiff having the right to cross the street and the defendant having the right to drive along the street with his automobile. Each party, however, owes a legal duty to the other in using the street. It was the duty of the plaintiff in starting across the street to exercise reasonable care for her own safety, and it was the duty of the defendant in driving his automobile to exercise reasonable care so as to avoid injuring any one, or colliding with any other person upon the street. The operation of an automobile upon the busy streets of a city necessitates exceeding carefulness on the part of the driver. Moving quietly as it does, without the noise which accompanies the movement of a street car or other ordinary heavy vehicle, it is necessary that caution should be continuously exercised to avoid collisions with pedestrians unaware of its approach. The speed should be limited, warning of approach given, and skill and care in its management so exercised as to anticipate such collisions as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions."—Approved: Domke v. Gunning (Wash.), 114 Pac. 436.

§ 4479a. Duty of One in Danger from Automobile to Use Care to Save Himself.

"If the deceased saw the automobile coming when the automobile was a hundred and fifty feet away from him, as was testified to by one of the plaintiff's witnesses, and shouted to it to keep out of the way, it was his duty to have removed himself to a safe position, where he would not be struck by the automobile, if he could have done so by the exercise of reasonable care after the danger was or should have been apparent to him. The deceased was bound to exercise reasonable care to protect himself from injury, and if he knew the automobile was coming, it was his duty to exercise reasonable care to get out of the way of it; that is, the moment that he saw, or as a reasonable man ought to have apprehended, danger from it."—Approved: Case v. Clark, 83 Conn. 183, 193, 76 Atl. 518.

§ 4480. Violating Speed Ordinance Prima Facie Negligence.

(a) "If you find that the plaintiff in going into Woodward avenue from Milwaukee on the date in question was operating his motorcycle at a greater speed than permitted under the laws of Michigan, and the traffic ordinance of the city of Detroit, then he was prima facie

guilty of contributory negligence, and could not recover."—Approved: Scott v. Dow, 162 Mich. 636, 127 N. W. 712.

(b) "The court instructs you that in an action brought to recover damages, either to person or property, caused by running an automobile propelled by mechanical power in the public highway at a greater rate of speed than fifteen miles per hour, the plaintiff is deemed to have made out a prima facie case by showing the fact that he or she has been injured, and that the person running such automobile, either by himself or his agent, was at the time of the injury running the same at a speed in excess of fifteen miles per hour."—Approved: Ward v. Meredith, 220 Ill. 66-68, 77 N. E. 118.

§ 4481. Exceeding Statutory Speed Negligence Per se.

"It was the duty of the defendant to know the law and the legal rate at which he could operate and run his automobile in the city of Trenton and upon the highways of Grundy county. And under the law the defendant had no right to run the automobile upon such streets or highways, at a greater rate of speed than nine miles per hour. And this he was conclusively presumed to have known.

"And if the jury believes from the evidence that the defendant ran the automobile at a greater rate of speed than nine miles per hour at the time and place of the injury and death of Minnie S—, whether he knew the same was in violation of the law or not, then this constituted and was, negligence as a matter of law."—Approved: Sapp v. Hunter, 134 Mo. App. 685, 115 S. W. 463.

§ 4482. And no Violation of Ordinance as to Speed, Signals and Turning Corners.

"It was also the duty of the defendant to observe all the provisions of the ordinance of the city of Spokane with reference to the speed of driving his automobile, the giving of any signal or warning, and the manner in rounding corners. In this respect I instruct you that under the ordinance of this city it would be negligence on the part of any person driving an automobile to drive it at the place in question at a greater rate of speed than four miles an hour; also, it would be negligence for the defendant to round the corner from Sprague avenue into Post street closer to the curb than six feet. In this respect I instruct you that if you find from the evidence that there was debris or building material piled upon the sidewalk, so that the same was impassable for foot passengers, and that said debris and building material extended beyond the sidewalk into the street, so that foot passengers were required to use the street in common with horses and vehicles, and if you find that the evidence also shows that this condition existed at the corner and upon both Sprague avenue and Post street and that there was a fence or barricade separating the debris and building material from the street, then the fence or barricade would be regarded as the curb in the provision of this ordinance. If you find from the evidence that the defendant at the time and place in question failed to exercise such care in any or all these respects as an ordinarily prudent person would exercise under like circumstances, or if you find from the

evidence that the defendant was negligent in any of the respects provided in the ordinance or otherwise, and that his negligence in any of such respects was the direct and proximate cause of the collision and the injury to plaintiff, then the defendant would be liable to her for the injury she sustained. On the other hand, if you should find from the evidence that the plaintiff herein was negligent and that her own negligence was the direct and proximate cause of the collision and her injury, or that her own negligence contributed to the collision and the injury in any appreciable degree, then the plaintiff cannot recover, and your verdict will be for the defendant even though the defendant himself was negligent."—Approved: Domke v. Gunning (Wash.), 114 Pac. 436.

§ 4483. Proceeding on Wrong Side of Highway Presumptively Negligent.

"If the jury finds that at the time of the accident, the defendant was driving on the right of the middle of the traveled part of the way, it is evidence of the exercise of due care on his part; and if the jury shall find that the plaintiff B— was driving his machine in an opposite direction and collided with the defendant, this is evidence that the plaintiff was acting in violation of R. L. c. 54, § 1, requiring him to drive to the right of the middle of the traveled part of the road, and un-explained, indicates negligence on the part of the plaintiff."—Approved: Bourne v. Whitman (Mass.) 95 N. E. 404.

§ 4484. Vigilant Watch for Other Vehicles Using Highway.

"The court instructs the jury that while the defendant and the automobile had an equal right to the street and road with the deceased, Minnie S—, and the horses and wagon, the law required that in the use and operation of the automobile, the defendant exercise reasonable care corresponding to the risk of injury to Minnie S—, and others on the public highway, and, it was the further legal duty of the defendant to keep vigilant watch for vehicles, carriages or wagons drawn by animals and especially vehicles, carriages or wagons driven by women and children, and, if necessary to prevent injury or death by the frightening of such animal or animals, to bring said automobile to a stop in order to give such driver or person an opportunity to alight from such vehicle, or an opportunity to take such other reasonable action as might be necessary for safety."—Sapp v. Hunter, 134 Mo. App. 685, 115 S. W. 463.

§ 4485. Causing Horses to Run Away.

(a) "If you find from the evidence, guided by these instructions, that the plaintiff was passing along the public highway driving a horse and buggy, and that he was exercising reasonable and ordinary care and caution in so doing, and that the defendant company, by its agent, D—, approached plaintiff on said highway at a high rate of speed, and in such approach with the automobile the plaintiff's horse became frightened at the automobile, and that when approaching the plaintiff upon said highway the said D— saw, or by the exercise of

ordinary care should or could have seen, or known, that the automobile or his manner of running or operating the same was frightening plaintiff's horse, and rendering the same unmanageable, and said D— thereafter negligently continued to operate the automobile toward the plaintiff's horse and failed to exercise ordinary care in operating the automobile, as alleged, after he saw, or by the exercise of ordinary care should or could have seen, or known, that the plaintiff's horse was frightened and becoming unmanageable, and that thereby the plaintiff was thrown from the buggy and injured, and that the defendant's negligence was the direct and proximate cause of the plaintiff's injury, then the plaintiff should recover in such sum as you find under the instructions hereinafter given. The defendants had a legal right to operate their automobile upon the highway, and if you find from the evidence that, at the time of the alleged injury to plaintiff, the defendants operated their automobile with such care as an ordinarily prudent and cautious man would use under like circumstances, having a regard to the use of the highway at the time, and having regard to the situation of the plaintiff as he was then in, then there can be no recovery. And if you find that the said D— approached the plaintiff and his horse while driving on the public highway, and that he sounded his horn as a warning and slackened the speed of the machine, or he stopped the automobile as soon as he reasonably could when he noticed, or could have noticed by the exercise of ordinary care, that the plaintiff's horse was frightened, or that he (D—) in what he did do acted in a reasonable and prudent manner and with ordinary care with due regard to the rights of the plaintiff, and that D— was not driving in an unreasonable, careless, and negligent manner, then the plaintiff cannot recover. And this is true although you may find that the plaintiff's horse became frightened and unmanageable and ran away and injured the plaintiff."—Approved: Strand v. Grinnell Automobile Garage Co., 136 Iowa, 68, 113 N. W. 488.

(b) "If you believe from the evidence that as the defendant approached the plaintiff he slowed down his machine to a reasonable and proper speed under the circumstances, and that the plaintiff's horse showed no evidence of fright at the approach of the automobile, and that the defendant turned his machine to the right and approached the defendant's horse and buggy at such a distance to the right as would enable the plaintiff to pass the automobile with safety had the horse not become frightened, then it would be your duty to find for the defendant.

"What was a reasonable and proper rate of speed under the circumstances, as disclosed by the evidence, you must determine, and you are instructed that if you find from the evidence that the horse showed no fright at the automobile until at or about the time the defendant's automobile came opposite the horse and buggy, that fact should be considered by you as of great importance in determining whether the rate of speed of the automobile was or was not reasonable and proper under the circumstances.

"You are instructed that if the plaintiff was driving along the highway with a loose line, and that he conducted himself in such a manner

as to indicate to the defendant that he thought the horse would not be frightened, and if you further find that the horse showed no fright at the automobile until the defendant reached or was opposite the horse and buggy, that under such circumstances the defendant was justified in operating his automobile at a much higher rate of speed than he would have been had the horse shown fright, or had the plaintiff indicated by his conduct that he had any fear himself that the horse would become frightened.

"It is not claimed by the plaintiff that the automobile collided with the horse and buggy. He does claim, however, that the defendant did not give him half the road. The law requires that a person proceeding along the public highway with any vehicle must turn to the right and give one-half of the road to the vehicle which he meets. What is meant by one-half the road is one-half of the traveled track; yet there was no obligation on the part of the defendant to give one-half of the traveled track, provided the plaintiff's horse and buggy were outside of the traveled track and on the east side of the turnpike, as in such case the defendant had the right to run his automobile in the traveled track, provided there was room to pass, and the horse had shown no signs of fright; and even though you find from the evidence that the defendant did not turn to the right and give the plaintiff one-half the traveled track, still if the accident was not caused by his failure so to do, then the plaintiff could not recover on that ground."—Approved: Needy v. Littlejohn, 137 Iowa, 704, 115 N. W. 483.

(c) "Under the law it was the legal duty of the defendant, at all times while operating his automobile upon the public streets, roads or highways of this state to keep a vigilant watch for vehicles drawn by animals and especially to keep a vigilant watch while so operating his automobile upon the streets of the city of Trenton, for vehicles, carriages or wagons driven by and in charge of women or children; and, if the jury believe from the evidence that defendant, by the exercise of such vigilant watch and observation, could have seen and observed the team the deceased was driving and in charge of, and could have stopped said automobile and the noise thereof in time to have prevented the injury and death of Minnie S—; and, that defendant negligently failed to keep such vigilant watch; and that, by reason of such failure to keep such vigilant watch, the horses were frightened and ran away and killed Minnie S—, while she was in the exercise of ordinary care, then the defendant is liable and the jury should so find."—Approved: Sapp v. Hunter, 134 Mo. App. 685, 115 S. W. 463.

§ 4486. Excessive Speed Proximate Cause of Injury.

"If you find from a preponderance of the evidence that the defendant was operating an automobile on the public road leading from the city of El Paso to Ysleta at a point adjacent to Evergreen Cemetery and Washington Park at a greater rate of speed than eighteen miles an hour, and you further find from the evidence that defendant's automobile collided with plaintiff's buggy at that point on said road, and you further find from the evidence that by reason of said collision plaintiff's wife was thrown from said buggy and received any of the injuries com-

plained of in plaintiff's petition, and you further find from the evidence that said rate of speed was the proximate cause of said injuries, then you will find for the plaintiff."—Approved: Posener v. Harvey (Tex. Civ. App.), 125 S. W. 356.

§ 4487. Owner of Automobile Responsible for Negligence of Chauffeur.

"If the jury find either that the defendant left the automobile in charge of his son to take it home or in charge of his son and coachman together to take it home, or in charge of his coachman alone, and the coachman neglected his duty in that regard and allowed the son to run the machine, and by the negligence of the son the accident occurred, without contributory negligence on plaintiff's part, then in either case the defendant is responsible and liable for that negligence and its consequences."—Approved: Collard v. Beach, 81 N. Y. S. 619, 81 App. Div. 582.

§ 4488. Imputed Negligence of Chauffeur.

"Now, briefly, you are to understand from these general charges that the husband of the plaintiff would not be liable for the negligence of the automobile driver, if there was any, unless by his own failure to exercise ordinary care at the time he contributed to his injury by doing or failing to do something that he ought to have done or should not have done at the time as an ordinarily prudent person."—Approved: Wilson v. Puget Sound Electric Ry. Co., 52 Wash. 522, 101 Pac. 50.

§ 4489. Bicycle Without Bell or Light—Contributory Negligence.

"In the matter of carrying a light or the failure to carry a light, the matter of ringing a bell or not ringing a bell, you are instructed that the failure to carry a light or the failure to ring a bell is not conclusive proof that plaintiff was guilty of contributory negligence; but these facts, like the other evidence in the case, should be taken into consideration by you in reaching your conclusion regarding the circumstances and surroundings of the accident."—Approved: Cook v. Fogarty, 103 Iowa, 500, 72 N. W. 677, 39 L. R. A. 488.

CHAPTER CXXI.

NEGLIGENCE—MASTER AND SERVANT.

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§ 4490. Master Not Insurer of Servant's Safety.

"A master is not an insurer of the safety of his servant, and the law imposes no greater obligation upon him than that he should use ordinary care for his servant's safety."—Approved: Commerce Cotton Oil Co. v. Camp (Tex. Civ. App.), 117 S. W. 451.

§ 4491. Reasonably Safe Place to Work—Master's Duty to Furnish.

(a) "It is the duty of the master to exercise ordinary care and prudence to furnish its servants with a reasonably safe place in which to perform the labor which devolves upon them by virtue of their employment, and generally to provide for the reasonable safety of the servant in the course of the employment, and, if the master fails in the performance of its duty in this particular, it is negligence on the part of the master, and the master is liable to the servant if injury results thereby, if the servant himself is without fault which proximately contributes to his injury."—Approved: Jachetta v. San Pedro, L. A. & S. L. R. Co., 36 Utah, 470, 105 Pac. 100.

(b) "It is the law in North Carolina that an employer of labor, to assist in the operation of mill and plants, where machinery is more or less complicated, is required to provide his employees, in the exercise of reasonable care, a reasonably safe place to work, and to supply them with machinery reasonably safe and suitable, and he is also required to keep such machinery in such condition as far as can be done in the exercise of reasonable care and diligence."—Approved: Midgette v. Branning Mfg. Co., 150 N. C. 333, 64 S. E. 5.

§ 4492. That is as Safe as Carrying on the Work Will Reasonably Permit.

"I instruct you that under no circumstances is a servant legally entitled to demand an absolutely safe place in which to work. All that the law requires of the master is to furnish a place as reasonably safe as the proper carrying on of the work will reasonably permit. A master is not bound to anticipate and guard against every possible danger, but only such as can be foreseen by the exercise of reasonable care. An employer is not an insurer of the safety of the place in which his servant works."—Approved: Pre v. Standard Portland Cement Co., 9 Cal. App. 591, 100 Pac. 122.

§ 4493. And Not Subject Servants to Danger Not Incident to the Work.

"You are instructed that it is the duty of every master to conduct his business with reasonable care and prudence so as not to negligently or carelessly subject his servants to any danger not ordinarily incident to or connected with his employment, and it is the duty of the master

to furnish his servants with a reasonably safe working place, and if, through the negligence of the master, the place where the servant was required to work is rendered unsafe, and because thereof the servant is injured, then the master is liable in damages for such injury unless the servant was guilty of negligence or want of ordinary care which contributed to such injury."—Approved: Cudahy Packing Co. v. Wesolowski, 75 Neb. 786, 106 N. W. 1007.

§ 4494. Safe Appliances and Instrumentalities to be Furnished.

(a) "It was the duty of defendant to exercise ordinary care to furnish plaintiff with safe appliances and instrumentalities with which to do his work, and to keep them in a safe condition."—Approved: Rudquist v. Empire Lumber Co., 104 Minn. 505, 116 N. W. 1019.

(b) "You are instructed that the master or employer owes a positive duty to his servant or employee to use reasonably safe appliances and instrumentalities for the use of his employees in prosecuting the work undertaken, and to use reasonable care to provide a reasonably safe place for the servants to work in, and to maintain it in a reasonably safe condition."—Approved: Olson v. Erickson, 53 Wash. 458, 102 Pac. 400.

(c) "The defendant in this case has a perfect right to use such a combination or boiler as it sees fit, provided that it exercises reasonable care in its selection, maintenance, and use."—Approved: Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164.

§ 4495. And These Must be Kept in Proper Repair.

(a) "That it was the duty of the defendants to use reasonable diligence and care to have the elevator and its several parts in a reasonably safe condition for the purposes for which they were used by authority or directions of defendants, and to keep the same in proper repair, so that the elevator might be used by those entitled thereto with a reasonable degree of safety with proper care and caution, and without fault on the part of those using the same; and the defendants are not relieved from this duty from the fact that they may not have personally possessed the skill to determine whether the machinery was reasonably safe or in a reasonably safe repair."—Approved: Oberfelder v. Doran, 26 Neb. 118, 41 N. W. 1094.

(b) "The court instructs you that it is the duty of an employer to furnish his employees with reasonably safe tools and appliances for the doing of the work intended to be done thereby, to furnish them with a reasonably safe and suitable place to work, and to keep such tools, implements, and appliances and such place of work in that condition, and for his failure so to do resulting in injuries to his employees to which their own acts or omissions have not proximately contributed, he is responsible in damages."—Approved: De Witt v. Floriston Pulp & Paper Co., 7 Cal. App. 774, 96 Pac. 397.

§ 4496. Place, Tools and Appliances to be Reasonably Safe When Properly Used.

"The relation existing between defendant and plaintiff at the time of the injuries complained of was that of master and servant, or em-

ployer and employee. Under the law it was the duty of the defendant, in the first instance, to use ordinary and reasonable care to furnish to the plaintiff a reasonably safe place to work, and reasonably safe tools with which to do the work appointed to him to do; that is to say, that the place, tools, and appliances should be reasonably safe when properly used.

"You are instructed that, under the undisputed evidence in this case, the pile driver in use by the plaintiff and his fellow servants was a reasonably safe tool, and the ladder thereon was a reasonably safe place within the meaning of the law. If it be a fact that the pile driver and the ladder thereon became unsafe by reason of plaintiff's or his fellow servant's use of the same in an improper manner, such fact would not show a failure on defendant's part to perform its duty in the respect above stated."—Approved: Wilder v. Great Western Cereal Co., 134 Iowa, 451, 109 N. W. 789.

§ 4497. Duty not Excused Where Master is not Owner of Machinery.

"The duty of the master to furnish safe machinery is not affected by the fact that he does not own the machinery furnished. It is sufficient if it is used by such employer. The duties which an employer owes to his servants, and which he is required to perform, are to furnish suitable machinery and appliances, by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed; and to make such provisions for the safety of employees as will reasonably protect them against the dangers incident to their employment. The performance of these duties cannot be shifted by an employer to a servant, so as to avoid responsibility for the injury caused to another servant by his omission."—Approved: Higgins v. Williams, 114 Cal. 176, 45 Pac. 1041.

§ 4498. Also the Master Should Employ Competent Hands to Carry on the Work.

(a) "The court instructs the jury that it was the primary duty of the defendant, W. A. G— & Co., to furnish the plaintiff's intestate where he was engaged at work a reasonably safe place and premises fit and suitable for the purposes for which they were being used, viewed from the nature of his employment, and to keep the same reasonably safe, and it was its further duty to furnish him reasonably safe machinery and appliances with which and about which he was required to work, and to keep the same in reasonable repair, and it was its further duty to employ and provide a sufficient number of competent hands to carry on the work in hand and at which said decedent was engaged and for which he was employed with reasonable safety, and said intestate had the right to rely upon the performance of these duties by said defendant while engaged in the line of his employment, and if the jury shall believe from the evidence that said defendant failed to furnish said intestate a reasonably safe place to work, and premises fit and suitable as named above, or to keep same reasonably

safe, or failed to furnish him reasonably safe machinery and appliances with which and about which he was required to work, or failed to employ and provide a sufficient number of competent hands to carry on the work in hand, and at which he was engaged, and for which he was employed, with reasonable safety, and that, by reason of its failure, if any, to perform either of its said duties as above described said intestate, T—, was caused to be thrown against or caught in a rapidly revolving wheel or pulley, whereby he was injured, and from which he died, the law is for the plaintiff, and the jury will so find."—Approved: Trumbo's Adm'x v. W. A. Gaines & Co. (Ky.), 109 S. W. 1188 (not reported in state reports).

(b) "The court instructs the jury that it was the duty of the defendant company to use ordinary and all reasonable care: First, to furnish and maintain a reasonably safe place for the plaintiff to do the work which he was employed by the defendant to do; second, to use a like degree of care to employ fit, competent, and careful men to do any other work required by said company to be done in, about, nearly and around the place where the plaintiff was working, and to see that said other workmen were careful in doing their said work; third, to use like care to make and give proper orders and instructions to its employees doing its work how to properly and carefully do the same, and to see that its said orders and instructions were obeyed and carried out by each and all of said employees; and that these duties could not be assigned or delegated by the defendant to any of its employees; and if the jury believes from the evidence in this case that the defendant company failed to exercise ordinary and all reasonable care in the performance of any one or all of said duties, or failed to perform any one or all of them, and such failure was the proximate cause of the injury to the plaintiff, then the jury will find for the plaintiff."—Approved: Lane Bros. Co. v. Seakford, 106 Va. 93, 55 S. E. 556.

§ 4499. And Make Rules for Their Protection in Performing their Duties.

"It is the duty of the master, when the nature of the business requires it, to make and promulgate rules for the protection of his servants, and to use due care and diligence, after the making and promulgating of a necessary rule, to have it enforced; and if you should find from the evidence in this case that the nature of the defendant's business was such as, in the exercise of due care and prudence for the safety of its employees, required the making and promulgating of rules, and should further find that the defendant failed to make and promulgate such rules, or, having made and promulgated the same, failed to use due care and diligence to have them enforced, and should further find that the injuries, if any, received by the plaintiff, were caused by such failure, you should find for the plaintiff."—Approved: Johnson v. U. P. Coal Co., 28 Utah, 46, 76 Pac. 1089.

§ 4500. These Duties Require for their Performance the Exercise of Ordinary Care.

"The defendant was under no obligation to keep the plaintiff absolutely safe and free from danger, nor to insure the plaintiff against

accident. Its duty, to express it tersely, was to use ordinary care to secure the plaintiff's safety. Ordinary care, you are instructed, is the care that is ordinarily exercised by persons of average prudence under the same or similar circumstances. Just what that degree of care is, or would be, is for the jury to determine. Having determined what, under the circumstances, would have been ordinary care, it is for you to say whether such care was exercised by the defendant about the premises in question."—Approved: Downey v. Gemini Min. Co., 24 Utah, 431, 68 Pac. 414.

§ 4501. Master not Bound for Absolute Safety or Suitability of Appliances.

"The jury are instructed that the defendant was not bound as an insurer for the absolute safety and suitability of the machinery and appliances furnished by him for use in his business, and that he was not bound to furnish the very best or most improved kind of machinery to be used in his factory. It was sufficient to prevent a recovery in this case if the machine and pulleys and appliances connected with the same were reasonably safe and suitable for the purpose for which they were used."—Approved: Harsha v. Babicx, 54 Ill. App. 586.

§ 4502. Servant Entrusted with their Performance a Vice-Principal.

(a) "It is the duty of the master to furnish proper and suitable appliances and to see that the same are properly adjusted, and any one to whom the master delegates such duty becomes for such purposes the vice principal of the master for whose negligent act the master is responsible."—Approved: Sullivan v. R. D. Wood & Co., 43 Wash. 259, 86 Pac. 629.

(b) "The jury are further instructed that the duties of the master to provide safe and suitable machinery and appliance for the business, and to furnish a safe place in which his servant is to work, are duties which the master can either perform personally, or delegate their performance to someone else; but if both the master and the person to whom such duties are delegated fail in the performance of any of said duties, and injury results to the servant by reason of said failure, the master is liable for such injury."—Approved: Giebell v. Collins Co., 54 W. Va. 518, 46 S. E. 569.

§ 4503. Employee May Presume Compliance.

(a) "The deceased had a right to assume, without examination, that said elevator and its several parts were in reasonably good condition and repair, and that it was reasonably safe to use the elevator in its proper employment."—Approved: Oberfelder v. Doran, 26 Neb. 118, 41 N. W. 1094.

(b) "The court charges the jury that it was the duty of the defendant to be reasonably prudent and cautious in selecting a handle for the lever of the car, and that when the handle was put in the lever, if plaintiff then and thereafter used it in his duties under his employment, then plaintiff, in using the handle, had the right to assume it was reasonably safe for service, unless he knew it was not so."—Approved: Southern Ry. Co. v. McGowan, 149 Ala. 440, 43 South. 378.

§ 4504. And that there are no Hidden Dangers in Working Place.

"Of course, the servant must use his faculties in ascertaining whether or not danger actually exists, if the same is apparent or open to the view. But he is not bound to be looking out or searching for latent or hidden dangers, nor is he charged with knowledge of the dangerous conditions of the place in which he is required to work, if it is the master's duty to make it safe; for the servant is justified in assuming, within reasonable limits, that the master has performed his duty, and he is also justified in acting upon that assumption, within reasonable limits."—Approved: Vandalia Coal Co. v. Yemm (Ind.), 94 N. E. 881.

§ 4505. Appliances that are to be Kept Safe Defined.

"I further instruct you, gentlemen, that, in the raising of the cant in question, whatever was necessary or needful or useful in order to raise the cant in an ordinarily safe manner, and consistent with the care and caution necessary to render safe and free from danger the workmen engaged in it, are instrumentalities or appliances, within the meaning of the law, whether the same be ropes, engines, platforms or staging, or servants; and it is the duty of the master, or its vice principal or yard foreman having charge of the raising of this cant, to furnish all such necessary instrumentalities and appliances, whether ropes, machinery, staging, or servants, and that they shall be reasonably suitable and competent."—Approved: Sroufe v. Moran Bros. Co., 28 Wash. 381, 68 Pac. 896.

§ 4506. Defects not Discoverable by Exercise of Ordinary Care.

"The jury is instructed that if the running away of the carriage described in plaintiff's petition, and the injury that plaintiff sustained on account thereof, was due to the breaking of any portion of the carriage or its equipment, but if the defect, if any, causing said breakage was latent, and could not have been discovered by the defendant in the exercise of ordinary care in the discharge of their duty, then defendants cannot be charged in law with negligence on account of such defect, if it really existed, and under such circumstances your verdict should be for the defendants."—Approved: Lyon v. Bedgood (Tex. Civ. App.), 117 S. W. 897.

(b) "Even if you should find it was the duty of the plaintiff to strip cards at the machine at which he was injured, and that he was engaged in the line of his duty at the time he was injured, and that the catch was defective, but should also find that the defendant had had no notice of the defective catch or that it had not been defective long enough for the defendant to have constructive notice of this defect, and that this defective catch was the cause of the plaintiff's injury, you will answer the first issue, 'No.' (Defendant not negligent in not furnishing safe appliance.)"—Approved: Blevins v. Erwin Cotton Mills Co., 150 N. C. 493, 64 S. E. 428.

(c) "If you find, from the evidence, that the defendants directed the construction of the scaffold, then you will consider whether or not defendants were negligent in so doing. Defendants were bound to

exercise ordinary care and skill in the construction of said scaffold, for the safety of the employees; that is to say, such care and skill as an ordinarily prudent man would exercise under the same or similar circumstances. If defendants did this, then you should find for them on this point; if not, then to this extent you should find for plaintiff. You are instructed, in passing upon this, that, should you believe from the evidence that defendants had employed any person to take charge of the erection of said scaffold, then any act of omission or commission by such person in this employment is as binding on the defendants as if done by themselves, provided you find that plaintiff himself did not aid in such erection."—Approved: Haworth v. Seevers Manuf'g Co., 87 Iowa, 765, 51 N. W. 68.

§ 4507. Relying on Independent Contractor to Build Proper Scaffold.

"That the defendants were bound to use ordinary care in providing suitable materials and proper persons to perform the work in which the plaintiff was at that time engaged, and, if you shall believe from the evidence that the defendants had provided reasonably safe and suitable material for the building of scaffolding, and a reasonably prudent and competent person to construct such scaffolding, then the defendants would not be liable if, through neglect or oversight of the scaffold builder, such scaffold was in fact insufficiently constructed; but you will examine the evidence with reference to whether the fault in the scaffolding was one growing out of insufficient material, or insufficient workmanship. If you shall find from the evidence that the injury resulted from the breaking of one of the pudlocks, then you will ascertain from the evidence whether or not the pudlock in question was one such as was usually and ordinarily used in and about such work; and, if it was, the defendants would not be liable because of its breaking, unless they had notice and knowledge of some defect therein. If it was apparently of good material and of the usual kind used in such work, then they are not liable, although, through some unknown reason, the same might have broken; and in such case upon such finding, your verdict should be for the defendants."—Approved: Stevens v. Howe, 28 Neb. 547, 44 N. W. 865.

§ 4508. Where Scaffolding is Defective in Material or Construction Injury Presumption of Negligence.

"I instruct further, that if the scaffolding was built by defendants for the use of plaintiff in doing the work he was engaged to do and that plaintiff was rightfully thereon, and that it fell while being used by him in a proper manner for the purpose for which it was built, the presumption is that the scaffolding was either defective in material or construction in the first instance, or had become so since it was put to use; and the defendants would be liable to plaintiff for the injuries, if any, sustained by him from the falling of said scaffold."—Approved: Cleary v. General Contracting Co., 53 Wash. 254, 101 Pac. 888.

§ 4509. Whether Appearance of Certain Columns Indicated They Should have been Braced.

"The court instructs the jury that it was the duty of the defendant to furnish the plaintiff a reasonably safe place to work. If the jury be-

lieve and find from the evidence that William A— was intrusted by the defendant with authority to superintend, control, and command over the plaintiff, and was managing and controlling the work in question and the plaintiff, as defendant's agent; and if you further believe and find from the evidence that at the time of the plaintiff's injuries the wire columns were in a leaning condition, and were thereby rendered dangerous and unsafe to work about, and that said A— had authority to brace said columns so as to prevent them from being dangerous, and that it was a part of his duty to so brace them, and that said A— either knew, or by the exercise of ordinary care would have known, that said wire columns were dangerous and unsafe by reason of the same being in a leaning condition in time so that by the exercise of ordinary care he might have put or caused the same to be put in a reasonably safe condition by so bracing the same before the injuries of the plaintiff, and that the said B— at the time of the injuries exercised ordinary care, and while in the exercise of such care the wire columns fell on him in consequence of them being in a leaning condition, and thereby dangerous and unsafe, and he was thereby injured, then your verdict must be for the plaintiff."—Approved: Burkard v. A. Leschen & Sons Rope Co., 217 Mo. 466, 117 S. W. 35.

§ 4510. Whether Shaft for Elevator Car Should have been Kept Lighted.

(a) "If you believe from the evidence that on the occasion in controversy, plaintiff's son, Thomas M—, stepped into defendant's elevator shaft not knowing that the same was an elevator shaft, and believing that he was stepping upon a floor, and that he was thereby caused to fall and sustain injuries, and if you further believe from the evidence that when said Thomas M— stepped into said shaft there was not sufficient light in said shaft to render the danger of stepping into the same, in the absence of the elevator car, patent and open to the common observation of persons possessing the experience and discretion to appreciate such dangers which you believe from the evidence said Thomas M— possessed at the time, and that the failure of the defendant to have said shaft so lighted, without warning said Thomas M— in person of the location of said elevator, was a failure to exercise that degree of care for the safety of its employees which you believe a person of ordinary prudence would have exercised under the same circumstances, and that such failure, if any, of the defendant, was the proximate cause of the injuries so sustained by said Thomas M—, then you will return a verdict in favor of the plaintiff against the defendant."—Approved: Swift & Co. v. Martine, 53 Tex. Civ. App. 475, 117 S. W. 209.

(b) "The defendant was not an insurer of the personal safety of Thomas M— while he was engaged in its service, and the extent of its duty to him was to exercise that degree of care for his personal safety which a person of ordinary prudence, in the same situation, would use under the same or similar circumstances; and if you believe from all the facts and circumstances in evidence that a person of ordinary prudence, in defendant's situation, would not, under the same circum-

stances, have lighted said elevator shaft artificially, and would not have personally notified said Thomas M— of the location of said shaft, then you will return a verdict in favor of the defendant."—Approved: Swift & Co. v. Martine, 53 Tex. Civ. App. 475, 117 S. W. 209.

§ 4511. Precautions Against Accidents in Mines.

(a) "It was the defendant's duty to provide and maintain for the mine an amount of ventilation of not less than 100 cubic feet of air per minute per person employed therein, circulated and distributed throughout the mine in such a manner as to dilute and render harmless and expel the poisonous and noxious gases from each working place in it. No working place should be driven more than 60 feet in advance of a break-through or an airway. All break-throughs or airways except those last made near the working-face of the mine should be closed up and made air tight by brattice or otherwise, so that the currents of air in circulation in the mine may sweep to the interior of the excavations where the persons employed in the mine are at work; and the mine should be provided with artificial means of producing ventilation such as a forcing fan, furnace, or other contrivance of such capacity and power as to produce and maintain an abundant supply of air. Now, if the jury believe from the evidence that the defendant, L—, failed to perform these duties or any of them, and by reason thereof and as the natural and proximate result of such failure an explosion occurred in said mine, and thereby the plaintiff's intestate was burned, and his death was thereby caused, they should find for the plaintiff.

"If the defendant or the mine boss working under him failed to use ordinary care in regulating the time and manner in which the miners should fire their shots, and negligently allowed them to fire their shots in such a way as to cause the explosion, when, by the exercise of ordinary care on the part of the defendant or the mine boss, this might have been avoided, and but for this the injury would not have occurred, the jury should find for the plaintiff."—Approved: Edwards' Adm'x v. Lam, 132 Ky. 32, 116 S. W. 283.

(b) "If you find from the evidence in this case that the air compressor in use at the Holy Terror Mine on the 22d day of October, A. D. 1901, was not kept in a reasonably safe condition, but was negligently allowed to get out of repair, whereby the compressor became ignited, forcing gas and foul air into the compartment of said mine in which the plaintiff was engaged at work, and that said gas and impure air suffocated and overcame him, causing him to fall upon the pump, or other appliances in said compartment, and resulting in the injuries of which he complains, then I instruct you that the defendant would be liable to the plaintiff for said injuries and you will assess the plaintiff's damages."—Approved: Davis v. Holy Terror Min. Co., 20 S. D. 399, 107 N. W. 374.

(c) "If the jury find from the evidence plaintiff was in defendant's employ mining coal on or about September, 1903, you are instructed it was defendant's duty to make and keep the entry in its mine, where plaintiff would have to pass, reasonably safe from the falling of over-

hanging rock, earth, and debris in the roof of said entry, and it was not plaintiff's duty to examine said roof to see that it was safe, but he had a right to rely upon the defendant to see that said entry was kept reasonably safe, and that it had exercised all reasonable care and diligence in that regard.

"If, therefore, you believe from the evidence the defendant or its agent in charge of said mine, knew, or by the exercise of reasonable diligence would have known, that the roof of an entry in its mine where plaintiff would have to pass was unsafe from overhanging rock, earth, or debris, and negligently failed to remove such earth, rock, or debris, or to make same reasonably secure, and plaintiff, while in discharge of his duties, and in the exercise of reasonable care and caution on his part, was injured, and had his leg and ankle bruised, crushed and broken by the fall of overhanging rock, earth, and debris in the roof of such entry, then your verdict should be for the plaintiff."—Approved: Garard v. Manufacturers' Coal & Coke Co., 207 Mo. 242, 105 S. W. 767.

§ 4512. Mine Boss to Make Frequent Inspection of Working Rooms.

"The court instructs the jury that if they believe from the evidence that, under and by the rules of the defendant company, it was the duty of the bank or mine boss of said company to make daily visits to the room in which the miners were at work, for the purpose of seeing whether or not said rooms were in safe condition for the miners to continue their work, and if they further believe from the evidence that the mine boss of the defendant failed or neglected to visit the room in which the said plaintiff was at work, or failed, if he made such visit, to discover the danger which threatened the plaintiff if he continued his work in said room, if they believe such danger was threatening, and could have been discovered by the use of ordinary diligence on the part of said boss, then said company was guilty of negligence."—Approved: Russell C. C. Co. v. Wells, 96 Va. 416, 31 S. E. 614.

§ 4513. Passage Ways and Places to Walk in and About Work to be Kept Safe.

(a) "You are instructed that it is the duty of an employer to exercise reasonable and ordinary care in furnishing his employees a reasonably safe place in which to work, and so it was the duty of the defendant to exercise reasonable care and prudence in providing a reasonably safe passageway for the plaintiff to use in carrying glass in the performance of his work; and if you believe from a preponderance of the evidence that the defendant did not exercise ordinary care in furnishing a passageway free from obstructions for the use of the plaintiff, and that such want of care was the direct cause of the injury complained of, then defendant is liable in this case, and you should so find, unless you further find from the evidence that plaintiff assumed the risk of the injury suffered, or was himself guilty of negligence which contributed in some degree to the happening of said injury."—Approved: Kennard v. Grossman, 2 Neb. Unoff. 743, 89 N. W. 1025.

(b) "You are instructed that the plank testified to by plaintiff, upon

which he claims he was required to walk in order to do his oiling was, if his statement was believed by the jury, a place furnished by the defendant company upon which plaintiff was to do his work, and it was the duty of the defendant to use ordinary care to make it reasonably safe for the plaintiff to walk thereon in the manner that he was required to walk. If you believe from the evidence that it was not reasonably safe for that purpose, and that by ordinary care it could have been made reasonably safe, and that the accident happened because the plank was not made secure by nailing or otherwise, while plaintiff was properly walking thereon, in and about his work, and that the plaintiff was injured while using ordinary care for his own safety, then your verdict should be for the plaintiff in such damages as under the instructions given in the case you believe would compensate him for the injury sustained."—Approved: Anderson v. Mammoth Mining Co., 33 Utah, 144, 93 Pac. 190.

§ 4514. Defects in Machinery that Ordinary Care Should Have Discovered.

(a) "Even though the jury may believe from the evidence that the hole in question in the shaft of the sheave wheel was made or cut for a key-seat, yet if the jury further believe that said hole was cut too large and too deep compared with the size of said shaft, and that said shaft or axle was thereby rendered weak and defective and insufficient, and not reasonably safe for the purpose for which it was used; and if the jury further believe that defendant, its agents and servants, knew, or by the exercise of reasonable care might have known of said hole in said axle or shaft, and of the weak and defective condition of said shaft on account of the same (if you believe said hole rendered said shaft weak and defective), or by the exercise of reasonable care might have known the same in time to have prevented the injury to plaintiff; and if the jury further believe from the evidence that by reason of the weak and defective condition of said shaft on account of said hole so made and cut (if you believe the same was made and cut in said axle) that said axle broke and said sheave wheel fell from its place and struck and injured plaintiff, your verdict should be for the plaintiff."—Approved: Phelps v. Conqueror Zinc Co., 218 Mo. 572, 117 S. W. 705.

(b) "That if the jury shall find from the evidence that the defendant's car was equipped with a broken drawhead, so that the drawheads of the two cars passed each other instead of meeting when they were brought together for coupling, and permitted the cars to come so close together as to crush a person coupling them, that would be negligence; and if they find from the evidence that the defendant so loaded its logs on said cars that the ends projected so far over the ends of the cars that when they were brought together to be coupled the ends of the logs on the two meeting cars came so close together as to crush a person coupling the cars, that would be negligence, provided these defects were known to the defendant or could have been known by reasonable care and diligence."—Approved: Liles v. Fosburg Lumber Co., 142 N. C. 39, 54 S. E. 795.

(c) "If you believe from all the evidence that the defendant did not use ordinary care in the premises, but at the time of the accident the tire bender was in a defective condition—that is, dangerous to those working at or near it, because it would sometimes start and revolve its rollers of its own accord without being thrown into gear by any one—and that said tendency to start off or by itself was known to the defendant, or in the exercise of ordinary care would have been known to it, then, and upon your so finding, the defendant is guilty of negligence. Unless you so find, you need inquire no further, for your verdict must then be for the defendant."—Approved: Fries v. Bettendorf Axle Co., 126 Iowa, 138, 101 N. W. 859.

§ 4515. Appliances Causing Injury From Their Being Insecurely Fastened.

"If you shall find from the evidence in the case that the swamp hook was insecurely and improperly fastened to the stump, and by reason thereof liable to give way and fall out, and to cause injury to the plaintiff, and that plaintiff did not know these facts and could not have known them under the circumstances by the exercise of reasonable care and caution, and that such facts were known to defendant's foreman in charge of the plaintiff, or by the use of reasonable care should have been known by him, and that the foreman failed to remedy the defect and failed to have the swamp hook properly fastened, and that such defect on the part of defendant's foreman was the cause of such injury to plaintiff, then you should find a verdict for the plaintiff."—Approved: Hoseth v. Preston Mill Co., 55 Wash. 416, 104 Pac. 612.

§ 4516. Permitting Wires to be Without Proper Insulation.

"It was the duty of the defendant company to exercise ordinary and reasonable care to render it safe for the plaintiff to work on its poles and among electric light wires. If such a degree of care and caution required said wires to be insulated, then it was negligence in the defendant to permit said wires, or a wire or part of the wire, to be without proper insulation, and thereby subject its lineman to risk of injury; and if, by reason of a want of such insulation, a lineman, without fault on his part, suffers injury, then the negligence of the company would be actionable, and the injured lineman could recover proper damages."—Approved: New Omaha Thomson-Houston Electric Co. v. Rombold, 68 Neb. 54, 93 N. W. 966.

§ 4517. Particular Defect in Machinery Need not be Shown, if it Works Defectively.

"If you are not satisfied as to what was the specific cause of the starting of the loom, but do find as a fact that it did start suddenly from a position of rest when it had been properly stopped, you may consider that fact as evidence to show that there was some defective condition in the loom and some negligence in connection with that defective condition, even though you can't state specifically what the defective condition was."—Approved: Ryan v. Fall River Iron Works Co., 200 Mass. 188, 86 N. E. 310.

§ 4518. Master Should Ascertain if it is in Defective Condition.

"The court instructs the jury that it was the duty of the defendant Oscar D— Company to furnish its employees with reasonably safe machinery with which to do the work required of them, and if they shall believe from the evidence that the engine mentioned in the petition was in a defective and unsafe condition at the time H. L. C— was injured, and that because of its defective and unsafe condition the iron girder which was being hoisted by it was caused to fall and by reason thereof the said C— received the injury which caused his death, and that defendant or any of its agents or employees whose duty it was to inspect or keep the said engine in order knew, or could have known by the exercise of ordinary care, of its unsafe condition, if such was its condition, then the law is for the plaintiff as against the Oscar D— Company, unless the said C— was negligent and thereby helped to cause or bring about his injury and but for his negligence, if any there was, he would not have been injured."—Approved: Cooper's Adm'r v. Oscar Daniels Co. (Ky.), 96 S. W. 1100 (not reported in state reports).

§ 4519. Knowledge or Duty of Master to Know Should Have Existed Sufficiently Long to Protect Employee from Injury.

(a) "It appears that such plates were placed and piled by the plaintiff's co-employees, whose negligence, if any, in so doing, was assumed by plaintiff when entering such employment. If, therefore, you find such plates as piled were not reasonably safe, such condition under the law would be considered the result of the negligence of such co-employees, and as such was assumed by plaintiff, and hence defendant would not be responsible therefor; but if the defendant through its foreman knew, or had reasonable grounds to know, of such unsafe condition, and had such knowledge a sufficient length of time before the accident resulting in the injury to plaintiff to have prevented the injury to plaintiff while acting in the exercise of reasonable care and prudence to protect its employees from injury, then it was its duty to so do."—Approved: Hamm v. Bettendorf Axle Co. (Iowa), 125 N. W. 186.

(b) "If the jury believe that injury, deterioration, settlement, or misplacement of the gas mains of the defendant company, which existed at Sixth and Market streets on October 4 and 5, 1906, were a natural or probable consequence of any matter or thing, such as a sewer, a depression, or a washout, which existed there in close proximity to the said mains, and that the gas company, or its agents, had knowledge, or by the exercise of reasonable care could have had knowledge, of such matter or thing for a sufficient length of time to have made a proper inspection and repair, then it was the duty of the gas company and its agents to efficiently guard against any damage that was likely to result because of the presence of the said matter or thing in proximity to its said mains; and if you believe that such matter or thing existed in proximity to the defendant company's mains at Sixth and Market streets on October 4th and 5th, and that the defendant company or its agents had knowledge, or ought to have had

knowledge, of it, and that by reason of such matter or thing the mains of the gas company were displaced and an explosion brought about which injured this plaintiff, then it is for you to say whether or not the defendant company and its agents did everything that they reasonably could have done in view of the fact that they and their agents knew of it, or by the exercise of reasonable care could have known of it; and if you believe that they and their agents did not take such proper precautions, then you would be justified in finding that the defendant company was negligent."—Approved: Diehle v. United Gas Improvement Co., 225 Pa. 494, 74 Atl. 349.

§ 4520. Burden on Plaintiff to Show Notice or that Reasonable Care Would Have Given Notice.

(a) "Before the plaintiff can recover, it is necessary for him to show that his injury was due to a defect in the machine at which he was working for the defendant, and that the defendant had notice, or could by reasonable care have had notice, of the defect in the machine."—Approved: Blevens v. Erwin Cotton Mills Co., 150 N. C. 493, 64 S. E. 428.

(b) "The burden of proof is upon the plaintiff in this case to show that the runway upon which plaintiff worked was defective, that this defect was the direct and proximate cause of the plaintiff's injury, and that the defendant knew of this defect or that by the exercise of ordinary care could have known of its existence."—Approved: Ozan Lumber Co. v. Bryan, 90 Ark. 223, 119 S. W. 73.

§ 4521. Unskilled Labor—Employment where Skilled Workmen are Required.

"The second of the six grounds of negligence alleged and claimed by plaintiff against defendant is 'That defendants were negligent in employing unskilled laborers for work which required skilled workmen.' If you find, from the evidence, that the defendants did not employ unskilled laborers where skilled workmen were required, then you need pursue this inquiry no further, but will find for the defendants on this point in the issue. If, on the other hand, you find it is sustained by a preponderance of the evidence, then you may next consider whether or not this was negligence on the part of the defendants. Defendants were bound to exercise only ordinary care in procuring labor on their building, and what would be ordinary care depends upon the circumstances proved as surrounding the case. You should take into account the character of the work to be done, the kind of men employed, and, if such care was used by the defendants as an ordinary, prudent man would exercise under the same or similar circumstances, then defendants are not guilty of negligence under this allegation, and you should find for the defendant, to this extent, on this point in issue."—Approved: Haworth v. Seevers Manuf'g Co., 87 Iowa, 765, 51 N. W. 68.

§ 4522. Unlicensed Workman—Presumption of Negligence in Employment.

"The first question, then, is: Was the man A—, who was in charge of the engine in question and which had been referred to in the evi-

dence, an incompetent and unfit person to perform the services at which he was engaged? This is to be determined by a consideration of all the evidence in the case having a bearing thereon, including a consideration of the character of the service, the necessity, if any, of a previous experience thereat, the length of experience, if any, which A— had, and the character of the particular act or failure of his which it is alleged caused plaintiffs' injuries. The particular negligence of A— here relied on and alleged may or may not be of such a character as to indicate his competency or otherwise. A particular act which in itself is negligent may indicate that it was performed by reason of incompetence on the part of the person so performing it, or it may be a mere fugitive act of negligence, performed by one who is possessed of all the necessary qualifications. You are to say in this case whether A— was competent—that is, fit—to perform the grade of services at which he was engaged, or whether he was not. If A— was not an unfit and incompetent person to do the work at which he was engaged, there can be no recovery on this ground. If, however, he was an incompetent and unfit person, the next question is: Was the defendant negligent in employing him or in retaining him in its employ? You have heard all the evidence. Defendant claims therefrom that, even if A— was in fact an incompetent person, the defendant did all that could be required of it under the circumstances in making inquiries and in seeking to advise itself concerning his fitness to do what they wanted him to do. Plaintiffs claim that what it did fell far short of what it should have done in this regard. If, in fact, he was incompetent, and you so find, a presumption then arises that defendant was negligent in employing him. In this connection, also, you are advised that A—, not having received a license under the laws of this state which would authorize him to have charge of the instrumentalities which he had in this case, a presumption arises that defendant was negligent in employing him to perform such work as that at which he was engaged. These presumptions operate in favor of the plaintiffs, and in support of the claims they make as to the negligence of the defendant in employing A—; but such presumptions are not conclusive by any means, and you will say from all the evidence whether defendant was negligent in the respect here under consideration, or whether it was not. If, then, A— was incompetent and unfit to operate the engine in question, and if you further find that defendant was negligent in employing him under the circumstances of this case, and if you find that plaintiffs' injuries were caused by the acts or failure of A— arising from his unfitness or incompetency, the plaintiffs are entitled to recover, unless they were themselves negligent in such manner as contributed directly to cause their own injuries."—Approved: Kundar v. Shenango Furnace Co.; Roberts v. Same, 102 Minn. 162, 112 N. W. 1012.

§ 4523. Actual or Constructive Notice of Incompetency of Fellow Servant.

"The court instructs the jury that if they believe from the evidence that Niles M—, the sawyer in defendants' sawmill at the time plaintiff

claims he was injured, was an incompetent sawyer, and that the defendants knew of his incompetency, or by the exercise of ordinary care could have known of his incompetency, and they further believe from the evidence that the plaintiff was injured by and through the incompetency of the said Niles M—, as a sawyer operating said sawmill, they should find for the plaintiff such sum in damages as will fairly compensate him for his mental and physical suffering, if any, for his loss of time, if any, and for his physical disability, if any, and for the permanent impairment of his power to earn money, if any, also for any physical suffering that it is reasonably certain from the evidence he will endure in the future, not to exceed $25,000.

"Unless the jury believe from the evidence that Niles M— was incompetent, and that such incompetency caused the injury, they should find for the defendants."—Approved: Crane v. T. J. Congleton & Bro. (Ky.), 116 S. W. 341.

(b) "It was the duty of the defendant to use reasonable care to learn and know whether its servants were competent and fit for their work, so that it would be reasonably safe for the defendant's other servants to work with them without being exposed to unnecessary danger to life or limb by reason of incompetency, if any; and if defendant's servant known as 'Scotty' was incompetent for his work, and if by reason thereof other servants of defendant were exposed to unnecessary danger to life and limb, and if defendant by reasonable care would have known of such incompetency and danger, if any, before the alleged injury to plaintiff, in time by reasonable care to prevent such danger, then it was defendant's duty to use reasonable care not to expose the plaintiff to the danger, if any, of working with such incompetent servant, if any."—Approved: Klofski v. Railroad Supply Co., 235 Ill. 146, 85 N. E. 274.

§ 4524. Retaining Incompetent Servant—Negligence Question for the Jury.

(a) "You are instructed that the duty of the defendant was to use ordinary care and diligence in respect to employing competent servants, having regard always to the character of the particular service, and the consequences that might result from incompetency in such service. If the defendant exercised such care and diligence in retaining in its employ Reodor L— at the time of the accident, the defendant was not guilty of negligence in so doing, notwithstanding the fact that Reodor L— may have been incompetent at such time, and notwithstanding the fact that an injury to the plaintiff may have resulted by reason of such incompetency."—Approved: Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 N. W. 809.

(b) "You are instructed that you cannot find that Reodor L— was incompetent unless you find that he was so deficient in the qualifications necessary to perform his work as an engineer as would make it an act of negligence on the part of any one to employ him in such capacity who had knowledge of such disqualifications."—Approved: Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 N. W. 809.

§ 4525. Injury Received by Servant Acting in Violation of Instructions.

"You are further instructed that the defendant, the Yellow Pine Oil Company, would only be liable for such injuries as the deceased may have received while engaged in the discharge of his duties, and within the scope of his employment. Therefore, if you believe from the evidence that the deceased was merely employed to witness and verify the gauges of oil, and was instructed not to gauge except in company of the gauger or a representative of the Sabine Oil & Marketing Company, and further believe that he was not engaged in the discharge of that duty in company with such gaugers or representatives at the time of the alleged accident, you should find a verdict in favor of the defendant, for the defendant would not be liable for an injury occurring while the deceased was doing, or trying to do, something he was not employed to do, or for an injury occurring while he was violating the instructions as to the manner in which he should gauge the oil. If you should further believe that such disobedience contributed to his injury, he cannot recover herein, and you will find for the defendant."—Approved: Yellow Pine Oil Company v. Noble, 101 Tex. 125, 105 S. W. 318.

§ 4526. Failure by Master to Make and Enforce Rules is Not an Assumed Risk.

"It is the duty of the master, when the nature of the business required it, to make and promulgate rules for the protection of his servants, and to use due care and diligence, after the making and promulgating of a necessary rule, to have it enforced; and if you should find from the evidence in this case that the nature of the defendant's business was such as, in the exercise of due care and prudence for the safety of its employees, required the making and promulgating of rules, and should further find that the defendant failed to make and promulgate such rules, or, having made and promulgated the same, failed to use due care and diligence to have them enforced, and should further find that the injuries, if any, received by the plaintiff were caused by such failure, you should find for the plaintiff."—Approved: Johnson v. Union Pac. Coal Co., 28 Utah, 146, 76 Pac. 1089.

§ 4527. Usage Preventing Application of Fellow Servant Rule.

"You are instructed that if you believe from the evidence that it had been the usage and custom of the defendant to allow or permit the persons feeding its machine to call a co-laborer, who tails the machine to take his place and discharge his duties as feeder during his temporary absence, and that it had been the habit or usage of the one feeding the machine to relink or repair the chain of said machine while in operation, and that defendant knew of such customs, usages, or habits, and acquiesced in them, then the acts, customs, or usages of the feeder of such machine, in these respects, would be deemed in law the usage or custom of the master, and the doctrine of fellow servant will not apply in this case."—Approved: Arkadelphia Lumber Co. v. Henderson, 84 Ark. 382, 105 S. W. 882.

§ 4528. Warning to Servant Unnecessary as to that Which he Knows or Ought by Reasonable Diligence to Know.

"Even though you should find that the wall was improperly constructed, and though you should further find that notice should have been given to the plaintiff of the nature of the lower course of the projection, you should not find, even then, for the plaintiff, if it appears to you from the evidence that the plaintiff ought to have known the nature of the lower course of the projection. Even where an employer has been negligent, if an employee knows of that negligence, knows he has been negligent, and, knowing such fact, continues to work without making complaint as to the condition, the employee is held to have assumed the risk; and, in determining whether the plaintiff in this case assumed the risk or not, you should not only hold him charged with what he actually knew, but you should hold him charged with what he might with reasonable diligence, have known. So that among other questions submitted to you is the question of whether or not the plaintiff ought not, in the exercise of reasonable diligence, to have known that this lower course was a stretcher course and, if you find that he ought to have so known, your verdict should be for the defendant.

"A servant, working upon the construction of a building at a place designated by the master or his foreman, has the right, in the absence of knowledge to the contrary, and in the absence of such notice as would lead him, in the exercise of due care and prudence, to such knowledge, to assume that the place of work is a reasonably safe one for that character of work. The servant is not bound to anticipate any defect or danger in the place of his work, caused or committed by the negligence of the master or his foreman, in the absence of knowledge on the part of the servant, or notice which would lead him in the exercise of care and prudence, to such knowledge. It was the duty of the defendant or his foreman, if he knew of the negligent or defective construction, to warn plaintiff of the condition of the wall and the danger to be apprehended from its condition, if any, before directing plaintiff to go upon the wall, unless the condition of the wall was such that the plaintiff, in the exercise of ordinary prudence, ought or should have known of its condition. And one matter that you are entitled to consider in determining what knowledge ought to be imputed to the plaintiff is his experience in the business in which he was engaged at the time of the accident."—Approved: Soderburg v. Wells, 57 Wash. 281, 106 Pac. 751.

(b) "Although you may believe from the evidence in this case that defendant was guilty of negligence at the time and place complained of by plaintiff, as defined in instruction No. 1 herein, yet if you shall further believe from the evidence that plaintiff was of sufficient age, discretion and intelligence to know or appreciate the dangers, if any, in adjusting the belt complained of by him, in defendant's factory, and shall further believe from the evidence that plaintiff in adjusting said belt was himself guilty of negligence, which contributed to bring about the injuries complained of, and but for which negligence he would not have been injured, then the law is for defendant, and you will so find."—Approved: Cohankus Mfg. Co. v.

Rogers' Guardian (Ky.), 96 S. W. 437 (not reported in state reports).

(c) "If you find from the evidence in this case that the plaintiff, while working in the clinker pile, knew or could have ascertained by the ordinary use and exercise of his natural senses that the clinkers were hot, I instruct you that defendant was under no duty to inform plaintiff that said clinkers were hot, and defendant is not guilty of negligence in failing to so inform him."—Approved: Pre v. Standard Portland Cement Co., 9 Cal. App. 591, 100 Pac. 122.

§ 4529. Nor Unless Master Both Knew Servant Did Not Know and Would Not by Reasonable Care Discover Danger.

"The second ground of negligence is that the defendant failed to warn plaintiff of the condition of such pile of plates and the risks and dangers thereof. The duty to warn the plaintiff did not arise unless the defendant know, or had reasonable ground to know, that such pile of plates was then unsafe, and not then unless the defendant had reasonable grounds to know that the plaintiff was ignorant, not only of the condition of such plates, but the risks incident thereto. Hence, if you fail to find that the defendant had reasonable grounds to believe that plaintiff was ignorant of the condition of such plates, or fail to find that the plaintiff did not know of the risks and dangers therefrom, or fail to find that such pile of plates was unsafe, or fail to find that the defendant knew that such plates were unsafe, if so, then in either of such events the duty to warn plaintiff did not arise, and in such case the defendant cannot be held to have been negligent in failing to warn the plaintiff of the condition of such plates and of the dangers, if any, arising therefrom. But if you find that such pile of plates were not in reasonably safe condition, and that the defendant knew thereof, and knew that by reason thereof it was dangerous, and had reason to know that the plaintiff did not know thereof and would not discover such danger while in the exercise of reasonable care and prudence to prevent injury to himself, and further find that defendant knew of such matters in time that by the exercise of reasonable care and prudence to warn plaintiff thereof and thus avoid injury therefrom to plaintiff, then on your so finding you would be warranted in finding that defendant was negligent in failing to warn the plaintiff of such dangers."—Approved: Hamm v. Bettendorf Axle Co. (Iowa), 125 N. W. 186.

§ 4530. Servant Known to be Ignorant of Duties should be Warned of Danger.

"If, at the time plaintiff was employed by the agents of the defendant company to operate the engine and drive wheel thereof in question, he was ignorant of the duties of such position and the dangers incident thereto, and if such facts were known to the agent of defendant company who employed him, then it was the duty of such agent to have instructed plaintiff how to operate said engine and drive wheel, and to have warned him of the dangers incident to starting said drive wheel; and if such agent failed so to do, and if such failure was negligence on the part of said agent, and if plaintiff was thereby injured, and if such failure on the part of defendant's agent was the direct

cause of such injury, and if plaintiff did not contribute thereto by some negligent acts, as hereinafter explained, you will find for the plaintiff."—Approved: Gulf, C. & S. F. Ry. Co. v. Newman, 27 Tex. Civ. App. 77, 64 S. W. 790.

§ 4531. Failure to Warn as to Caustic Qualities of Substance Known to Master and Unknown to Servant.

"If you believe from the preponderance of the evidence in this case that the sight of one of plaintiff's eyes was injured or destroyed on the 8th day of October, 1905, while plaintiff was in the employ of defendant and in the discharge of his duties under such employment, and while in the exercise of due care and caution on his part, and that the same was so injured or destroyed by any substance upon which plaintiff was required by the defendant, or those acting under its authority, to perform labor in the course of his said employment, and it further appears to your satisfaction that such injuries were caused by the caustic or corrosive qualities of such substance, if it had such qualities, and that such qualities were known to the defendant, or could have become known to it by the use and exercise of ordinary care, and that said defendant failed and neglected to warn or caution plaintiff of such qualities, and that the same were not known to the plaintiff or obvious to him, and that the neglect of the defendant to warn or caution plaintiff thereof was the proximate cause of such injuries, then I instruct you that you must render a verdict for the plaintiff."—Approved: Boin v. Spreckles Sugar Co., 155 Cal. 612, 102 Pac. 937.

§ 4532. Assumption of Risk by Minor is in Accordance with His Capacity and Experience.

"You will observe, gentlemen of the jury, that this is a question of fact for you to determine in this case as to whether or not this was a dangerous vocation in which the plaintiff was engaged, and, if so, whether the nature of his employment, whether the work in which he was engaged, belonged thereto, or was required of him thereby, or whether it was an extraordinary risk or not. You will notice that the law makes a distinction as to the risks and hazards that are extraordinary, and not the usual risks of his employment. It is the duty of the master to point out those which are unusual and extraordinary, and call the attention of the employee to them and warn him of his danger. So it is that a minor assumes the ordinary hazards and risks of his engagement that he through his degree of intelligence knows, or should know and appreciate, and consequently he assumes these dangers also that are so open and obvious to his senses that one of his age, capacity, and experience would, in the exercise of ordinary care and prudence common to persons of like age and experience, know and appreciate, and would be expected to be sufficiently attentive and alert to avoid. In other words, the minor's assumption of the hazards and dangers incident to his employment is to be determined by his capacity to know, understand, and appreciate them, and his caution, alertness, and aptitude as well to avoid them. In that regard you have the right to con-

sider the witness and his ability as to alertness and capacity, and that, of course, gentlemen of the jury, is a question for you to determine as to the facts, as to what was the nature of his employment, what was the nature of his work and what was the hazard and risk, applying the law as I have given it to you, and the law as I have given it to you is the standard by which the plaintiff is to be judged, as to whether or not he assumed the risk of this employment with a knowledge of the defects, and is thereby prevented from recovering in this action. A minor assumes the ordinary risk of any employment which he undertakes, in so far as the risks are, or ought to have been, appreciated by him, whether the source of his knowledge is by information, observance, and experience, or by instructions, that he had received. The fact that the plaintiff was a minor does not enlarge his rights, if you find that he understood, or should have understood, the danger. This is to be taken in connection with what I have already instructed you in regard to the law applicable to a minor."—Approved: Ferrari v. Beaver Hill Coal Co., 54 Or. 210, 102 Pac. 1016.

§ 4533. Where Judgment so Immature as not to Comprehend Danger Employment Negligence Per se.

"It is an actionable wrong for a person to place or employ a child of such immature judgment as to be unable to comprehend the danger to work with or about a machine of a dangerous character likely to produce injury, and in this case, if you are satisfied by a preponderance of the evidence that the defendants employed plaintiff at and about a machine of a dangerous character, and one likely to produce injury, and that he was injured while working at and about said machine, and at the time of his injury he was of such immature judgment as to be unable to comprehend the dangerous character of the said machinery, you ought to find for the plaintiff."—Approved: Taylor v. Wootan, 1 Ind. App. 188, 27 N. E. 502, 50 Am. St. Rep. 200.

§ 4534. Warning Required is Measured in the Same Way.

"The jury are instructed that it is the duty of the master who sets a servant to work in a place of danger, or with dangerous machinery or appliances, to give him such notice and instructions as is reasonably required by the youth, inexperience, or want of capacity of the servant; and, failing to do so, the master is liable for the damage suffered through such failure."—Approved: Giebell v. Collins Co., 54 W. Va. 518, 46 S. E. 569.

§ 4535. Care Should be Taken to Make Inexperienced Servant Fully Understand and Appreciate Danger of Employment.

(a) "Under the law, when one is known to be inexperienced, who is put to work upon a machine which is dangerous to operate unless with care, and by one who is familiar with its structure, it is the duty of the employer to instruct such person so that he will fully understand and appreciate the danger of his employment and the necessity for the exercise of due care therein. Therefore, if you find from the evidence that the employment of plaintiff at the time of his injury was dangerous,

and that plaintiff was known to be inexperienced, and that defendant knew the peril or should have known the peril to which plaintiff would be exposed, and did not give him sufficient instruction therein, and if he from youth or inexperience failed to appreciate the danger, and was injured in consequence thereof, and because of defendant's negligence, and the plaintiff was not guilty of contributory negligence, then the defendant is responsible."—Approved: Ittner Brick Co. v. Killian, 67 Neb. 589, 93 N. W. 951.

(b) "Among the nonassignable duties of the defendant to the plaintiff are the duty to use ordinary care to furnish him a reasonably safe place in which to perform the duties of his employment, and reasonably safe means, instruments, and appliances with which to perform his duties, and to use ordinary care to maintain them in that condition, and also, if plaintiff was young and inexperienced, and for this reason did not know of or appreciate the danger of his immediate employment, if any, and defendant knew, or ought to have known, this in the exercise of ordinary care on its part, then it was defendant's duty to instruct him as to both latent and patent dangers, so that, as far as might be by proper care on his own part, the plaintiff would be enabled to perform his duties in safety to himself. If defendant failed to properly discharge any of these duties to plaintiff in so far as they are covered by the allegations of negligence in this case, and by reason of such neglect or failure of defendant plaintiff was injured while using due care himself, and in the line of his duties, and when he had not assumed the risk, then defendant is liable in this action. If defendant performed its duty to plaintiff as above indicated, or if plaintiff was himself wanting in ordinary care for his own safety, contributing to his injury, or if plaintiff had assumed the risk, in either case you should find for the defendant."—Approved: St. Louis Stave & Lumber Co. v. Sawyers, 90 Ark. 473, 119 S. W. 830.

§ 4536. If from Failure to Warn Injury Results from Dangerous Machine Plaintiff May Recover.

(a) "You are instructed that if you find from the evidence that the plaintiff was employed by defendant, and was by the defendant's foreman ordered to perform services upon and about defendant's stave machine, and that said stave machine was a dangerous machine, and that defendant's foreman did not instruct plaintiff how to perform the services required of him, so that said services might be done in a reasonably safe way, and the danger incident to the same be obviated or lessened if the same can be done, and the plaintiff, by reason of his youth and inexperience, did not know or understand how to perform said service without danger to himself, and that, in attempting to perform the said service required of him, he was injured, defendant is liable, and your verdict will be for the plaintiff."—Approved: Arkadelphia Lumber Co. v. Whitted, 81 Ark. 247, 98 S. W. 697.

(b) "You are instructed that if you find from the evidence that defendant, by its foreman, ordered the plaintiff, Emmett W—, to perform work at the defendant's stave machine, and that the said stave machine

was a dangerous and deceptive machine, and that the plaintiff, by reason of his youth and inexperience did not know or appreciate the danger incident to the service about said machine, and that defendant's foreman did not warn him of such danger or explain to him how to perform the service required of him, and that by reason of the failure to give him proper instructions how to perform the service required of him, or to warn him of the danger incident to the performance of such service about said stave machine, together with the plaintiff's want or lack of knowledge or appreciation of the danger incident to such inexperience, he was injured, then it will be your duty to find for the plaintiff."—Approved: Arkadelphia Lumber Co. v. Whitted, 81 Ark. 247, 98 S. W. 697.

(c) "You are instructed that if you find from the evidence that the plaintiff, John H—, in taking the place of Chivis H—, while absent temporarily, in feeding the bolting machine, was following the general habit, mode, or course of procedure in vogue at the time at the defendant's stave mill, and that in doing so the said John H— honestly believed that he was performing his duty, or within the scope of his duty and employment, and, furthermore, that the said bolting machine was a dangerous machine, and that John H— had not been instructed as to its danger, or how to perform said work with reference thereto, and by reason of his youth and inexperience he was injured, then it will be your duty to find for the plaintiff."—Approved: Arkadelphia Lumber Co. v. Henderson, 84 Ark. 382, 105 S. W. 882.

(d) "If defendant's foreman ordered plaintiff into a place of danger, to aid in fixing the belt, and plaintiff by reason of youth and inexperience did not know of and appreciate the danger of the situation, and defendant knew this, or ought in the exercise of ordinary care on its part to have known it, then it was defendant's duty to warn him of his danger, so that, as far as might be by proper care on his part, plaintiff could perform his duty in safety to himself. If the defendant failed in this respect, and plaintiff, while exercising due care for his own safety, by such failure suffered the injuries sued for, then plaintiff should recover in this action."—Approved: St. Louis Stave & Lumber Co. v. Sawyers, 90 Ark. 473, 119 S. W. 830.

§ 4537. If Servant Comprehends the Warning the Risk is Assumed.

"Had the plaintiff been warned to keep away from the shaft, and of its dangerous nature when running? If he was notified of the danger, did he comprehend and understand it? If so, he cannot recover. In determining whether he understood the warning, if given, you may consider the plaintiff's age at the time, his intelligence, his experience or want of experience, and such like. In other words, you may consider these circumstances to enable you to ascertain and determine whether he fully understood and appreciated the danger. If such warning was given, and he understood it, and continued to work there after such knowledge, he cannot recover in this action."—Approved: King v. Ford River Lumber Co., 93 Mich. 172, 53 N. W. 10.

§ 4538. And so if he Knows or is Deemed of Sufficient Intelligence to Appreciate the Danger.

"One of the charges of negligence on the part of the defendant is that the defendant failed to give the said Emil M— any caution, warning, or instruction as to the dangers or hazards of the place where he was set to work, or the work he was required to do. In relation to this matter, you are told that it is the duty of a master to use reasonable and ordinary efforts to warn or instruct young or inexperienced servants respecting the danger, if any, of obeying directions given to such servant, whenever obedience to such orders or directions will expose such servant to danger of injury from any cause which is known, or which would, in the exercise of ordinary care, be known, to the master, whenever the master knows, or, in the exercise of ordinary care, should know, that the servant, because of youth or inexperience, is not aware of the danger; and providing the danger is not known, or open and obvious, so that in the exercise of ordinary care the servant would be aware of such danger. As applied to this case, if you find from the evidence that the defendant directed Emil M— to go into the bin where he met his death, and if you further find from the evidence that the same was a dangerous place, and going into the bin was a dangerous undertaking, and if you further find from the evidence that the defendant, through its agents or employees in charge of the work, knew that M— was about to go into the bin, then you are told that it was the duty of the agents in charge of the work to notify and warn M— of the dangers which, in the exercise of ordinary care, they either knew, or should have known, he was about to encounter. However, if you should find from the evidence that the defendant, through its agents in charge, directed M— to go into the bin, yet if you should find from the evidence that at the time M— went into the bin he knew the condition thereof, or if you should find from the evidence that the dangers he did encounter were open or obvious, so that in the exercise of ordinary care M— could be aware of the dangers he was about to encounter, then the defendant would not be liable for the injuries sustained, or for the death of M—."—Approved: Meier v. Way, Johnson, Lee & Co., 136 Iowa, 302, 111 N. W. 420.

§ 4539. It is for the Jury to Say to What Extent, if at all, a Servant Should be Warned.

"I further instruct you that if you find that there was a danger from involuntary contact which would be brought about by the improper use of the saw, which danger must be guarded against by the operator, in connection with guarding against the voluntary contact of the body of the person with the saw, it is for you to determine from all the testimony whether or not such danger would be comprehended by a boy of the age and discretion of the plaintiff; and it is for you to determine to what extent a boy of such age, understanding, and experience should be instructed in order to comprehend the dangers arising from such use as the saw was designed for, and you are to judge to

what extent, if at all, the plaintiff should have been warned and instructed in the light of the facts in this case and circumstances thereof."—Approved: Gage v. Springston Lumber Co., 53 Wash. 108, 101 Pac. 501.

§ 4540. Right to Rely on Minor's Statements as to his Experience.

"The court instructs the jury that the fact that the deceased was in the employ of the defendant company as coal loader did not prevent the defendant employing the deceased to work as a helper on the mine machine; and if the jury believe from the evidence that B. H— approached the deceased while he was engaged at his work as coal loader, and inquired of him whether or not he had worked upon a mine machine as helper, and the deceased informed said H— that he had so worked, and upon that information the said H— requested the deceased to assist him as a helper in running the machine in room No. 4 to cut it out, and the deceased consented thereto without making any sort of objection, then, although the deceased may have been but 17 years of age, if the jury believe from the evidence that he was possessed of ordinary intelligence, the said H— had the right to rely upon the representations of the deceased to him as to his experience; and if, under such circumstances he entered upon the work of assisting to run said mine machine as a helper, the deceased was required to exercise ordinary care to avoid danger and injury to himself while so at work, and the said H— would not be required to instruct him as to his duties unless it appeared from the manner in which he undertook to perform and did perform the same that he was incapable of doing it for want of knowledge and information as to what the duties of a helper upon a mine machine were."—Approved: McVey v. St. Clair Co., 49 W. Va. 412, 38 S. E. 648.

§ 4541. Precedents Under Statutory Duty to Guard Machinery.

(a) "You are further instructed that the statute referred to does not provide for, as already stated to you, or define, any particular kind or character of guard to be provided and maintained by an employer, but requires him to provide a proper guard, and, even though it should be shown that it was possible to have provided a guard which would have prevented the injury complained of, such fact is not in itself proof of failure to comply with the law in furnishing a proper guard, and the question for you to determine is whether or not the defendant in this case, under all of the evidence, had provided, and was maintaining at the time of the alleged accident, a guard sufficient to protect the plaintiff against such dangers as reasonably intelligent and experienced millmen or operators would have anticipated."—Approved: Noren v. Larson Lumber Co., 46 Wash. 241, 89 Pac. 563.

(b) "The court instructs you that, if you find from the evidence that the saw, upon which the plaintiff was injured was not properly guarded, and that it was possible and practicable for the defendant to guard said saw without interfering with its efficient use, and that the plaintiff was in the line of his duty at the time of his injury, and that, if said saw had been properly guarded, the plaintiff would not

have sustained the injury complained of, you should find for the plaintiff, unless you further find that the plaintiff was guilty of negligence contributing to his injury."—Approved: Evansville Hoop & Stave Co. v. Bailey, 43 Ind. App. 153, 84 N. E. 549.

(c) "The court instructs the jury that it was the duty of the plaintiff, while working in the vicinity of the machine in question, to exercise ordinary care for his own safety; that is, such care as a person of ordinary prudence would exercise under the same or similar circumstances. And the court instructs the jury that, if you believe from the evidence that one of the duties of the plaintiff as an employee of defendant was to keep clean the floor in the vicinity of the machine in question, and, had the plaintiff fulfilled the said duty on the occasion in question, he would not have slipped, and would not have caught his hand in the gearing in question, then and in that case your verdict must be for the defendant."—Approved: Huss v. Heydt Bakery Co., 210 Mo. 44, 108 S. W. 63.

(d) "The court instructs the jury that, if you believe from the evidence that the gearing upon the machine in question could not be safely and securely guarded without materially interfering with the efficient working of the machine in question, then and in that case the failure to so guard said gearing constituted no negligence on the part of defendant."—Approved: Huss v. Heydt Bakery Co., 210 Mo. 44, 108 S. W. 63.

(e) "The court instructs the jury that, even though you believe from the evidence that the gearing on the machine in question was entirely unguarded, yet if you further believe and find from the evidence that the presence of said gear wheels and the fact that said gear wheels were uncovered were known to the plaintiff and if you further believe from the evidence that the danger of working near the same was open and obvious and was known to plaintiff and was so obvious and imminent that a person of ordinary prudence would not have continued to work near said gear or cog-wheels, then and in that case your verdict must be for the defendant."—Approved: Huss v. Heydt Bakery Co., 210 Mo. 44, 108 S. W. 63.

§ 4542. Same under Statutes as to Employment of Children.

(a) "The jury are instructed that in this case the law is that no child under the age of 14 years shall be employed, permitted, or suffered to work at any gainful occupation in any mercantile institution, store, office, laundry, manufacturing establishment, factory, or workshop within this state; and in this case it does not make any difference whether the plaintiff was or was not told by the foreman to work on the straightening machine, if you believe from the evidence the plaintiff was under the age of 14 years at the time he was injured and was at that time working for defendant in its manufacturing establishment for a compensation to him to be paid by defendant."—Approved: Strafford v. Republic Iron & Steel Co., 142 Ill. App. 461, 87 N. E. 358.

(b) "Or, if you believe that without the consent of the plaintiff herein the said Coleman K— was caused by the defendant to work

around a machine that was more dangerous for him, the said Coleman K—, to work with and around than the machine with which he was originally employed to work and that he was injured as alleged, and that said change from one machine to the other, if any, was the proximate cause of the injuries complained of, and that his capacity to earn money during his minority has been diminished, and that the said Coleman K— was a minor and the son of plaintiff and that the defendant knew that he was a minor, you will return a verdict in favor of the plaintiff, unless you find for the defendant under instructions hereinafter given you or under the instruction given you in some special charge."—Approved: Hillsboro Cotton Mills v. King, 51 Tex. Civ. App. 518, 112 S. W. 132.

§ 4543. Assumption of Risk is by one Acting Entirely on his own Judgment as to Safety of Working Place.

"That if the plaintiff, at the time he was injured, was acting by his own will and his own judgment, uncontrolled by anyone connected with that mine, and if it was his duty to have determined whether or not the roof of the mine was safe to work under, and if the plaintiff was injured by his misjudgment or negligence, he cannot recover in this action, and your verdict should be for the defendant."—Approved: Coal Company v. Estievenard, 53 Ohio St. 43, 40 N. E. 725.

§ 4544. And Generally Servant Is Presumed to Know Usual Risks of Employment.

(a) "You are further instructed that the plaintiff, John N—, must be held to have learned, and to have known whatever a person of ordinary prudence exercising ordinary and usual care would have learned and known, under the circumstances surrounding him in the discharge of the duties of his employment. And, if he did in fact know, or, with the exercise of such ordinary care, could have learned, prior to said accident, the manner in which the work was being performed, and the obvious risks and dangers arising in connection with such work, and if the injury sustained by him resulted from such obvious dangers and risks, then such injury must be regarded as having been sustained through a risk voluntarily assumed by him, and defendant would not be liable on account thereof."—Approved: Nelson v. Boston & M. Consol. Copper & Silver Mining Co., 35 Mont. 223, 88 Pac. 785.

(b) "You are instructed, however, that if at the time of the employment an employee knew of the dangers and the extent thereof incident to an occupation and employment in which he is employed, or if while in the service he acquired such knowledge, or in the ordinary discharge of his own duties he must necessarily have acquired such knowledge as to the danger and extent of same, incident to such work, the employee assumes the risk and danger of such work, and the employer is not liable, although not warned or instructed by the employer as to the nature and extent of such danger."—Approved: Missouri Valley Bridge & Iron Co. v. Ballard, 53 Tex. Civ. App. 110, 116 S. W. 93.

(c) "If you find from the evidence in this case that the plaintiff, while working in the clinker pile, knew or could have ascertained by the ordinary use and exercise of his natural senses that the clinkers were hot and would burn him if he came in contact with them, then I charge you that plaintiff, in accepting employment to work on said clinker pile, assumed the risk of being burned by said clinkers, and your verdict should be for the defendant."—Approved: Pre v. Standard Portland Cement Co., 9 Cal. App. 591, 100 Pac. 122.

(d) "Plaintiff in working upon said clinker pile assumed not alone all the risks that he knew, but also all the risks he could have ascertained by the ordinary exercise and use of his natural senses."—Approved: Pre v. Standard Portland Cement Co., 9 Cal. App. 591, 100 Pac. 122.

§ 4545. And Cannot Insist Master Could have Adopted Safer Method.

"The court instructs the jury if they believe from the evidence that the plaintiff knew the hazards of his employment as the business was conducted and was injured while engaged therein, he cannot maintain an action against the defendant for the injury merely on the ground that there was a safer mode in which the business might have been conducted, the adoption of which would have prevented the injury."—Approved: Guaranty Cons. Co. v. Broeker, 93 Ill. App. 272.

§ 4546. And all Dangers Open, Obvious and Apparent to a Man of Ordinary Care.

(a) "To maintain the defense of assumption of risk you must find by a fair preponderance of the evidence that the dangers of plaintiff's getting injured were open and apparent and known to him; that is, that the danger of being injured in the manner and from the cause that he was injured was so open, obvious, and apparent that a man of ordinary care and prudence, with the same knowledge and experience as plaintiff has, surrounded by similar conditions, could not have taken the chance or risk of such injury. In determining this question, as well as all the other acts of the plaintiff, you must decide it by the standard of what an ordinarily careful and prudent man of similar knowledge and experience and under similar conditions and surroundings would do."—Approved: Sullivan v. R. D. Wood & Co., 43 Wash. 259, 86 Pac. 629.

(b) "If you find that, at the time plaintiff undertook to draw water from the end of the tank car, it was dangerous for her to do so at said time and place, and if you further find that plaintiff knew it was dangerous, or if the danger was open and obvious to her observation, then she assumed the risk, and you should find for the defendant."—Approved: Louisiana & T. Lumber Co. v. Brown, 50 Tex. Civ. App. 482, 109 S. W. 950.

(c) "You are instructed that if the accident to plaintiff was the direct and proximate result of the defective condition of the pole upon which plaintiff was at work, and such defective condition could have been discovered by a proper inspection of said pole, and the plaintiff

knew that a proper inspection had not been made, and knew the danger, if any, to which he was exposed by reason thereof, or such danger was obvious, or must in the performance of his work as a telephone lineman have been known to him, then in either such event you are charged that he assumed the risk which might arise from the dangerous situation, and the defendant would not be liable in damages to plaintiff."—Approved: Southwestern Telegraph & Telephone Co. v. Tucker, 50 Tex. Civ. App. 476, 110 S. W. 481.

(d) "When the parties do not stand upon an equal footing—that is, where the danger of the place is not obvious and apparent to the servant, or, by the exercise of ordinary care and prudence on his part, would not have become apparent—then the servant has a right to assume that the master has furnished him with a safe place in which to work. But where the dangers incident to the employment are alike open and obvious to the master and servant, or by the exercise of ordinary care and prudence could have been seen and noticed by the servant, then the parties are upon an equality, and the servant assumes the risk, and the master is not liable for the injury to the servant resulting therefrom."—Approved: Harris v. Brown's Bay Logging Co., 57 Wash. 8, 106 Pac. 152.

(e) "I have instructed you that the servant or employee assumes the usual and ordinary risks incident to its employment. And on that head I further instruct you that the servant or employee must use ordinary care and prudence for the discovery of defective or dangerous places, or dangerous machinery, at or about which he may be employed, and which are likely to cause him injury; and, if he fails to use ordinary care and prudence in this regard, and injury results to him, he cannot recover damages, and that without regard to the fact that the corporation may have been negligent also."—Approved: Cockerill Zinc Co. v. Streets, 79 Kan. 806, 101 Pac. 475.

(f) "An employee is chargeable with knowledge of the ordinary conditions under which the business is conducted, and its ordinary risks and hazards, and will be presumed to have assumed all such risks and hazards, which to a person of his experience are or ought to be patent and obvious. Such risks and hazards are to be regarded as patent if by the exercise of ordinary care the same would be discovered. And if in this case, you believe from the evidence that the conditions which produced the alleged injuries were such that a person in the exercise of care and caution could have known of them, then the hazard, if any, is one that the plaintiff will be regarded as having assumed and there can be no recovery."—Approved: Gallivan v. McCarthy, 147 Ill. App. 545.

(g) "If the jury shall believe from the evidence that at the time of the injury to the plaintiff the rock or rocks in the earth forming the top of the tunnel were insecure or loose and likely to fall, and that said condition was obvious, or that the defendant knew thereof, or by the exercise of ordinary care could have known thereof, then the jury are instructed that the plaintiff assumed the risk or danger of the rocks

falling upon him, and the jury will find a verdict for the defendant."—Approved: Louisville & N. R. Co. v. Cason (Ky.), 116 S. W. 716.

§ 4547. Question of Fact whether Ordinarily Prudent Man would Use Defective Appliance.

"By contributory negligence is meant such act or omission on the part of plaintiff as an ordinarily prudent man would not do or suffer under similar circumstances, which act, concurring with a negligent act or omission of the defendant railway company, becomes the proximate cause of an injury. Therefore, if the jury believe from the evidence that the lifting jack furnished by the defendant was defective or out of repair, so as to make its use probably dangerous, and likely to result in an injury to those using it, and if such defects and want of repair, and the probable consequences of the use thereof, were known to plaintiff at the time he did use the same, which use resulted in an accident and injury to him, if any, and if such defects and want of repair were such that an ordinarily prudent person would not have used the lifting jack in its then condition, then the plaintiff cannot recover in this case, notwithstanding you may believe that the defendant was negligent in furnishing the same, and you will find for the defendant."—Approved: St. Louis, Southwestern Ry. Co. v. Kern (Tex. Civ. App.), 100 S. W. 971 (not reported in state reports).

§ 4548. Assumed Risk does not Extend as Matter of Law to Temporary Work Outside of Regular Course of Employment.

"A servant's implied assumption of risks, which accompanies and is a part of a contract of hiring, is confined to that particular work and class of work for which he is employed, and, if the master orders him to work temporarily in another department of the general business where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employees, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work; and, in a case involving the principle here declared, it will not be held, as a matter of law, that the injured party assumed the risk, unless the evidence is clear, explicit, and uncontradicted to that point."—Approved: Quinn v. Electric Laundry Co., 155 Cal. 500, 101 Pac. 794.

§ 4549. When Ordered to Perform Such Work may Rely on Master's Implied Assurance of Safety.

(a) * * * "If the servant is suddenly called on by the master to perform a duty not falling within the scope of the duties of his contract of employment, and he does so, he will have a right to rely upon the implied assurance of the master that the danger to his person to be encountered thereby is such only as can be guarded against by the exercise of ordinary care and prudence on his part, and if he use such care and prudence, and is injured, the master will be liable."—Approved: Norfolk Beet-Sugar Co. v. Hight, 59 Neb. 100, 80 N. W. 276.

(b) "The court instructs the jury that if they believe, from the evidence, the foreman of the defendant ordered the plaintiff to work where he was working at the time of the accident in question, the said foreman was chargeable with the specific duty of exercising reasonable care to see that the place where he ordered the plaintiff to work was reasonably safe, and the plaintiff had the right to rely upon the performance of such duty by the foreman before he ordered the plaintiff to work."—Approved: Cobb Chocolate Company v. Knudson, 207 Ill. 452, 69 N. E. 816.

§ 4550. Servant may Assume that Defect Master Undertook to Correct was Corrected.

"You are further instructed that if you find from the evidence that, prior to the injury, the plaintiff was advised of a defect in the cable, and saw it, and this defect was called to the attention of the defendant, and the defendant assumed to change the cable and remedy the defect, and thereafter directed the plaintiff to continue the use of the elevator, and the plaintiff was induced to believe, by the acts and conduct of the defendant, that said elevator and cable were safe for use, and did so believe, and did not know, and by the exercise of ordinary care could not have known, that the defect in the cable rendered it weak and unsafe for use in the manner in which he was using it at the time of the injury, then he cannot be held to have assumed the risk consequent upon such defect."—Approved: Stomne v. Hanford Produce Co., 108 Iowa, 137, 78 N. W. 841.

§ 4551. Servant's Reliance on Vice-Principal's Assurance of Danger Guarded Against.

"The notice, however, alleged in defendant's plea, must have been for a sufficient length of time to have enabled the plaintiff's intestate to have gotten out from under said block before it fell, or if the plaintiff's intestate remained under the block after he had notice of the looseness of the block and the danger of its falling for a sufficient length of time to have gotten out from under said block, and avoided the injury, plaintiff would not be entitled to recover; but if the evidence reasonably satisfies you that Al R—, while acting as superintendent and in the discharge of such superintendence, said in hearing of plaintiff's intestate, 'Go on and use the block, and I will keep the strain on the chain,' then plaintiff would have had the right to rely upon this statement and continue his work, and if the plaintiff did engage in the duties of his employment in helping to land the column, and Al R—, while plaintiff's intestate was engaged in the duties of his employment, negligently gave the order to signal to slacken the chain, and the chain was slackened, and you further believe from the evidence that the slackening of the chain loosened the block, and it fell and killed James W—, plaintiff would be entitled to recover."—Approved: Reiter-Conley Mfg. Co. v. Hamlin, 144 Ala. 192, 40 South. 280.

§ 4552. Promise to Repair Relieves where Reasonably Prudent Man Would Continue to Work.

(a) "If, therefore, notwithstanding such promise, the plaintiff could not remain in defendant's employment and continue to pass through the said entry without constant and immediate danger, the character of which was fully known to the plaintiff, he must then be held to have assumed such risk. But if such promise was made, and if the danger was not great and constant, and if a reasonably prudent person would have remained in such employment and continued to pass through the said entryway, then such promise may be deemed to have relieved the plaintiff from the charge of having assumed the risk of such employment."—Approved: Cotton v. Center Coal Mining Co. (Iowa), 123 N. W. 381.

(b) "The plaintiff claims that on November 9, 1903, he complained to James S—, the night superintendent of the defendant company, of the unguarded condition of the opening in such third floor, and that he promised to remedy or fix it. If you find that plaintiff, on or about such time, called the attention of said S—, as an officer of said defendant, to the unguarded condition of said floor, and, in so doing, gave the said S— to reasonably understand that he objected thereto, on his own behalf, and as dangerous; and find that the said S—, as such superintendent, promised or gave plaintiff to reasonably understand that such defective conditions would be remedied, then such a complaint and promise to repair, if so established, would be sufficient within the meaning of the law as to such condition so complained of to suspend the waiver of risk on the plaintiff's part otherwise arising if no such complaint and promise were made. The plaintiff claims that he also so notified one M— in September, 1903; but you should not take such claim into consideration in determining the above-mentioned questions, by reason of the remoteness of the time thereof."—Approved: Huggard v. Glucose Sugar Refining Co., 132 Iowa, 724, 109 N. W. 475.

(c) "The court instructs the jury that if you believe from the evidence in this case that the hay-cutter was defective, as charged in the declaration, and that the plaintiff notified the defendant of such defect, and if you further believe from the evidence that such defect, if any, rendered the service which plaintiff was engaged to perform, more dangerous, and that the defendant thereupon promised the plaintiff that he, the defendant, would have said hay-cutter repaired; and if you further believe from the evidence that the plaintiff thereupon relied upon the said promise of the said defendant to repair said hay-cutter, and that the said plaintiff continued in his said employment a reasonable time to permit the defendant to repair said hay-cutter, the plaintiff was not, then, guilty of negligence in continuing to use said hay-cutter for a reasonable time. And the court further instructs you that in such case your verdict should be for the plaintiff, unless you further find from the evidence that the plaintiff was himself guilty of negligence in the manner in which he used said hay-cutter at the time he was injured; or that you further find from the evidence that the dan-

ger by reason of said defect, if any, was so great that no prudent person would have used said hay-cutter in its then condition, as shown by the evidence in this case."—Approved: Donley v. Dougherty, 75 Ill. App. 379.

§ 4553. But only for a Reasonable Time and Where the Danger is not Imminent.

"The court instructs the jury that when an employer, or his superintendent having authority to remedy defects in machinery, is notified by the servant of the employer of defects in machinery that render the service such servant is engaged to perform, more hazardous, and such employer or superintendent thereupon expressly promises to make the needed repairs, the servant may rely on such promise, and may, if he so relies on such promise, continue in the employment a reasonable time to permit the performance of such promise without being guilty of negligence in so remaining in such employment; and if, in such case, during such time, any injury results from such defects to the servant while he is in the exercise of ordinary care and caution for his own personal safety, from the negligence of his employer in manner and form as charged, the servant may recover from the employer his damages for such injury, except when the danger is so imminent that no prudent person would undertake to perform such service under such conditions."—Approved: Taylor v. Felsing, 164 Ill. 331, 45 N. E. 161.

§ 4554. But he must Act with Circumspection in View of the Defect.

"The operator of a dangerous machine, who has received from his employer a promise to supply a device calculated to lessen the danger, must, if he elects to operate the machine before the device is attached, operate his machine with due and proper care, considering its unprotected condition, in order that he may avoid injury. Therefore it was the duty of the plaintiff, while he was relying upon the promise to attach the spreader or guard, if such promise was made him, to handle the machine with reasonable care, in view of the fact that the spreader or guard had not been attached; and, if he did not so handle it, he forfeited the promise and cannot now recover for his injury."—Approved: Crooker v. Pacific Lounge & Mattress Co., 34 Wash. 191, 75 Pac. 632.

§ 4555. Jury to say if Boy should have Continued to Work where Promise is Indefinite.

"If there were defects in the appliances as set forth in the complaint, and the boy, B—, knew thereof and complained to the pit boss about them, and the boss ordered him to continue his work, saying that he would repair the defect when he got ready, and thereupon the boy, B—, continued in his work and was injured by reason of such defects, he is not barred from a recovery, thereby, if otherwise entitled to recover, if an ordinary boy of his age, experience and intelligence would have continued in the service under the same circumstances."—Ap-

proved: Western Coal & Mining Co. v. Burns, 84 Ark. 74, 104 S. W. 535.

§ 4556. Risks Assumed are those only Usually Incident to the Work.

"You are instructed that one who contracts to perform labor or render services for another takes upon himself those risks, and only such as are, usually incident to the employment engaged in; and the deceased, in this case, when he engaged in digging the tunnel, assumed the ordinary risks and dangers only which are incident to such employment."—Approved: Kearney Electric Co. v. Laughlin, 45 Neb. 390, 63 N. W. 941.

§ 4557. And Dangers Alike Open and Obvious to Servant and Master.

(a) "If you find from the evidence that the danger was alike open and obvious to the plaintiff and to the defendant, both the plaintiff and the defendant are upon an equality, and the master is not liable for an injury resulting from the dangers incident to the employment."—Approved: Tham v. Steeb Shipping Co., 39 Wash. 271, 81 Pac. 711.

(b) "I instruct you that by the term 'risks of the business' is meant such risks as the employee is as likely to know as the master, and which are the natural and ordinary incidents of the work the employee agrees to do, and which are liable to happen in the performance of such work."—Approved: Pre v. Standard Portland Cement Co., 9 Cal. App. 591, 100 Pac. 122.

(c) "You are also further charged that if you find that the deceased, Charles J. R—, was injured in lowering said air pump substantially as alleged by plaintiff, and that such injury, if any, proximately caused his death, and you further find that there was danger or risk in removing said air pump in the manner and with the means by which it was being removed yet, if you further find such danger or risk, if any, in the performance of said work was as open to the observation and knowledge of the deceased, Charles J. R—, as to the defendant then plaintiff cannot recover, and you will so find by your verdict."—Approved: Ramm v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.), 92 S. W. 426 (not reported in state reports).

§ 4558. But not Extraordinary or Unusual Risks nor Master's Negligence.

"The court instructs the jury that the servant only assumes the usual and ordinary risks incident to the business, and such risks as are known to him or which might have been discovered by him by the exercise of ordinary care. But the servant does not assume extraordinary or unusual risks, nor risks due to the master's own negligence, unless the servant had notice of such perils or by the exercise of ordinary care should have had notice thereof."—Approved: Eblin v. American Car & Foundry Co., 238 Ill. 176, 87 N. E. 385.

§ 4559. His Assumption Includes Extraordinary Hazard of which he has Notice.

"The court instructs the jury that a servant assumed only such risks as are usually incident to his employment, and any extraordinary

hazard of which he has notice, or which by the reasonable exercise of his faculties he could have noticed, but he does not assume the risks of danger known to the master, or which by the exercise of reasonable care should be known to the master, or which can be avoided by the master by the exercise of reasonable care, provided such dangers are unknown to the servant, and could not have been known to him by the ordinary exercise of his faculties."—Approved: Mann v. Illinois Cent. Traction Co., 236 Ill. 30, 86 N. E. 161.

§ 4560. Master and Servant not on Equal Footing—Latter cannot Refuse to Act on Suspicion of Danger.

"Under the law of this state, the master and servant do not stand upon an equal footing, even when they have equal knowledge of the danger. The position of the servant is one of subordination and obedience to the master. The servant has the right to rely upon the superior knowledge and skill of the master. The servant is not entirely free to act upon his own suspicion of danger. If, therefore, the master orders the servant into a place of danger, and the servant is injured, he (the servant) is not guilty of contributory negligence, unless the danger was so glaring that a reasonably prudent person would not have entered into it."—Approved: Tham v. Steeb Shipping Co., 39 Wash. 271, 81 Pac. 711.

§ 4561. To Refuse to Obey Order Danger must be Manifest and Glaring.

(a) "The jury are instructed that though the plaintiff may have believed the act he was ordered to do was not safe, yet this does not and should not defeat a recovery by him in this action if you further find and believe from the evidence that the plaintiff was negligently ordered into this position by said N—, and was told by said N— that it was safe, and that the plaintiff relied upon said assurance of safety and upon said order, provided you further find that the danger of the timbering or structure falling was not of such a manifest or glaring nature as to threaten immediate injury in case the plaintiff obeyed the order."—Approved: Swearingen v. Consolidated Troup Mining Co., 212 Mo. 524, 111 S. W. 545.

(b) "You are instructed that if you believe, from the evidence, that Napoleon F— was not a fellow servant of plaintiff, but was a foreman, with full power and authority to control the movement of the men employed at the work in question, and that he had full authority to direct and control the manner of doing said work, and that said Napoleon F— did, within his authority, order the plaintiff to work in a dangerous place or perform the work in a dangerous manner, that then and in that event the plaintiff did not assume the hazard or risk of obediece unless the danger was so imminent that a man of ordinary prudence would not have incurred the risk or hazard."—Approved: Yarber v. Chicago & A. Ry. Co., 235 Ill. 589, 85 N. E. 928.

§ 4562. Momentary Forgetfulness of Danger does not Bar Recovery.

"I charge you that, if the servant is injured by danger which is known to him, or which in the exercise of care and intelligence on his part he should have known, yet if, in a moment of forgetfulness, while in the discharge of his duties, and owing to the haste required to perform such duties, he momentarily forgets such danger, and in such moment of forgetfulness is injured, that does not in law preclude a recovery; that is, the minute that fact appears, it is not proper for law to say, You cannot recover because you knew of the danger, and you forgot it. That is a fact and circumstance which you may take into consideration with all the other facts and circumstances in determining the character of the danger, and determining the question whether or not the servant was guilty of negligence."—Approved: Passage v. Stimson Mill Co., 52 Wash. 661, 101 Pac. 239.

§ 4563. Particular Disease may be Risk Incident to Work.

(a) "However in connection with the tenth paragraph of this charge, if you find and believe from the evidence that the plaintiff knew at the time he was engaged to perform the caisson work, or if afterwards and before his alleged injury he knew, or if in the ordinary discharge of his caisson work he necessarily acquired the knowledge, that the relative position of such sandhog house to the place where his caisson work was being performed was not in such a position as to be a reasonably safe means and method in carrying on the work in which he was engaged, you are instructed that plaintiff assumed the risk incident to the position of such house relative to such place of work, and you will find for defendant upon this issue, although you may find in this connection defendant owed a duty, was negligent thereto, and plaintiff was injured thereby."—Approved: Missouri Valley Bridge & Iron Co. v. Ballard, 53 Tex. Civ. App. 110, 116 S. W. 93.

(b) "Bearing in mind the fourth paragraph of this charge, you are instructed that if at the time plaintiff began the caisson work he knew of the caisson disease, and that it was a hazard incident to the work he was to perform, or if before he was striken with the caisson disease, if you believe he contracted the same, he acquired the knowledge from an outside source that such a disease was a hazard incident thereto, or if you believe that in the ordinary discharge of his duties he necessarily acquired the knowledge that such disease was a hazard incident to such employment, you are instructed that plaintiff assumed the risk, and, although you find that defendant was negligent as to warning plaintiff, on such issue defendant is not liable."—Approved: Missouri Valley Bridge & Iron Co. v. Ballard, 53 Tex. Civ. App. 110, 116 S. W. 93.

§ 4564. Assuming Increased Risk from Defect by Continuance in Service.

(a) "The court instructs the jury that an employee who continues in the service of his employer after notice of a defect increasing the dan-

ger of the service, assumes the risk as increased by the defect, unless the master promised to remedy the defect; and in the event that the master does so promise, the servant may, while relying upon such promise, remain in the service of the master only for such a time thereafter as would be reasonably sufficient to enable the master to remedy the defect, and that if the master does not, within a reasonable time after such promise, remedy the defect, then and in such event, if the servant continues still in the employ of the master, he assumes the risk as increased by the defect; and the court therefore instructs the jury, that if they believe, from the evidence in this case, that the standing upon which the plaintiff worked while in the employ of the defendant was defective, that the defendant promised to remedy the same but failed to do so within a reasonable time after such promise, and that the plaintiff continued thereafter to work for the defendant knowing that the defendant had failed to remedy the defect within a reasonable time after such promise, then and in such event the court instructs the jury that the plaintiff assumed the additional risk of the defect in the condition of the floor, and if the jury so finds they will return their verdict for the defendant."—Approved: Illinois Steel Co. v. Mann, 170 Ill. 200, 48 N. E. 417.

(b) "If the jury shall believe from the evidence that the defendant, pursuant to its promise to plaintiff, erected a guard over the saw in question, to prevent shingles from striking the same, about six days before the injuries to plaintiff here complained of, but that said guard was not wide enough to fully prevent shingles from striking the saw, all of which plaintiff well knew, but that plaintiff made no further complaint to defendant, and did not ask defendant to increase the width of said guard and make it more safe, but continued to use said saw and guard and so imperfectly constructed, with full knowledge of the danger in so doing, for about six days, and until he received the injuries here complained of, then he voluntarily assumed the risks of operating said saw thus imperfectly guarded, and he cannot recover in this action, even if the jury shall further believe that the operation of the saw by the plaintiff with such imperfectly constructed guard was the proximate cause of the injuries to himself here complained of."—Approved: Lally v. Crookston Lumber Co., 82 Minn. 407, 85 N. W. 157.

(c) "A party entering upon a particular employment assumes the risk and perils usual thereto, when the usual and customary means to guard against accidents are adopted. If the servant, with full knowledge of the danger, and understanding the increased risk occasioned thereby, consents to enter into the employment, then he voluntarily incurs the risk; and, if he suffers damages in consequence of injury received thereby, he will be without remedy. The fact that he remains in the master's employment under such circumstances, and with such knowledge, is what constitutes contributory negligence on his part. In such a case, the master, in permitting his machinery to be thus more than ordinarily dangerous, is guilty of negligence; but the servant, with full knowledge thereof, by remaining, contributes thereto,

and hence he cannot recover if he has such knowledge."—Approved: King v. Ford River Lumber Co., 93 Mich. 172, 53 N. W. 10.

§ 4565. But if Accident Results Directly from Master's Negligence he is Liable.

"You are instructed that it is the duty of the master to use ordinary care to provide his servant with a reasonably safe working place and with reasonably safe appliances with which to work; but an employee assumes the risks arising from defective appliances used or to be used by him, or from the manner in which a business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment or continues in it without complaint or objections as to the hazards. Where, however, the servant, in obedience to the requirements of his master, incurs the risk of appliances which, although dangerous, are not of such character that they may not be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury from accident, provided such accident results directly from the negligence of the master."—Approved: Bell v. Rocheford, 78 Neb. 304, 110 N. W. 646.

§ 4566. Fellow Servant is Vice Principal when Discharging Duty Imposed on Master.

"I charge you further that the servant does not assume the risks of carelessness of those who undertake to discharge, under the master's directions, the master's duty toward the servant, even if such persons are also servants of the same master; nor does the servant assume risks which he neither knows nor suspects, nor had reason to look for. The risks incident to his employment which he assumes are such risks as he knows, or which by the exercise of ordinary care he should have known of. In this connection, I charge you that while in the discharge of his ordinary duties the man R— was a fellow servant of the deceased, yet while engaged in transmitting signals from the foreman, M—, to the men operating the donkey engine, he was discharging a duty imposed by law upon the vice principal, and was therefore, while so engaged, a vice principal of the defendant; and if you find from a preponderance of the evidence that R— failed to correctly transmit the signal given him by the foreman, M—, and by reason of such failure the injury, if any, complained of, was caused, then you must find the defendant was guilty of negligence."—Approved: Sroufe v. Moran Bros. Co., 28 Wash. 381, 68 Pac. 896.

§ 4567. Except, if he Voluntarily Assumes Such Duty it is Act of Fellow Servant.

"If the jury believe from a fair preponderance of the evidence that plaintiff and his fellow laborer, K—, were informed that there was gas in the back heading, that prior to and at the time of the accident plaintiff knew that the part of the entry where he was injured had

been marked out and was unsafe on account of the existence of gas, and for this reason he and K— were given a safety lamp with which to work, that when furnished with a safety lamp plaintiff said to K—, in substance, if there was enough gas for a safety lamp, they should get the fire boss to go in there, and that K— replied, in substance, that he could adjust or test the gas as well as the fire boss, that thereupon K— entered the place with the safety lamp, and, after doing so, then believing it safe, entered again, but with an open lamp, and while working in the place with an open lamp the gas was by such lamp exploded and plaintiff injured, he cannot recover."—Approved: Western Coal & Mining Co. v. Buchanan, 82 Ark. 499, 102 S. W. 694.

§ 4568. And where he himself is Injured there is Assumption of Risk.

"If you find from the evidence that the plaintiff was employed by the defendant to work at a machine called the equalizer, and you further find that the plaintiff, without any directions so to do from the foreman of the defendant, Chester C. S— (and without his knowledge and consent), voluntarily left his machine and assisted in the work of mending a broken belt upon another machine (and that in so doing he went out of the line of his duties), and that, while so engaged, the plaintiff received the injuries complained of, you will find for the defendant."—Approved: St. Louis Stave & Lumber Co. v. Sawyers, 90 Ark. 473, 119 S. W. 830.

(b) "If Claude S— was injured while engaged on his own motion outside of the line of his duty in voluntarily performing the work of another employee, he assumed the risk of injury, and cannot recover." —Approved: St. Louis Stave & Lumber Co. v. Sawyers, 90 Ark. 473, 119 S. W. 830.

§ 4569. Promise to Repair Need not be Express but may be Reasonably Inferred.

"A general rule of law is that a person working with a defective or unguarded machine, and without complaint, and knowing of the dangers of the same, assumes the danger of the defect or unguarded part; but there is no longer any doubt that, where an operator of machinery has expressly promised to repair a defect, the workman does not assume the risk of an injury caused thereby, within such period of time after the promise as would be reasonably allowed for its performance; nor, indeed, is any express promise or assurance from the master necessary. It is sufficient that the workman may reasonably infer that the matter will be attended to. So you are instructed that if the plaintiff, at the time of his employment and at the time of the accident, saw the danger from the lack of the guard, and complained of the same to the foreman, and the foreman promised to put on a guard, and the plaintiff went to work, and continued at work, on the promise, and you further find that the danger was not so imminent and immediate that a reasonably prudent man would not go to work or continue at work on the saw, and that at the time of the accident the plaintiff was relying upon the foreman's promise to place on a guard,

then you are instructed that the plaintiff did not assume the risk and danger of an injury resulting from the lack of a guard."—Approved: Crooker v. Pacific Lounge & Mattress Co., 34 Wash. 191, 75 Pac. 632.

§ 4570. Engineer may Assume that Switch, Signals and Lights are Properly Placed.

"You are instructed that the said Granville R. O— was not obliged to know or inquire beforehand whether or not the switch was properly placed, and whether or not the proper lights and signals had been placed, but, in the absence of absolute knowledge to the contrary, he had the right to assume that all that could be reasonably be done to render the roadway safe had been done. There is an implied undertaking or obligation on the part of the defendant with its employees to see that all that can reasonably be done to make the road safe had been done."—Approved: Chicago, B. & Q. R. Co. v. Oyster, 58 Neb. 1, 78 N. W. 359.

§ 4571. Vice Principal—Negligent Order Exposing Servant to Extraordinary Peril.

(a) "Where the employer places one employee under the direction and control of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised, the employer would be liable, in the event of injury to such employee."—Approved: Kearney Electric Co. v. Laughlin, 45 Neb. 390, 63 N. W. 941.

(b) "If you find from the evidence that the foreman, John W—, was, during the plaintiff's work, the supreme authority present, and that all the men engaged in the work in the so-called 'cut' were subject to his orders in every particular, and that no one present had any higher authority over them,—if he had the right to direct them what to do and where to work, and how to do it,—then I charge you that he was a vice-principal, and that for any negligence on his part in directing plaintiff to work at the squibbing or loading in question the defendant is liable."—Approved: Holman v. Kemp, 70 Minn. 422, 73 N. W. 186.

§ 4572. Same—Given Control over other Servants, Master Liable for his Acts.

(a) "It was the duty of the defendant company to keep the entry complained of in good repair, and the roof in a reasonably safe condition. Being a corporation, it could only discharge this duty through employees. Now if you find that the defendant devolved this duty on A. J. E—, the pit boss, and gave him the right to employ and discharge workmen, and to direct them as to what they should do, then the said A. J. E— would not be a fellow workman with F—, but a vice principal; and if you find that he was negligent in not seeing to and having the roof put in a reasonably safe condition before the accident, then his negligence would be the negligence of the defendant; and if

you further find that from his want of care F— was killed, then your verdict should be for the plaintiff."—Approved: Fosburg v. Phillips Fuel Co., 93 Iowa, 54, 61 N. W. 400.

(b) "When an employer gives his servant general directions as to the business which is intrusted to him to perform, then the employer is held to have confided in the discretion of the servant, and is answerable for all the acts of the servant in the performance of the duty required."—Approved: Rosecranes v. Iowa & Minnesota Tel. Co., 65 Iowa, 444, 21 N. W. 769.

(c) "Further regarding the relation of fellow servants, you are instructed that the master may so act, and instruct his servants to obey one of their number in the performance of their work for the master, that in the performance of such duties so required by the master the servant so authorized to transact the business of the master in the performance of such duties for the time, as to such servants who have received of the master a direction to obey, becomes the agent or representative of the master, in such sense that the master is liable for the negligence of the servant so invested with authority, while in the performance of the duties directed in the manner aforesaid by the master. And if you find from the evidence that Samuel M—, the vice-president and general manager of the defendant corporation told the plaintiff to obey Foreman P—, and that P— would tell him what to do, and that thereafter P— told the plaintiff, prior to the time of the injury, to obey the orders or commands of Richard G— and that M— knew that plaintiff was under the direction of Richard G—, and required to obey the orders and instructions of G—, and acquiesce therein, then the said G—, when he told the plaintiff to use the rip saw in the manner and for the purpose it was being used at the time of the injury, was the agent or representative of the defendant corporation, in such sense that the order of Richard G— to use the rip saw in the manner and for the purpose it was being used at the time of the injury would be the order of the defendant to use the said rip saw."—Approved: Newbury v. Getchell & Martin Lumber & Manufacturing Co., 100 Iowa, 441, 69 N. W. 743.

(d) "If the jury find from the evidence that one William A— was foreman of the defendant, A. Leschen & Sons Rope Company, and as such foreman was superintendent for the defendant of the plaintiff and of the place where plaintiff was required to work, if you find plaintiff was required to work at such place, and superintend for the defendant the work of removing the wire columns and had entire superintendence, charge, and control thereof, and had power and authority to provide material to brace the wire columns in question, and that this was a part of his duty, and that said A— was the representative of the defendant directing the work in question, and the plaintiff was subject to his orders and directions, then the jury are instructed that said A—'s acts and conduct in connection with said wire columns and the bracing thereof were the acts and conduct of the defendant so far as this case is concerned, and in respect to said acts he was not a fel-

low-servant with the plaintiff."—Approved: Burkard v. A. Leschen & Sons Rope Co., 217 Mo. 466, 117 S. W. 35.

§ 4573. Fellow Servant as to Some Duties and Vice-Principal as to Others.

"That in so far as P— was engaged in the work of using the pile driver, and the tools and the appliances appurtenant thereto, he was a fellow servant with the plaintiff. If you find, however, from the evidence that he was charged with the duty, in whole or in part, to procure or prepare the pile driver and the tools and appliances ordinarily and reasonably necessary for its proper use, then, to such extent, he was not a fellow servant, but was a vice principal—that is to say, for such purpose, he stood in the place of his principal, the defendant—and, if he was negligent in respect to such duty, the defendant is chargeable with such negligence. For instance, as stated to you in the previous instruction, the defendant was charged with the duty of exercising ordinary care to furnish the tools and appliances that were ordinarily and reasonably necessary for the proper and safe use of the pile driver. Now, if the defendant delegated that duty to P—, or to any other person, and the duty was not, in fact, performed by the person to whom it was delegated, the failure of such person will be deemed the failure of the defendant, and the neglect of such person the neglect of the defendant; and in such case it is immaterial whether such person was in fact P— or some other person, but the defendant is not chargeable with P—'s negligence, if any, in so far as he was engaged in the use of such tools and appliances as were actually furnished."—Approved: Wilder v. Great Western Cereal Co., 134 Iowa, 451, 109 N. W. 789.

§ 4574. Instruction upon Non-Liability for Acts of Fellow Servant.

"While it is true, that a common employer is not responsible to a servant for an injury caused by the negligence of his fellow servant engaged in the same line of employment, yet it is the duty of a railway company as employer, to provide safe structures, competent employees, and engines, and all appliances necessary to the safety of the employed, and to adopt such rules and regulations for running its trains as will insure safety, and, having adopted such rules, to conform to them, or be responsible for consequences resulting from a departure therefrom."—Approved: Chicago & N. W. Ry. Co. v. Taylor, 69 Ill. 461.

§ 4575. Fellow Servants—Facts Constituting Relation of.

(a) "The court instructs the jury that, in order to constitute servants of the same master fellow-servants, it is essential that they shall be, at the time of the injury, directly co-operating with each other in the particular business in hand, or that their duties shall bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution; and if the jury believe, from the evidence, that the plaintiff, Meyer, and the man, Hermann V—, who was assisting him at the time of his alleged injury, were in the

employ of the defendant, George P—, and that they were directly cooperating with each other in the particular business in hand, or that their usual duties brought them into habitual association so that they might exercise an influence upon each other promotive of proper caution, then the court instructs the jury, as a matter of law, that the said plaintiff and the said V—, who was thus assisting him at the time of his alleged injuries, were fellow-servants; and if the jury further believe, from the evidence, that the injury received by the plaintiff was occasioned by his own carelessness and negligence, or through the carelessness or negligence of the said V—, who was thus assisting him at the time and place mentioned in the declaration, then the defendant would not be liable to the plaintiff, if he was otherwise without fault, and the jury should find the defendant not guilty."—Approved: Pagels v. Meyer, 193 Ill. 172, 61 N. E. 1111.

(b) "I charge you that the men on the day shift, who were working on the sand pile during the day time of the day when plaintiff was injured, were the fellow servants of the plaintiff, and if they left the sand pile in a dangerous condition as the result of the negligent manner in which they did their work, and plaintiff's injury resulted therefrom, that was the negligence of a fellow servant of the plaintiff, for which the defendant is not responsible."—Approved: Livingstone v. Saginaw Plate Glass Co., 146 Mich. 236, 109 N. W. 431.

(c) "If you find from the testimony that at the time of the accident and alleged injuries the plaintiff, Samuel B—, was one of the gang engaged in repairing the line of defendant and in stringing an additional wire along said line, and that the pole he was climbing fell by reason of the strain put upon it by the other members of said gang stretching a wire attached to said pole, and that plaintiff was negligent in remaining upon said pole while said wire was being stretched, or the other members of said gang were negligent in stretching said wire while plaintiff was upon said pole, in either event the plaintiff cannot recover, if such negligence contributed to his injury as a proximate cause thereof."—Approved: Berley v. Western Union Telegraph Co., 82 S. C. 360, 64 S. E. 157.

§ 4576. Incompetency of Fellow Servant that was or should have been Known.

"The court instructs the jury that if you believe from the evidence that G— and P— were incompetent and unfit persons to perform the duty of propelling said hand car, and that by reason thereof they pulled or jerked upon the handle bar instead of pressing down; and you further find they were negligent; and, further, that the defendant knew, or by the exercise of ordinary care could have known, of the unfitness and incompetency of said G— and P—, if you find they were unfit and incompetent, and that the defendant was guilty of negligence in employing and keeping said G— and P—, then your verdict should be for the plaintiff."—Approved: Int. & G. N. R. Co. v. Martinez (Tex. Civ. App.), 57 S. W. 689 (not reported in state reports).

§ 4577. Fellow Servants—Switchman and Car Coupler are not in Missouri.

"The jury are instructed that if they believe and find from the evidence that on Sept. 15, 1901, the plaintiff, George L. P—, was attempting to couple a certain stationary freight car, to a certain moving car backing toward the same, for the defendant railroad company, and that his right hand and wrist were caught between the corners of said cars and injured, and that the said injury was caused by the negligence and carelessness of the switch-tender, in throwing the switch for track No. 17 instead of track No. 18, thus causing the corners of the car at which plaintiff, P—, was standing, to collide and come together with force and violence, and that the plaintiff, at the time, was in the exercise of ordinary care himself, then your verdict must be for the plaintiff."—Approved: Phippin v. Missouri Pac. Ry. Co., 196 Mo. 321, 93 S. W. 410.

§ 4579. Relation of Independent Contractor between Plaintiff and Defendant.

(a) "In passing on the question of whether or not the plaintiff, when he received his injuries, if he received any, was an independent contractor, you are charged that the furnishing of specifications for the work by the defendant, if it furnished such, and the right to determine whether the work had been done according to the contract, would not be inconsistent with the existence of an independent contract between the plaintiff and the defendant as to such work. One who lets work under an independent contract has the right to provide by the contract what work shall be done and what result must be accomplished to fulfill the contract."—Approved: Texas Short Line Ry. Co. v. Waymire (Tex. Civ. App.), 89 S. W. 452 (not reported in state reports).

(b) "If the relation which the plaintiff bore to the defendant company at the time of the alleged accident and injury, and in regard to the work he was then engaged in doing, was that of an independent contractor from the control of, or the right of control by, said company as to the manner in which the work was to be done, he would not be a servant of the company and would not be entitled to recover herein. On the other hand, if the defendant exercised, or had the right to exercise, control over the manner in which plaintiff was to do the work he was engaged in at the time he is alleged to have been hurt, or over the means by which it was to be done, he was an employee and servant of the company, and it would owe him the duty of ordinary care in furnishing reasonably safe appliances for his work, and in causing them to be inspected as is hereinafter given you in charge."—Approved: Texas Short Line Ry. Co. v. Waymire (Tex. Civ. App.), 89 S. W. 452 (not reported in state reports).

§ 4580. Giving Notice to Master of Claim for Injury and Waiver.

"You are further instructed that the undisputed evidence in this case shows that on the 31st day of September, 1902, by a written con-

tract entered into between plaintiff and defendant, plaintiff agreed that in the event he should sustain any personal injury while in the service of the defendant for which he should make claim against defendant for damages he would, within 30 days after receiving such injury, give notice in writing of such claim to the claim agent of the defendant, which notice should state the time, place, and particulars of such injuries and nature and extent thereof, and the claim made therefor. The undisputed evidence further shows that said provisions in said contract were not complied with by the plaintiff, or, in other words, that plaintiff did not give the written notice within thirty days provided for in said contract. Therefore you are instructed that the failure of plaintiff to give such written notice constitutes a bar to recovery by him in this case unless you find and believe from the evidence that the giving of such written notice by him within the said thirty days was waived by the defendant. So, if you find and believe from the evidence that the giving of the written notice by plaintiff within thirty days after he received his injuries, as provided for in said written contract, was not waived by the defendant, you will return a verdict for the defendant. In this connection, however, you are further instructed that if you find and believe from the evidence that the plaintiff was run over by one of defendant's engines or tenders and injured, as alleged in his petition, and if you further find and believe from the evidence that the defendant had notice and knowledge of the time and place of said accident and of plaintiff's injuries just after it occurred, and if you further believe from the evidence that the defendant, without such notice in writing having been given it by plaintiff before the expiration of thirty days after said injuries were received by plaintiff, undertook to investigate, and did investigate, the happening of said accident and the injuries resulting to plaintiff therefrom, and through its claim agent called on the plaintiff with a view of entering into negotiations looking to the adjustment of any claims plaintiff might have for damages on account of his injuries, and if you further believe from the facts and circumstances in evidence in the case that the defendant intended to waive the giving of such notice provided for in said contract of employment, and intended to and did treat plaintiff as if such notice had been given, then the failure on the part of plaintiff to give such written notice constitutes no bar to a recovery by him in this case, if under the evidence and the law as given you in charge by the court you find and believe he is otherwise entitled to recover."—Approved: Missouri, K. & T. Ry. Co. v. Hendricks, 49 Tex. Civ. App. 314, 108 S. W. 745.

CHAPTER CXXII.

NEGLIGENCE—ELECTRICITY.

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§ 4581. Degree of Care of those Handling Electricity.

"The court instructs the jury that all persons or corporations, who handle a force of great inherent danger to the lives and safety of others, are held by law to a high degree of care in handling the same, to the end that other persons shall not be hurt by the same, while such other persons are not trespassing and are rightfully minding their own business; in other words, the care required is measured by and equal to the danger. When any one handles a force of utmost danger, a very great care is required. What would be care in handling a force of little danger might not be care in handling a force of great danger, and might be negligence in handling such a force. As the danger increases, so the degree of care increases which is required of persons who are handling the force. The degree of care required is proportionate to the danger of the force, and, where a force of highest dan-

ger is handled, a very high degree of care is required in handling the said force, to the end that no other person lawfully minding his own business and not trespassing may be hurt by the force."—Approved: Bourke v. Butte Electric & Power Co., 33 Mont. 267, 83 Pac. 470.

§ 4582. Negligently Maintaining Wires Making Highway Unsafe.

"The court instructs the jury that if they shall believe from the evidence that the defendant company negligently maintained its telephone line along the Greenville and Central City public road in such a dangerous condition that said public road, by reason of said line being so maintained along said road, was not reasonably safe for public travel, and if the jury shall further believe from the evidence that the said telephone line fell in the public road on the occasion in controversy by reason of the negligent manner in which the same was maintained by the defendant company, and as the direct and natural result thereof, and if the jury shall further believe from the evidence that the buggy in which the plaintiff was driving on the occasion in controversy collided with the defendant company's said line, and that plaintiff was thrown from said vehicle by the force of said collision and injured, then and in that event the jury should find for the plaintiff such compensatory damages, if any, as they may believe from the evidence was thereby caused to him, not exceeding $5,000, the amount claimed."—Approved: Burton v. Cumberland Telephone & Telegraph Co. (Ky.), 118 S. W. 287.

§ 4583. Ordinary Care in Constructing Guy Wires for Telephone Poles.

"Under the law the defendant Southwestern Telegraph & Telephone Company had the right to construct and maintain such guy wires as were reasonably necessary to support its telephone poles, provided that in doing so it exercised ordinary care for the safety of pedestrians in said city; and if, from all the facts and circumstances in evidence, you find that said company was not guilty of negligence in constructing and maintaining the particular guy wire in controversy, anchored as you believe the same was anchored, with such facilities as you find pedestrians had, if any, of knowing its location, then you will return a verdict in favor of the said Southwestern Telegraph & Telephone Company."—Approved: City of Ft. Worth v. Williams (Tex. Civ. App.), 119 S. W. 137.

§ 4584. Presumption that Company Knows of Condition of its Wires.

"The defendant was presumed in law to have that knowledge of the condition of its wires which it could have had by the exercise of that degree of care, prudence, and diligence that an ordinarily prudent person would have used under the same or similar circumstances."—Approved: Citizens' Telephone Co. v. Thomas, 45 Tex. Civ. App. 20, 99 S. W. 879.

§ 4585. And the Danger in Hanging Wires from Contact.

"The defendant, H—, in breaking, coiling, and hanging the dead or uncharged wire on June 20, 1901, is presumed to have known that

it was an electric wire, and to have known and realized the dangerous properties of electricity and that a higher degree of care was necessary when a thing on account of which an injury may be caused was a highly dangerous one, and that dead electric wires may be enlivened or become charged with a current of electricity by coming in contact with a charged wire, and that in case any person touched or grasped such a wire it would, or might reasonably be expected to, endanger the life or limbs of any person touching it."—Approved: Nagle v. Hake, 123 Wis. 256, 101 N. W. 409.

§ 4586. Absence of Ground Wire as Proof of Negligence.

"If, however, you find that the defendant failed to provide a ground wire at plaintiff's residence, and that such attachment was necessary to make the appliance most approved in use, and if you find that such failure was negligence, and if you find that a current of electricity passed over defendant's wires from a stroke of lightning and injured plaintiff's wife, then, if you find that the provision of a ground wire would have lessened the current of electricity so that plaintiff's wife would not have been injured, then, if you so find, you will find for the plaintiff."—Approved: Southern Telegraph & Telephone Co. v. Evans (Tex. Civ. App.), 116 S. W. 418.

§ 4587. Presence of Ground Wire as Producing Dangerous Diversion of Electricity.

(a) "If the jury believe from the evidence that on the evening of the 24th day of April, 1902, the defendant caused to be transmitted over an electric arc light circuit owned and operated by it, a current of electricity of such character that it was liable to be dangerous to human life, if diverted in whole or in part from the wire of such circuit; and if you further believe that the wire of such circuit at the time such current was so transmitted (if it was so transmitted) was in such condition that such a circuit was liable to be diverted in whole or in part from the wire of such circuit; and if you further believe that such current was so liable to be diverted (if so liable) because the wire of such circuit was electrically connected with the ground at that time at two or more places so as to divert a sufficient volume of electricity to kill a man; and if you further believe from the evidence that, at the time the foregoing conditions existed (if they did exist) the defendant knew, or by the exercise of reasonable care and prudence could or should have known, that such condition existed, or that there was a probability of their existence; and if you further believe that it was a want of reasonable care and prudence on the part of the defendant to so transmit such current of electricity under the circumstances aforesaid as claimed by the plaintiff to have existed (and you find that each and every one of such circumstances did exist); and if you further find that by reason of such a diversion of the whole or a part of such a current under such circumstances (if so diverted under such circumstances) the whole or a part of such diverted current passed through and into the body of Francis M. H— and killed

him, without contributory negligence on his part, and that the diversion of such a current so transmitted was the proximate cause of the death of Francis M. H—, and that such death was due to the want of such ordinary care and prudence on the part of the defendant or its employees, under all the circumstances found by you to exist; and you further believe that the plaintiff on said day was the wife of said H— and suffered pecuniary loss from his death, your verdict should be for the plaintiff."—Approved: Harrison v. Kansas City Electric Light Co., 195 Mo. 606, 93 S. W. 951, 7 L. R. A. (N. S.) 293.

§ 4588. Presumption of Negligence from Accident Causing Injury.

(a) "In cases of this kind, gentlemen of the jury, for reasons which I need not here discuss, the law provides that where it is shown that an accident of this kind has happened, and that the accident is caused by the breaking of a wire or by something going wrong in the business of a corporation engaged, as this one was, in supplying electric lights, and it is further shown that this wire which broke and which caused the accident was the property of and in the custody and control of the defendant, the law presumes then, or raises the presumption, that the defendant was negligent, and that the accident was caused by its negligence; and if there is no further testimony in the case, excepting the testimony tending to show the mere fact of the breaking of the wire, that the injury resulted from that breaking, and that the wire belonged to this defendant and was within its custody and control, then it would be your duty to find for the plaintiff; and, when that is shown,—I should say, provided that there was no contributory negligence shown on the part of the plaintiff,—the burden is shifted to the defendant to show to your minds by a preponderance of evidence that it was not at fault, and that the accident happened without any negligence or want of ordinary care upon its part."—Approved: Boyd v. Portland Gen. Electric Co., 41 Ore. 336, 68 Pac. 810.

(b) "If you find that plaintiff was injured by the wire in question, and that said wire was hanging down on said lot, and that said wire was erected, maintained, and owned by the defendant, and was under its management and control, and that by contact with said wire the plaintiff, having a right to be on said property, was injured, a prima facie case of negligence is made out, and the burden was cast upon the defendant to show that this wire was hanging down through no fault of its servants and agents."—Approved: Southwestern Telegraph & Telephone Co. v. Bruce, 89 Ark. 581, 117 S. W. 564.

§ 4589. Electricity as Dangerous to Licensee on Premises.

"The deceased R— was lawfully on the premises of the defendant. Although R— was working for an independent contractor and was not under the control of the defendant, still it was the duty of the defendant to exercise ordinary care and diligence to have the premises in reasonably safe condition. By ordinary care and diligence is meant such care as persons of ordinary prudence would exercise under the same or similar conditions. If the insulation on the electric wires in

question was in an imperfect and dangerous condition, and if such condition was known to the defendant or could have been known by the exercise of reasonable care or inspection, and if R— received an electric shock by reason of such imperfect condition, and it was without any negligence on his part, then plaintiff is entitled to recover a verdict. The mere fact, however, that the insulation was in an imperfect condition would not make the defendant liable unless the further fact appears to your satisfaction from the evidence that the defendant knew or could have known of such defective condition by the exercise of due and ordinary care and inspection.

"On the other hand, you are instructed that defendant was not an insurer of the safety of plaintiff's husband, and would not be liable for the mere fact that R— was killed from the electric shock on defendant's premises, nor would the defendant be required to use the most perfect kind of insulation, if that which was used was reasonably safe and proper under all the circumstances and facts in the case, and the defendant would not be liable if the death of R— resulted from accident without the fault or negligence of anybody."—Approved: Ryan v. St. Louis Transit Co., 190 Mo. 621, 89 S. W. 865.

§ 4590. Contact with Wire Placed by Third Person over Defendant's Wires which they Charged.

"If you believe from the evidence that the wire with which plaintiff claims to have come in contact was hung over an electric light wire of defendant, by some person or persons over whom the defendant had no control, on the day on which plaintiff claims to have been injured, and that defendant did not have knowledge or notice of the presence of such wire at the time plaintiff claims to have been injured, and that its failure to have such knowledge or notice was not the result of negligence on its part, then your verdict must be for the defendant."—Approved: Brubaker v. Kansas City Elec. Light Co., 130 Mo. App. 439, 110 S. W. 12.

§ 4591. Duty to Keep Safe and Properly Insulated Wires in Certain Places.

"The court instructs the jury that defendant was required to have and keep safe and properly constructed wires and poles at the place where plaintiff was injured; and that it was its duty, in using electricity at the place and manner shown in the evidence, to use such care as was commensurate with the danger, and to employ such skill and knowledge as are ordinarily possessed and exercised by those experienced in the nature of the element and probable consequences of its application for the purpose it was used; and that if they believe, from the evidence, the defendant failed to have there such wires and poles or to employ such skill and knowledge, in consequence of which plaintiff was injured, it was negligent, and they should find for the plaintiff."—Approved: City of Owensboro v. Knox, 116 Ky. 451, 76 S. W. 191.

(b) "It was the duty of the defendant, the Bowling Green Gaslight Company, to use the highest degree of care and skill known, which

may be used under the same or similar circumstances, to so insulate or protect its wires as to make them free from danger to those who may be brought in contact with them; and if they believe from the evidence that the said company failed to so insulate or protect the wire with which the plaintiff's decedent came in contact, and that his injuries were caused as the direct result of such failure, then the law is for the plaintiff, and the jury should find for the plaintiff such a sum in damages as will be a fair and reasonable compensation for the mental and physical suffering of said decedent, if any, caused by said injury, not to exceed $25,000, unless they further believe from the evidence that in receiving his injury plaintiff was himself negligent, and that but for his own contributory negligence, if any, he would not have been injured."—Approved: Bowling Green Gaslight Co. v. Dean, 142 Ky. 678, 134 S. W. 1115.

§ 4591a. Duty of Master to Warn Servant of Hidden Dangers from Insulated Wires.

"The court instructs the jury that, if they believe from the evidence that on or about the ——— day of ———, ———, the plaintiff, ———, was in the employ of the defendant, ———, as a carpenter, and that while in the discharge of his duty as such carpenter he was then and there using ordinary care and prudence for his safety, while so employed, and while in the course of such employment, and while in the performance of his duty it became necessary for him to tear down a certain piece of corrugated iron sheeting from the compressor house of the defendant corporation, and that while thus engaged, and without negligence on his part, he was injured by being shocked and burned by a current of electricity which reached him by reason of a defect in the insulation of an electric wire, and the negligent and careless placing of said wire, then and there under the control of the defendant corporation, which broken and defective condition of the insulation of said wire and which negligent and careless placing of said wire was due to the failure of the defendant corporation to exercise ordinary care to maintain said wire in a reasonably sound and safe condition and to place said wire in a reasonably safe place, of which broken and defective condition of the insulation of said wire and of which negligent and careless placing of said wire the defendant corporation had actual knowledge, or, with the exercise of ordinary care and caution, could have discovered such broken and defective condition of the insulation of said wire, and such careless and negligent placing of said wire, within sufficient time to have repaired the broken and defective insulation and corrected the negligent and careless placing of said wire, or could have warned plaintiff concerning the same, and did not do so, and that said wire was then and there in the possession and under the control of the defendant corporation, and that, in the performance of his duty, and without negligence on his part, and not having had the opportunity of knowing the defect in the insulation of said wire or the negligent and careless placing of the same, the plaintiff was injured, as set forth in his complaint and the amendments thereto, by coming in contact with the current of electricity from said wire, as

aforesaid, and that the said defective condition of the insulation of said wire, together with the careless and negligent placing of the same, was the proximate cause of the plaintiff's injury, then I instruct you that it is your duty to find a verdict for the plaintiff in a sum not greater than the sum sued for."—Approved: Cutter v. Pittsburgh Silver Peak Gold Mining Co. (Nev.), 116 Pac. 418 (not reported in state reports).

§ 4592. Servant Could Assume Working Place is Reasonably Safe.

(a) "When the plaintiff entered the employment of the defendant he assumed all of the ordinary and usual risks incident to the work that he was hired to do; but he did not assume any risk of which he had no knowledge, and which was due to the negligence of the defendant. In going about and performing his work, the plaintiff had the right to assume that the defendant had exercised reasonable care to furnish him a reasonably safe working place, and he was not required to suspect that the defendant had been guilty of negligence, or to make any such investigation or inspection as would be prompted only by the suspicion that the defendant had omitted to perform its duty."—Approved: New Omaha Thomson-Houston Electric Light Co. v. Rombold, 68 Neb. 54, 93 N. W. 966.

(b) "Deceased was not called upon before entering upon his work on the pole to examine or inspect the wire and tie on defendant's line at the place in question to learn whether it was properly insulated. Being authorized and required to work upon the pole, he would have a right to assume and believe that defendant had properly constructed, maintained, and inspected it. And unless you find that condition and danger arising from such defect was one so open and plain that it would naturally attract his attention and should have been seen by him in the exercise of ordinary care in and about his work, then I say to you that he would not be charged with either knowledge or notice of the true condition or danger. He would only stand charged with knowledge and notice of the dangers incident to a wire of equal voltage, similarly situated and properly tied and insulated."—Approved: Hodgins v. Bay City, 156 Mich. 687, 121 N. W. 274.

§ 4593. Servant of Long Experience Should Observe Lack of Insulation.

"The degree of care and caution that plaintiff's decedent was required to observe and exercise when he went upon this pole in question was the care and caution that an ordinarily prudent man of 20 years' experience with electric wires and cables, knowing the extremely dangerous character of such wires carrying a high voltage, would ordinarily observe and exercise, having regard to the insulation ordinarily employed. Plaintiff's decedent, because of his experience and knowledge of the dangerous character of electric wires carrying a high voltage of electricity, was called upon to use and exercise greater care than a person who never had such experience or knowledge of the extremely dangerous character of such wires. His degree of care must be com-

mensurate with his experience and knowledge of the dangerous character of electric wires carrying a high voltage of electricity, and if you find that decedent, under the circumstances as I have just stated, failed in such degree of care, for his own safety, he would be guilty of contributory negligence, and plaintiff could not recover. Plaintiff's decedent was a man of several years' experience with electricity, electric wires, telephone wires, cross-arms, etc., and must have known the result of coming in contact with live wires, as well as the purpose and effect of the insulation, and when he went up on this telephone pole in question and out upon the cross-arm carrying these electric wires, I charge you that it was his duty before going out onto such cross-arm and over these electric wires to observe such conditions as were apparent and would naturally attract the attention of a man of ordinary caution under the conditions present, and if by looking he would have discovered that the insulation was stripped off from the tie wire and the tie wire had cut the insulation on the main wire, and that this made the place extremely dangerous, and if he failed in such duty, I then charge you he was guilty of contributory negligence, and in that event your verdict should be no cause of action."—Approved: Hodgins v. Bay City, 156 Mich. 687, 121 N. W. 274.

§ 4594. Wearing Safety Belt when Working with Wires.

"If the jury believe from the evidence that a man of ordinary prudence, exercising ordinary care for his own safety under such circumstances as surrounded R— at the time of this accident, would have worn and used a safety belt, and that R— did not at the time of this accident wear a safety belt, and if the jury further believe from the evidence that the death of R— would have been prevented if the deceased had worn a safety belt, then the jury must find the defendant not guilty."—Approved: Commonwealth El. Co. v. Rose, 114 Ill. App. 181, aff'd, 214 Ill. 545, 73 N. E. 780.

§ 4595. Obvious Defects in Insulation are Assumed Risks.

"An employee is under the same legal duty to care for his own safety that his employer is to provide for his protection from accidents. It was the duty of James R. D—, while in the performance of his work as a lineman, to exercise ordinary and reasonable care and caution, under the circumstances of his situation, to avoid electric shocks and consequent death. While he had a right to assume that the defendant had used ordinary care and diligence to make it reasonably safe for him to work on live wires, yet he was not at liberty to close his eyes to defects of insulation which were open and obvious, or which he might have seen by using ordinary and reasonable care and caution. If you believe from the preponderance of the evidence that the insulation on wire called No. 2 was broken by said D— when he tied said wire around the glass insulator, and if you further find from the preponderance of the evidence that said break in the insulating material on said wire was open and obvious to said D—, or that he ought to have seen it by an exercise of ordinary care on his part before he

attempted to tie on the next wire, then your verdict must be for the defendant, even though defendant might have been negligent."—Approved: New Omaha Thomson-Houston Electric Light Co. v. Dent, 68 Neb. 668, 94 N. W. 819.

§ 4596. Hanger Wire within Reach of Boy on Street.

"Plaintiff's intestate was bound to exercise ordinary care for his own safety, taking into consideration his age and experience, and all of the other circumstances of the case. You have a right to consider in this regard the question of whether the hanger wire was such a contrivance and placed in such a situation that a boy of the age, knowledge, and experience of plaintiff's intestate would be liable to attempt to turn on said light in the manner in which it is claimed the plaintiff's intestate did at the time of his death; the usage or custom, if any, that existed among the public generally as to grasping the hanger wires on the lamps on the public streets, and shaking the same for the purpose of turning on said light; the distance of said hanger wire from the street; its proximity to the sidewalk; the fact that said pole upon which said wires were strung occupied a public street; the knowledge, if any, which the plaintiff's intestate had as to the danger of grasping said hanger wires; any warning which you may find he had received as to keeping away from the poles or wires of the defendant; the question of whether the danger of grasping the hanger wire, as he did, was an apparent danger or hidden danger; whether the hanger wire was supposed to be charged with electricity or not; and all of the other circumstances of the case which in your judgment have a bearing upon the question of whether he exercised that due and reasonable care for his own safety which a boy of his age and experience should have exercised under the same or similar circumstances."—Approved: Charette v. Village of L'Anse, 154 Mich. 304, 117 N. W. 737.

§ 4597. Plaintiff's Negligence Proximately or Naturally Contributing to Injury.

"You are further instructed that even if you find that the defendant company was guilty of the negligent acts complained of in plaintiff's complaint, and that such negligence was the cause of the alleged or any injury to the plaintiff, nevertheless if you find that the plaintiff was guilty of any negligence on his part which proximately or naturally contributed to his injury, and without which such injury would not have happened, then plaintiff cannot be permitted to recover in this action, and your verdict must be for the defendant."—Approved: Rangenier v. Seattle Electric Co., 52 Wash. 401, 100 Pac. 842.

§ 4598. Wires Blown Down by Storm—Act of God.

"I will give to you a request to charge that was handed to me by counsel for the defendant, and you will receive it as the law, the same as any I have given you. If you should find from the evidence that the defendant's wire was properly and legally erected and grounded, and that the wires of the electric lighting plant were properly and safely placed and insulated; also, that there was no current passing over de-

fendant's wires from the electric light wires, or, if there was such a current, it was because of an extraordinary storm; also, that there had not elapsed a reasonable time for either the defendant or the electric lighting company to make necessary repairs and to put the lines and wires in a safe condition; and if you find that it was such a current of electricity that killed plaintiff's horses—I charge you that your verdict should be for the defendant."—Approved: Anthony v. Cass Co. Home Tel. Co. (Mich.), 130 N. W. 659.

CHAPTER CXXIII.

NEGLIGENCE—INJURY TO TRESPASSERS AND LICENSEES.

§ 4599. Licensee—Premises to be in Reasonably Safe Condition.
4600. Railroad Yards Habitually Used by the Public.
4601. Hole in Carpet of Theater Causing Patron to Fall.
4602. Burning Refuse in Highway Causing Runaway.
4603. Dangerous Premises Causing Injury to Lessee.
4604. Liability of Agent of Abutter for Injury from Obstruction on Sidewalk.
4605. Injury to Theater Patron from Defect in Private Sidewalk for Entrance.
4606. Injury to Child on Street from an unhitched Horse.
4607. Degree of Care by Abutter as to Opening on Sidewalk.
4608. Whether Warnings and Barriers Sufficient or Not for the Jury.
4609. Duty of Hotel to Restrain Guest from Casting Missile on Street.
4610. Trespassers, no Obligation to Keep Premises Safe for.
4611. Burden of Hotel Guest to Establish Negligence Causing Injury.

§ 4599. Licensee—Premises to be in Reasonably Safe Condition.

"It was the duty of the defendant to exercise ordinary care to keep in a reasonably safe condition that part of its woodyard and premises which those loading wood in wagons were invited to use, and that, if they believed from the evidence that the defendant failed to exercise such care, and that the premises provided for the use of those loading wood on wagons were not in a reasonably safe condition, and that the defendant or its servants in charge of its factory knew this, or by the exercise of ordinary care could have known it, and by reason of the unsafe condition of the premises, and as the proximate result thereof, the plaintiff received the injuries complained of, they should find for him."—Approved: Ferguson & Palmer Co. v. Ferguson's Adm'r (Ky.), 114 S. W. 297.

§ 4600. Railroad Yards Habitually Used by the Public.

"If you believe from the evidence that at said time the plaintiff was in a state of intoxication, and that such condition of the plaintiff caused or contributed to his injury, you will find for the defendant. Or if you believe from the evidence that plaintiff was on the premises of the defendant without his consent, either express or implied, you will find for the defendant. In this connection, you are instructed that if said yards had for a long time been habitually used by the public, and that defendant had acquiesced in such use of its said yard by the public other than its employees, for such time and continuing to the time of plaintiff's injury, then the plaintiff would not be precluded from a recovery

on account of a failure to get the express consent of the defendant to go on its yards; but such consent would be implied."—Approved: St. Louis S. W. Ry. Co. v. Driver (Tex. Civ. App.), 137 S. W. 409.

§ 4601. Hole in Carpet of Theater Causing Patron to Fall.

"The court instructs the jury that, if the treater was dimly and insufficiently lighted, and the hole existed in the carpet and those facts rendered the aisle or passageway unsafe and dangerous to persons passing along or over it, and that defendants knew, or by the exercise of ordinary care would have known, the unsafe and dangerous condition a sufficient length of time to have mended or removed the carpet, and have provided a proper light, and that defendants neglected to do so, and that plaintiff purchased a ticket of admission and was being shown to a seat by servant of defendants and was passing through the aisle exercising ordinary care, that her foot was caught in the hole of the carpet, and in consequence she tripped and fell and received certain injuries, then the verdict should be for the plaintiff."—Approved: Nephler v. Woodward, 200 Mo. 179, 98 S. W. 488.

§ 4602. Burning Refuse in Highway Causing Runaway.

"You are instructed that the defendant company had no right to place obstructions upon the public highway in the nature of refuse material, unless it was reasonably necessary to temporarily use the highway while making improvements. If in this case it was reasonably necessary for the company to pile the debris mentioned within the right of way of the public highway in making its improvements, it was its duty to use due and proper care in doing so, so as to guard against injury; and, unless such care was used and injury resulted therefrom, and plaintiff herein was not guilty of contributory negligence, the company is responsible for any injury directly resulting therefrom. If it was not reasonably necessary for the defendant, in making its improvements, to use the highway for piling and burning the debris from the old flume, then the company had no right to use it for that purpose; and if it did so use it for that purpose, and plaintiff was injured therefrom while traveling upon the highway in the usual manner, and was not guilty of contributory negligence, then he is entitled to recover."—Approved: Selby v. Vancouver Waterworks Co., 32 Wash. 522, 73 Pac. 504.

§ 4603. Dangerous Premises Causing Injury to Lessee.

"As material and prominent questions of fact that are required to be answered by you before reaching a verdict in this case, I suggest the following: First. Was the building in question, at the time it was leased to B— & O—, insecure, dangerous, and a nuisance, and liable to collapse and injure or kill persons within or about it at any moment? Second. Was this known to the defendant company, or could it have been learned by the use of reasonable care? Third. Was the injury and death of Philip P— brought about in part by his own negligence? Before you can find a verdict for the plaintiff you must find an affirmative answer to the first question,—that the building described in the complaint was a nuisance when rented; further, that either this was known

to the defendant or could have been learned by the use of reasonable care; and, further, as a condition precedent to the plaintiff's recovery, a consideration of all the evidence in the case must disclose a want of negligence on his part."—Approved: Patterson v. Schlitz Brewing Co., 16 S. D. 33, 91 N. W. 336.

§ 4604. Liability of Agent of Abutter for Injury from Obstruction on Sidewalk.

"Gentlemen, if you believe from the evidence that the defendant had charge of the work of putting in the foundation and erecting the building upon the lot in question, and had the care of the premises to which the sidewalk belonged, and that the planks of the sidewalk were removed, although by some persons other than the defendant, and without his direction, but were removed for the purpose of hauling material upon the lot for the construction of the building, and that the defendant had control of the sidewalk, and knew that the opening through it was used for hauling building material upon the lot, and that the sidewalk was in fact out of repair, and in a dangerous condition at the time the accident occurred, and if you further find that the defendant was guilty of negligence in permitting it to be and remain open and out of repair, and in a dangerous condition, and in consequence thereof the plaintiff was injured without fault on her part, then I instruct you that the defendant would be liable, although the title to the property was in his wife, and the defendant was acting for her in the erection of the building."—Approved: Ellis v. McNaughton, 76 Mich. 237, 42 N. W. 1113.

§ 4605. Injury to Theater Patron from Defect in Private Sidewalk for Entrance.

"If the jury find from the evidence that the defendant in this case built a sidewalk on the east side of his opera house, and the same was used by the public whenever they had occasion to visit his premises or to pass the same, and find, further, that the plaintiff in this case intended to visit the opera house on the night of the accident, and was passing along the sidewalk for that purpose, when he met with the accident, the defendant cannot set up as a defense to this action that the property in question is private property, and that the plaintiff was a trespasser thereon."—Approved: Brezee v. Powers, 80 Mich. 172, 45 N. W. 130.

§ 4606. Injury to Child on Street from Unhitched Horse.

"If you find from the evidence that on or about the 23d day of December, 1905, plaintiff Robert M. M— and his three minor children, Mary M—, Joe M—, and Robert M—, were in a vehicle on Blum street in the city of San Antonio, and that a certain horse belonging to defendants herein became frightened and ran against said vehicle, and that thereby plaintiffs Mary M—, Joe M—, and Robert M— were thrown to the ground or pavement, and by reason thereof, they or either of them sustained any of the injuries complained of in the plaintiff's petition, and you further find that the driver in charge of said defendants' horse that

ran against the said vehicle left said horse unattended on said street, without being hitched, and that, in leaving said horse on said street without being hitched, if you find he was so left, defendants' driver in charge of said horse was guilty of negligence, and that such negligence, if any, was the direct cause of the injuries, if any, to said plaintiffs or either of them, then you will find for such plaintiffs as you may believe from the evidence have been damaged thereby, if either."—Approved: Swift & Co. v. Murphy, 45 Tex. Civ. App. 497, 100 S. W. 997.

§ 4607. Degree of Care by Abutter as to Opening on Sidewalk.

"A person causing an opening to be made in, or an obstruction to be on, the surface of a thoroughfare or public sidewalk where people are constantly traveling, and have an undoubted right to travel, is required by the law to use more than ordinary care, and to exercise the greatest care and caution while causing or maintaining such opening or obstruction, to the end that the same may not cause injury to travelers."—Approved: Bowley v. Mangrum & Otter, 3 Cal. App. 229, 84 Pac. 996.

§ 4608. Whether Warnings and Barriers Sufficient or Not for the Jury.

"I further instruct you that whether the signs, signals, warnings, barriers, lights, and obstructions, if any, were sufficient under the conditions to make the said plaintiff guilty of contributory negligence, is a question of fact for you to determine from the evidence; and it is also a question of fact for you to determine from the evidence whether or not there was at the time of the accident any sign, signal, light, warning, barrier, barricade, or obstruction to protect the public from falling into and being precipitated into the said excavation."—Approved: Perkins v. Sunset Telephone & Telegraph Co., 155 Cal. 712, 103 Pac. 190.

§ 4609. Duty of Hotel to Restrain Guest from Casting Missile on Street.

"If the jury shall believe from the evidence that the defendant George W— did throw the bottle from the roof garden on the occasion in evidence referred to, and that the plaintiff was thereby injured, and if you shall further believe from the evidence that the defendant W— was at and prior to the time that he threw the bottle in the roof garden of the defendant Seelbach Hotel Company, and that he was intoxicated, and that his manner and behavior were such as would indicate to a man of average prudence operating the roof garden that he (W—) might throw a bottle or other missile from the said garden to the street below, and that these facts were known, or by the exercise of ordinary care could have been known, to the defendant Seelbach Hotel Company, or its agents, or any of them, controlling the roof garden, then it became the duty of the defendant and of its agents to remove the said W— from the said roof garden or otherwise control him, and that the law in that event is for the plaintiff against the said Seelbach Hotel Company."—Approved: Bruner v. Seelbach Hotel Co., 133 Ky. 41, 117 S. W. 373.

§ 4610. Trespassers—No Obligation to Keep Premises Safe for.

(a) "The defendant was under no obligation to the plaintiff to keep its premises safe at places which its customers loading wood were not

invited to use, and that, if the jury believed from the evidence that the plaintiff, at the time he was hurt, was at a place not provided for the use of persons loading wood, and by reason of this he was hurt, they should find for the defendant."—Approved: Ferguson & Palmer Co. v. Ferguson's Adm'r (Ky.), 114 S. W. 297.

(b) "The plaintiff was bound to leave defendant's premises by the usual, ordinary, and customary way in which the premises are and have been departed from, provided the same be safe and in good condition; and if for his own convenience, or other reason (than defect in the usual place of departure), he leaves such way, he becomes at best a licensee, and cannot recover for injuries from a defect outside of said way, unless it was substantially adjacent to such way, and in this case the defect was not so adjacent."—Approved: Armstrong v. Medbury, 67 Mich. 250, 34 N. W. 566.

§ 4611. Burden on Hotel Guest to Establish Negligence Causing Injury.

(a) "The court instructs the jury that before the plaintiff can recover in this case for any injuries sustained through the ignition of the bandages and dressings on plaintiff's person, he must prove by a preponderance or greater weight of the evidence each of the following propositions: 1. That at the time of the occurrence in question there was a match in the bed in which the plaintiff was. 2. That the defendant knew of the presence of such match in said bed, or by the exercise of ordinary care and caution on its part would have known of such presence. 3. That said match ignited and thereby caused the injuries to the plaintiff. 4. That plaintiff himself was not guilty of any negligence which proximately contributed to bring about his injuries.

"The burden of proving each and every one of the foregoing propositions is upon the plaintiff. If the plaintiff has failed to prove by a preponderance of the evidence any one or more of these propositions, or if the evidence on any one or more of said propositions is evenly balanced, or preponderates in favor of the defendant, then and in such case you have no discretion, and under the law the defendant cannot in such circumstances be held liable for any injuries sustained by the plaintiff through the ignition of said bandages and dressings."—Approved: Croupp v. Garfield Park Sanitarium, 147 Ill. App. 7.

(b) "The court instructs the jury that even though you believe from the evidence in this case that there was a match in the bed in question, and that such match caused the injuries to plaintiff, yet, if you further believe from the evidence that the plaintiff himself negligently dropped or placed such match in said bed, then the defendant cannot, under the law, be held liable for the consequences of the fire started by such match."—Approved: Croupp v. Garfield Park Sanitarium, 147 Ill. App. 7.

CHAPTER CXXIV.

NEGLIGENCE—MUNICIPAL CORPORATIONS.

§ 4612. Streets—Not Insurer of Safety of.
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4616. And this Applies to Sidewalks.
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4626. If Permission is Given to Obstruct Street, City Must See it is Properly Guarded.
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4629. Notice is Presumed when Sufficient Time Has Elapsed for a Defect to Have Been by Ordinary Care Discovered.
4630. There Must also Have Elapsed after Notice, Reasonable Time to Repair.
4631. Notice Not to be Presumed Unless Defect is Open and of Long Standing.
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4657. Hypothesis that Plaintiff Rashly Traveled on Road Unsafe by Reason of Ice.
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4661. Duty to Maintain Bridge for Ordinary Usage Only.
4662. Duty of Corporation Having Toll Bridges to Keep Reasonably Safe.
4663. Hydrant Bursting and Flooding Property—Notice Actual or Presumed.

§ 4612. Streets—Not Insurer of Safety of.

(a) "You are instructed that a city is not an insurer of the safety of its streets, but is only required to keep them in a safe condition for ordinary travel; and, although the plaintiff may have exercised due care and could not have prevented the runaway, yet, if the street or crossing where the injury occurred was in a safe condition for ordinary travel, the city is not liable."—Approved: Meisner v. City of Dillon, 29 Mont. 116, 74 Pac. 130.

(b) "The defendant is not required to have the sidewalks so constructed as to secure absolute immunity in using them, nor is it bound to employ the utmost care and exertion to that end. Its duty under the law is only to see that its sidewalks are reasonably safe for persons exercising ordinary care and caution."—Approved: Struble v. Village of De Witt, 81 Neb. 504, 116 N. W. 154.

§ 4613. Nor That one Using Shall be Absolutely Safe From Accident.

(a) "The defendant requests the court to charge, and I do charge you, that the law only imposes upon the city the duty to keep its side-

walks in a condition reasonably safe for public travel. The city is not an insurer against accident, nor is it required to make its walks absolutely safe from accident, and the fact of an injury to a person passing upon the walk is not in and of itself evidence that the walk was not reasonably safe and fit for public travel."—Approved: Gilson v. City of Cadillac, 134 Mich. 189, 95 N. W. 1084.

(b) "The jury are instructed that the city is not required to foresee or provide against every possible danger or accident that may occur, but is required to exercise ordinary care to keep its streets in such condition as to be reasonably safe for public travel by persons exercising ordinary care for their own safety; and it was the duty of plaintiff, in using said streets, to exercise ordinary care to prevent injury or accident to her own person."—Approved: Board of Councilmen of City of Frankfort v. Chinn (Ky.), 89 S. W. 188 (not reported in state reports).

§ 4614. Nor is City Liable for Every Defect Therein.

(a) "The court instructs the jury that a municipal corporation is not an insurer against accidents upon its streets and sidewalks, nor is every defect therein, though it may cause injury, actionable. It is sufficient if the streets are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day, and it is only the duty of a municipal corporation to use reasonable care to keep its streets in a safe condition for pedestrians."—Approved: City of Richmond v. Pemberton, 108 Va. 220, 61 S. E. 787.

(b) "The jury is instructed that the defendant city is not an insurer against accidents upon its streets, nor is it liable for every defect therein, though it might cause the injury sued for. And if you find from the evidence that the street at the place of the alleged injury was in a reasonably safe condition for travel in the ordinary modes, then you will find for the defendant."—Approved: Lincoln v. Gillilan, 18 Neb. 114, 24 N. W. 444.

(c) "The city is not an insurer against accidents in its streets or on the sidewalks. The law does not prescribe a measure of duty so impossible of fulfillment, or a rule of liability so unjust and severe. It imposes upon the municipal corporation the duty of guarding against such dangers as can or ought to be anticipated or foreseen in the exercise of reasonable prudence; and when an accident happens by reason of some slight defect, from which danger was not reasonably to be anticipated, and which, according to common experience, was not likely to happen, it is not chargeable with negligence. If you find from the evidence that the defect in the sidewalk was not of such a character as would justify one in reasonably anticipating that the accident would happen thereby, your verdict must be for the city."—Approved: City of Denver v. Hubbard, 29 Colo. 529, 69 Pac. 508.

(d) "The jury are instructed that a municipal corporation is not liable for every accident that may occur from defects in its sidewalks or streets. Its officers are not required to do everything that human energy and ingenuity can possibly do to prevent the happening of accidents or injury to the citizens. If they have exercised a reasonable

care in that regard, they have discharged their duty to the public. The town is not an insurer or a warrantor of the condition of its streets and sidewalks; nor is every defect therein actionable, though it may cause the injury sued for. It is sufficient to relieve the town from liability in this case if you find from the evidence that the sidewalk at the place of the accident was in a reasonably safe condition for travel at the time the accident is alleged to have occurred. If you believe from the evidence that at the place where the plaintiff met with the injury complained of the sidewalk was at the time in a reasonably safe condition, your verdict should be for the defendant."—Approved: Town of Norman v. Teel, 12 Okl. 69, 69 Pac. 791.

§ 4615. But Its Duty is Ordinary Care to Keep Them Reasonably Safe For Those Who Use Ordinary Care.

(a) "The town is not an insurer against all accidents on its streets, but is responsible only when it fails to use ordinary care to keep its streets in a reasonably safe condition for public travel, and, if it fails in this respect and injury results which is not due to the want of ordinary care on part of the person injured, it is liable."—Approved: Witt v. Town of Latimer, 139 Iowa, 273, 117 N. W. 680.

(b) "The court instructs the jury that the defendant is not required to foresee or provide for or against every possible accident or danger that might occur to the public upon its streets, but it is only required to use and exercise reasonable prudence or care in keeping said streets and the sidewalks upon them used for public travel in a reasonably safe condition for such travel."—Approved: City of Burnside v. Smith (Ky.), 119 S. W. 744.

(c) "You are instructed that the defendant corporation is bound by law to use all reasonable care, caution, and supervision to keep its streets in a safe condition for travel in the ordinary mode of traveling, and if it fails to do so it is liable for injuries sustained in consequence of such failure; provided the party injured is himself exercising reasonable care and caution."—Approved: Meisner v. City of Dillon, 29 Mont. 116, 74 Pac. 130.

(d) "Under its charter and under the law, it is and was the duty of the city of Lincoln to keep and maintain the sidewalk complained of, and at the point in question, in a reasonably safe condition for travel by the ordinary and usual modes; and if the plaintiff, while passing over in the usual mode, using ordinary care for his personal safety, received personal injury, and suffered damage on account of defendant's neglect of that duty, you should find for the plaintiff."—Approved: City of Lincoln v. Holmes, 20 Neb. 39, 28 N. W. 851.

(e) "I charge you that the duty imposed on the defendants, commissioners of public works, was to repair only such sidewalks as were so out of repair as to endanger persons passing thereon, and that defendants are not liable for every defective sidewalk, but only for such as are so out of repair as to endanger persons passing thereon.

"I instruct you that, if you find from the evidence that the sidewalk where the plaintiff has testified that he was injured was not so out of repair as to endanger persons in ordinary health and of ordinary

strength, and with the ordinary control of their muscles and faculties while passing thereon, you must find for the defendants."—Approved: Taylor v. Manson, 9 Cal. App. 382, 99 Pac. 410.

(f) "The court instructs the jury that it is not for every defect or any imperfection in the street, even though it may cause an injury, that the defendant city is liable, but that the defect or imperfection must be such that on its account the street is not reasonably safe for the people traveling thereon when exercising ordinary care for their own safety and traveling in the usual modes."—Approved: Heberling v. City of Warrensburg, 204 Mo. 604, 103 S. W. 36.

§ 4616. And this Applies to Sidewalks.

(a) "The defendant, as a municipal corporation, had the power, among others, to construct and maintain sidewalks along its streets; and in the exercise of this power it was the duty of the defendant to exercise ordinary and reasonable care and diligence to see that its sidewalks were constructed and maintained in a reasonably safe condition for public travel; and a failure on the part of defendant to exercise ordinary and reasonable care and diligence in these respects would constitute negligence, for which the defendant would be liable."—Approved: Beazan v. Incorporated Town of Mason City, 58 Iowa, 233, 12 N. W. 279.

(b) "The court instructs the jury that the defendant, the city, is bound by law to use reasonable and ordinary caution and care and supervision to keep its sidewalks and streets in a safe condition for travel by night as well as by day, and if it fails to do so, it is liable for injuries sustained in consequence of such failure, provided the party injured is himself exercising reasonable and ordinary care and caution; and the fact that the plaintiff may in some way have caused injury sustained by him will not prevent his recovery if by ordinary care he could not have avoided the consequence to himself of the defendant's negligence."—Approved: City of Lincoln v. Walker, 18 Neb. 250, 25 N. W. 66.

§ 4617. In the Less as Well as the More Frequented Streets.

"The jury are instructed that it is the duty of a town or city to use reasonable care to keep all sidewalks and crossings in its public streets in reasonably safe condition, even if the crossing or sidewalk is in the suburbs of the town or city, where less used than in the more frequented streets."—Approved: Town of Norman v. Bright, 223 Ill. 99, 79 N. E. 90.

§ 4618. It is not Bound for Latent Defects not Discoverable by Ordinary Care.

"You are instructed that the defendant, city of Chicago, is not liable for latent or unseen defects in its sidewalks not discoverable by the exercise of ordinary care; and, if you believe from the evidence that the sidewalk in question was, at the time and place of the alleged accident, in a reasonably safe condition for ordinary travel thereon by persons using such degree of care and caution as reasonably prudent persons would use for their safety under all the circumstances shown

by the evidence, so far as was discoverable by the defendant by the use of ordinary care, then you should find the defendant, city of Chicago, not guilty."—Approved: Karczenska v. City of Chicago, 239 Ill. 483, 88 N. E. 188.

§ 4619. It Need Not Provide Against Every Possible Accident.

"The court instructs the jury that the defendant is not required to foresee or provide for or against every possible accident or danger that might occur to the public upon its streets, but is only required to use and exercise reasonable prudence or care in keeping said streets and the sidewalks upon them used for public travel in a reasonably safe condition for such travel."—Approved: City of Brownsville v. Arbuckle (Ky.), 99 S. W. 239 (not reported in state reports).

§ 4620. Streets Must be Reasonably Safe for the Infirm and Crippled.

(a) "The duty of caring and of abstaining from the unlawful injury of another applies to the sick, the weak, the infirm, as fully as to the strong and healthy; and when the duty is violated the measure of damages is for the injury done, even though the injury might not have resulted but for the peculiar physical condition of the person injured, or may have been augmented thereby. The proximate cause of an injury is the efficient cause. The public streets and sidewalks in a city are not constructed and maintained for the sole use of the healthy and robust people, but for the use of the infirm, the sick and decrepit as well. They may be lawfully traveled by every citizen, without regard to age, sex, or physical condition. If the city negligently permits such streets and sidewalks to remain out of repair, and any person (who is himself free from negligence) is injured, the city is liable for the injury. The city is chargeable with the knowledge that people of different bodily conditions travel its streets, and that among these are the weak, the decrepit and those with organic predisposition to disease. The city is chargeable with knowledge that all classes of persons, including both the healthy, and diseased, and lame, constantly travel its streets and sidewalks, and that such disease or lameness might greatly aggravate a bodily injury. Hence the city has reasonable ground to expect that if one of that class, who are diseased or lame, is injured by reason of a defect in the sidewalk or street, the disease or lameness might develop, and retard or prevent a cure."—Approved: Short v. City of Spokane, 41 Wash. 257, 83 Pac. 183.

(b) "The public streets and sidewalks in a city are not constructed and maintained for the sole use of the healthy and robust people, but for the use of the infirm, the sick, and decrepit, as well. They may lawfully be traveled by every citizen, without regard for age, sex, or physical condition. If the city negligently permits such streets and sidewalks to remain out of repair, and any person, who is himself free from negligence, is injured, the city is liable for the injury."—Approved: Jordan v. City of Seattle, 30 Wash. 298, 70 Pac. 743.

§ 4621. If a Street is in a Dangerous Condition there May be Liability.

(a) "It is the duty of the defendant, the city of Louisville, to keep its highways, including the pavement of the south side of Jefferson street,

between Shelby and Campbell streets, in a reasonably safe condition for use by pedestrians; and if you shall believe from the evidence that at the time mentioned in the petition the pavement on the south side of Jefferson street, between Shelby and Campbell streets, was not in a reasonably safe condition for use by pedestrians, but was in a dangerous condition by reason of a hole in the sidewalk, and the city, or any of its officers or agents, knew thereof, or could have known by the exercise of ordinary care, and that the plaintiff fell into that hole and received the injuries of which she complains, then the law is for the plaintiff, and you should so find, unless you shall believe from the evidence that at the time the plaintiff fell into the hole she was negligent, and by reason of her negligence helped to cause or bring about the injury of which she complains, when, but for such negligence, if any there was, she would not have been injured."—Approved: City of Louisville v. Romer (Ky.), 97 S. W. 348 (not reported in state reports).

(b) "If the jury shall find from the evidence that the city did not create or cause the opening in the sidewalk, nor authorize the same to be done, then the city would be liable, if at all, only for negligently permitting the same to exist in a dangerous condition on the public streets. It is not negligence per se for the city to allow a covered hole upon its sidewalk. It is for the jury to determine whether or not the character of the place was such that injuries to travelers thereon might reasonably be anticipated, and whether or not the city was negligent in allowing and permitting the same to exist, and in arriving at a conclusion upon this question the jury should take into consideration the nature and character of the place, its size, location, and the character and sufficiency of the covering. The burden is on the plaintiff to show either that the covered hole was originally dangerous—that is, when it was first covered—and that injuries to the public might be reasonably anticipated by the city authorities, or that it had thereafter become so long enough before the accident for the authorities to have known it so as to impose upon them the obligation to put it in a proper condition."—Approved: Revis v. City of Raleigh, 150 N. C. 348, 63 S. E. 1049.

§ 4622. Where Construction Leaves Street Unsafe Travelers Must be Warned.

"The duty ordinarily resting upon the city to keep its streets in reasonably safe condition for public travel does not exist during the time occupied in making public improvements or repairs in or upon such streets, and such city is relieved from liability from such conditions as are reasonably necessary for the purpose of performing the work, and for the time reasonably required for its performance, and, while such improvements are in progress in or upon the streets of a city, the city must exercise reasonable care to protect those properly and lawfully upon such streets from the consequences of any unsafe condition that may exist."—Approved: South Omaha v. Burke, 3 Neb. Unoff. 314, 94 N. W. 528.

§ 4623. And Natural Causes that May So Render it Must be Guarded Against.

"If the city of Detroit left the street at 6 o'clock in the evening in a condition that was proper and fit to be traveled over by horses, bicycles, wagons, and such, at that time, it does not necessarily follow that it was left in a reasonably safe condition. Something more, in my opinion, is required of the city. The city is required to leave that street in such condition that it will remain in the condition in which it was put; that is, if it was put in a condition at 6 o'clock reasonably safe and fit for public travel at that time, then the further duty falls upon the city to consider what the elements are, and to consider what is likely to occur during the night; and they are required by law, in my opinion, to put it in such a condition that it will stand or withstand the elements or conditions that might reasonably and ordinarily be expected at that season of the year. So, gentlemen of the jury, the principal fact in this case left for you to determine is, did the city leave that street in a condition in which it would be expected it would remain in a condition that was reasonably safe? Did they do all that prudence and foresight would demand of them? In other words, if the rain and storms that might be expected, if you believe that they might be expected at that time of the year, would put that street out of repair and render it dangerous, then, gentlemen of the jury, in my opinion, negligence would be chargeable against the city; but if you find that a storm of unusual severity, or a storm that might not be expected under ordinary circumstances and conditions at that time of the year, came up, then it is something human foresight cannot see or prevent, and that would be an extraordinary visitation of the elements, and the city of Detroit would not be, in such a case, chargeable with negligence."—Approved: Beattie v. City of Detroit, 137 Mich. 319, 100 N. W. 574.

§ 4624. Secus as to Unusual Occurrences.

"The county officers are not required under the law to anticipate unforeseen or unusual occurrences, such as an unusual flood or freshet, and such occurrences in the law are considered to be the acts of God, which county officers are not required to guard against. So the first thing for you to determine in this case is whether or not this washout that occurred in the street was one which ordinary prudence would have anticipated and guarded against. If ordinary human prudence and caution would not have anticipated and guarded against it, then it was not negligence on the part of the county that the washout really occurred. Under these circumstances, it would be considered an act of God, so that for the washout itself the county would not be responsible. If, however, it was such an occurrence that human prudence would ordinarily foresee and ordinarily in the exercise of reasonable care would anticipate and guard against, then it would not come under the class of occurrences known as the act of God, and it would be negligence on the part of the county not to have guarded against it or prevented it."—Approved: Neel v. King County, 53 Wash. 490, 102 Pac. 396.

§ 4625. Rubbish or Exavation Calculated to Frighten Horse Should be Removed or Filled Up.

(a) "If the jury believe from the evidence that at the time the plaintiff received the injuries for which she sues there was a pile of rubbish, consisting of scraps of tin, an old bath tub, an old oil can, or other thing of like character, on one of the streets of Nicholasville, and that the defendant's officers either knew, or could by the exercise of such diligence as persons of ordinary diligence usually exercise have discovered that such a pile of rubbish was on the street, and that the defendant's officers after having such knowledge, or after they could have acquired such information by the exercise of the degree of diligence stated above, could by the exercise of the same degree of diligence have removed said pile of rubbish before the plaintiff was injured, and if the jury further believe from the evidence that said pile of rubbish was such an object as was reasonably calculated to frighten a horse of ordinary gentleness when driven near same by persons traveling along the street, and if they further believe from the evidence that the plaintiff's horse was a horse of ordinary gentleness, and that, while being driven along the street, it became frightened at said pile of rubbish, and because of such fright thus caused, ran away with plaintiff, and threw her from the buggy, breaking one of her arms, a rib, fracturing the bone in one of her legs, or that she was otherwise cut or bruised, or received some of said injuries, the jury should, unless they believe as stated in the instruction, find for the plaintiff, and fix her damages at such a sum as they believe from the evidence will fairly and reasonably compensate the plaintiff for the pain and suffering endured, the loss of time, if any, and the permanent impairment, if any, of her ability to labor, not exceeding in all the sum of $5,000, the amount claimed by the plaintiff in her petition."—Approved: Board of Councilmen of Town of Nicholasville v. Fain (Ky.), 99 S. W. 275 (not reported in state reports).

(b) "I instruct you further, gentlemen, that if you believe that there was a hole in the bridge, and that the defendant knew or ought to have known it was there, as I have instructed you, but that the horse did not step into the hole, but instead shied at the hole, and backed away, cramping the buggy, thus throwing the plaintiff out, and she was using due care and caution to prevent injury to herself, then the defendant would be liable if plaintiff was injured; provided, however, you further find that the hole in the bridge was such as was calculated to cause an ordinary horse to shy and become frightened. And it is for you to determine whether the hole in the bridge, if there was one there, was such an object as was calculated to cause horses generally to shy and become frightened."—Approved: Benson v. City of Spokane, 39 Wash. 101, 80 Pac. 1106.

§ 4626. If Permission is Given to Obstruct Street City Must See it is Properly Guarded.

"When the city issues a building permit to use and obstruct a street, it is the duty of the corporate authorities to see to it that the persons whom she authorizes to use her streets shall properly guard and pro-

tect such obstructions; and, if she negligently fails to perform this duty, she is responsible to one who is injured *by means of such obstructions*, while properly using such streets and who is at the time exercising due care."—Approved: Indianapolis v. Doherty, 71 Ind. 5, 6.

(b) "The city of San Antonio has no power to delegate the exclusive use of its public streets or plazas or any part of them to any person, firm, or corporation. If, therefore, you find from the evidence that the city of San Antonio permitted or delegated to the San Antonio Spring Carnival Association exclusive use or control of that part of Main Plaza where plaintiff claims to have been injured, and that the said association placed or permitted to be placed an iron pin or peg in said plaza, and (if same was so placed) that same was protruding above the surface of said plaza, and you further find that the city of San Antonio, through some of its officers or agents, having charge of such matters, knew that said pin or peg, if any, had been so left and was protruding (if you so find) above the surface of said plaza, or that said pin or peg had remained at said point, and in said condition for such length of time prior to plaintiff's injury that the said city, through its officers or agents having charge of such matters, should and would by the exercise of ordinary care and diligence have known of such protrusion and condition of said pin or peg (if it was so), and if you further find from the evidence that plaintiff, while in the exercise of ordinary care for his own safety (if you find he was exercising ordinary care), while moving over and along said plaza, tripped or fell over said pin or peg, and was injured as claimed in his petition (if he did so fall), and if you further find that it was negligence on part of defendant city to have permitted said peg or pin to have been in such condition at said time and place (if it was so), and that such negligence, if any, was the direct cause of plaintiff's injury, if any, then you must return a verdict in favor of plaintiff and against the defendant, City of San Antonio."—Approved: City of San Antonio v. Ashton (Tex. Civ. App.), 135 S. W. 757.

§ 4627. Curbs and Gutters to be in Reasonably Safe Condition.

"If the jury believe that the curb and gutter at the time and place complained of was in a reasonably safe condition for the use of persons exercising ordinary care and prudence, they should find for the defendant city."—Approved: City of Covington v. Whitney (Ky.), 99 S. W. 337 (not reported in state reports).

§ 4628. Notice of Defect or Time Within Which Notice is to be Presumed, Necessary for Liability.

(a) "The court instructs the jury that, before they are authorized to find for plaintiff, they must believe from the evidence that the plank walk where plaintiff claims to have been hurt was unsafe for public travel over it, and that defendant through its officers whose duty it was to look after the condition of the defendant's streets, and to have them repaired and made reasonably safe, when not so, had notice or knowledge of the defect or unsound condition of said walk which caused plaintiff's injury, or could by the exercise of ordinary care or diligence

have had such notice, and that a reasonable time had elapsed in which defendant could have repaired said place in said walk after such notice was received, or would have been if ordinary care or diligence had been exercised by defendant's officers before plaintiff was injured, and, unless they so believe, they will find for defendant."—Approved: City of Brownsville v. Arbuckle (Ky.), 99 S. W. 239 (not reported in state reports).

(b) "If the jury believe from the evidence that the plaintiff, while exercising reasonable care and caution to avoid injury, was injured by reason of the defective construction or unsafe condition of the sidewalk in question, and if they further believe from the evidence that the authorities of the town of Norman knew of the defective condition of said sidewalk, or if in the exercise of reasonable care in the management, control, and supervision of its streets and sidewalks the said authorities should have known of its condition; that is, if its unsafe condition had existed for so long a time prior to the accident that the town authorities, in the exercise of proper care in inspecting sidewalks, would have known it in time to have repaired the same,—then the town of Norman is liable, and your verdict should be for the plaintiff."—Approved: Town of Norman v. Teel, 12 Okl. 69, 69 Pac. 791.

(c) "The court instructs the jury that if the plaintiff fails to show notice to the city of Denver, either actual or constructive, of the defective condition of said sidewalk at the point where the accident occurred, for such time prior to the accident as to have enabled said defendant to have repaired the defect, your verdict should be for the defendant."—Approved: City and County of Denver v. Magivney, 44 Colo. 157, 96 Pac. 1002.

(d) "The court instructs the jury that if they believe from the evidence that the plank walk on what is known as Main street, in the town of Brownsville, Ky., at the time and place plaintiff claims to have been injured by falling through said walk, that said walk was not then in a reasonably safe condition and repair for the use of the public travel over said walk, and that plaintiff was injured by reason or on account of such unsafe condition of said walk, and that defendant through its officers whose duty it was to look after defendant's streets and the sidewalks upon the same, and have them kept in a reasonably safe condition for public travel, had notice or knowledge of such unsafe condition of said sidewalk, or could or would have had such notice or knowledge by the use of ordinary diligence or care on the part of such officer or officers, and that defendant had reasonable time after such notice or knowledge of such unsafe condition of said sidewalk to repair it and put it in a reasonably safe condition, and failed to do so, they will find for plaintiff such compensatory damages as will compensate her for the physical pain or the mental anguish or sufferings sustained by reason of the injury, and for the reasonable amount of doctor bills incurred by plaintiff in the treatment of her injury, and for any impairment of her power to earn money, all together not to exceed $5,000 in damages."—Approved: City of Brownsville v. Arbuckle (Ky.), 99 S. W. 239 (not reported in state reports).

§ 4629. Notice is Presumed When Sufficient Time Has Elapsed for a Defect to Have Been by Ordinary Care Discovered.

(a) "The court instructs you that it is the duty of a city in this state to use reasonable care to keep its walks and streets in a reasonably safe condition for public travel by those who are in the exercise of ordinary care for their own safety; that where a walk or a public street remains in an unsafe condition for a considerable time, and such a length of time that the city authorities, in the exercise of ordinary care and diligence, should have discovered such condition and remedied it, then notice to the city of such defective or unsafe condition of such walk or street is presumed."—Approved: Graham v. City of Rockford, 238 Ill. 214, 87 N. E. 361.

(b) "You are instructed that it is not necessary that the defendant city should have had actual notice of the unsafe and dangerous condition of the sidewalk (if you find that the said walk was unsafe), if you find that such condition of said sidewalk existed a sufficient length of time before the injury to have enabled the defendant city or its officers and agents, by the exercise of ordinary care and diligence, to have known of the existence thereof, and remedied the same then the law implies a notice to the defendant city of the existence of the condition. If the city authorities, knowing that a sidewalk or crossing is defective or unsafe, or after having had sufficient time in the exercise of reasonable diligence and ordinary care to discover and repair any defect in the sidewalk, suffers it to remain in an unsafe condition, and if any person while lawfully and in the exercise of ordinary care and prudence passing over such sidewalk or crossing in such unsafe condition becomes injured by reason of such defect in the crossing, the city becomes liable in damages to the party injured."—Approved: Robison v. White City, 77 Kan. 293, 94 Pac. 141.

(c) "It was the duty of the defendant city to keep and maintain its streets and sidewalks in good order and repair, for the safe use and convenience of the traveling public, walking and passing thereon; and if the city authorities, knowing that a sidewalk is defective and unsafe, or after having had sufficient time, in the exercise of reasonable diligence or ordinary care, to discover and repair the defect or break in the walk, suffer it to remain in an unsafe condition, and if any person, while lawfully and in the exercise of ordinary care passing over the sidewalk in such unsafe condition, becomes injured by reason of any defect in the walk, the city becomes liable for the damages sustained at the time of the accident. * * * There can be no liability of the city at all, unless there was neglect of duty on the part of its officers; and there can be no neglect of duty unless they knew the sidewalk was broken, or with reasonable diligence could have known it, long enough to have enabled them to have repaired it before the accident occurred."—Approved: Sheel and Wife v. City of Appleton, 49 Wis. 125, 5 N. W. 27.

(d) "The defendant city is liable only for such unsafe condition of its streets as it had actual notice of, or ought to have known of by exercising what would be, under all the circumstances, ordinary and reasonable caution and diligence. If, therefore, the preponderance of the evidence fails to show that the defendant knew or ought to have known

of the unsafe condition of said box, if you find it was unsafe, then your verdict should be for the defendant."—Approved: City of South Omaha v. Meyers, 3 Neb. Unoff. 699, 92 N. W. 743.

(e) "But if you should find that the street commissioner did not have actual knowledge of the existence of this obstruction, then I instruct you that the law is that, if the incline was in existence for such a length of time that the city authorities, by the exercise of ordinary vigilance, would have discovered it in time to prevent the accident, the city cannot escape liability for want of notice. Under such circumstances the law imputes notice. Failure to discover a dangerous defect in a public street within a reasonable time is itself negligence."—Approved: Cowie v. City of Seattle, 22 Wash. 659, 62 Pac. 121.

§ 4630. There Must Also Have Elapsed After Notice Reasonable Time to Repair.

(a) "A city is not an insurer against accidents upon its streets, and, in order to hold it liable for defects therein, it must be shown that the city had actual or constructive notice of the defect which caused the accident, and had reasonable time to repair it or guard against any accident that might reasonably be expected to result therefrom after having such notice, and that by constructive notice is meant that the defect by which the injury is alleged to have been caused had been so open and notorious and continued for such a length of time before the injury that the city, by its proper officers, exercising reasonable diligence, should have acquired knowledge of such defect."—Approved: City of Portsmouth v. Houseman, 109 Va. 554, 65 S. E. 11.

(b) "If you believe from a preponderance of the evidence that the meter box referred to in the testimony was rotten and out of repair, and that it was, by reason of such unsafe condition, an unsafe and dangerous place in said street, and rendered it dangerous to use said street and walk immediately adjacent thereto, and if you further find that plaintiff, without fault on her part, fell into said meter box, then you will return a verdict for her, provided you further find that the defendant city knew, or by the exercise of ordinary care ought to have known, of said condition of said box long enough before said accident to have put it in good repair."—Approved: City of South Omaha v. Meyers, 3 Neb. Unoff. 699, 92 N. W. 743.

§ 4631. Notice not to be Presumed Unless Defect is Open and Long Standing.

(a) "In relation to the condition of the sidewalk, notice to the proper officers of the city of its being out of repair cannot be inferred or presumed, unless the defect was so open and notorious, of long standing, and of such a character as would naturally arrest the attention of the passer-by, and the burden of proof to establish these facts is upon the plaintiff."—Approved: McGrail v. City of Kalamazoo, 94 Mich. 52, 53 N W. 955.

(b) "If the jury find from the evidence that the sidewalk inspector went over that walk a fortnight before the accident, and tested the plank at the ends, and found the walk secure at that time, or, finding

defects, remedied them, so that the walk was left in a condition reasonably safe for public travel, then the city would not be responsible or negligent as to loose planks which had been in the walk before; and, if any defect developed in the walk after that, it must have been of such a character as would naturally have arrested the attention of the 'passers-by' in order to have charged the city with such constructive notice as would make it liable, and after such defect was noticeable the city must have had a reasonable time to repair it, and if the defect was not of such a character you will find for the defendant."—Approved: McGrail v. City of Kalamazoo, 94 Mich. 52, 53 N. W. 955.

(c) "If the sidewalk was properly constructed, and afterwards became out of repair, then defendant would not be liable, unless you find that it had notice of such defect. But actual notice need not be proven in all cases. It may be inferred from the notoriety of the defect or danger from its continuance for such a length of time as to lead to the presumption that the proper officers did in fact know, or with proper diligence might have known, the same."—Approved: Montgomery v. City of Des Moines, 55 Iowa, 101, 7 N. W. 421.

§ 4632. Or Reasonable Care Should Have Discovered it.

(a) "The court has permitted evidence to go to you tending to show that the walk within a short distance from the place where it is claimed the accident happened was out of repair; that is, that boards were loose at other places in the same block. You are especially instructed that this testimony should be considered by you, as against the city, only for the purpose of tending to show, if it does (and that is for you to say), whether or not the city authorities should have had knowledge or notice of the condition of the walk or plank where the accident is claimed to have happened, by the exercise of reasonable care."—Approved: Bailey v. City of Centerville, 108 Iowa, 20, 78 N. W. 831.

(b) "If you find from the evidence that the plaintiff did meet with the accident complained of, and that the sidewalk was out of repair and defective, but that the city authorities had no knowledge of such defective or dangerous condition, then she is not entitled to recover; but if you further find that such defective condition of the sidewalk had existed for such a length of time as that, by the exercise of ordinary care and diligence, the city would have known of the same, or that the sidewalk inspector employed by the city was actually informed of said defective condition prior to the time of the alleged accident, then it would be your duty to find that the city had notice of the defective condition of the sidewalk."—Approved: City of Guthrie v. Finch, 13 Okl. 496, 75 Pac. 288.

§ 4633. It is for the Jury to Draw or not the Necessary Inference as to Notice.

"The notice required in the proviso may be actual notice to the street commissioner, or by personal knowledge of such officer, or by the existence of the defects complained of being of such long standing that it might and ought to have been known, and that the want of knowledge may, under given circumstances, imply want of due care; and, in the absence of proof of actual knowledge, you will determine from all the

evidence in the case whether the walk, at the place the plaintiff claims she was injured, had been, prior to that time, out of reasonable repair, and not in a reasonably safe and fit condition for public travel, and whether it had continued for such length of time prior to the accident that the want of knowledge may, under the circumstances of this case, imply want of due care on the part of the village in keeping the sidewalk in repair. If you so find, in view of all the evidence in the case, and the inferences naturally to be deduced from such evidence, you can find for the plaintiff, in the language of the statute, 'such just damages as will compensate her for the injury sustained.' "—Alberts v. Village of Vernon, 96 Mich. 549, 55 N. W. 1022.

§ 4634. And this by the Greater Weight of the Evidence.

(a) "The burden is upon the plaintiff to satisfy the minds of the jury by the greater weight of the evidence that the proper officers of the city knew, or by ordinary diligence might have discovered, the defect or dangerous obstruction, and also that the character of the same was such that injuries to persons using the sidewalk, in the exercise of ordinary care and watchfulness, might have been anticipated."—Approved: Revis v. City of Raleigh, 150 N. C. 348, 63 S. E. 1049.

(b) "In this case there was evidently notice of this defect to the street commissioner, if defect it was; and if you find from the evidence that this defect in this sidewalk was open, notorious, and dangerous, and if you find that it existed for a space of time from the 20th of December to the 31st day of January, a period of fifty days, then you may presume, and it will be presumed, that the city had notice of that defect. The length of time the defect has existed, the travel upon that street, and the injury to other persons all determine this question; and you may proceed upon the presumption that the city had notice of this defect, if you find it had been in that condition for the length of time which I have mentioned."—Approved: Dory v. City of Duluth, 103 Minn. 154, 114 N. W. 465.

§ 4635. Notice Inferred is Equivalent to Actual Notice.

(a) "The court instructs the jury that when an excavation has been made in the streets or sidewalks of a city, with or without the consent of the public, and it is left unguarded and unprotected for such a length of time that the public authorities of the city, in the exercise of reasonable care and prudence, ought to have discovered the fact, then actual notice to such authorities of the condition of the street and sidewalk is not necessary to hold the city liable for injury sustained by a person in consequence of the dangerous condition of the street or sidewalk, if he is himself using reasonable or ordinary care to avoid such injury, and does not by his own negligence directly contribute to produce the injury complained of."—Approved: City of Lincoln v. Walker, 18 Neb. 250, 25 N. W. 66.

(b) "Negligence is the gist of this action, and the burden of proving the negligence on the part of the defendant city, as alleged in plaintiff's petition, is upon the plaintiff, and before he would be entitled to recover in this action he must prove the negligence so alleged in his peti-

tion on the part of said defendant by a fair preponderance of the evidence, and in this case, if you find from the evidence that the said scuttle hole in controversy was constructed in such manner as was considered exercising ordinary reason and prudence, ordinarily safe to persons passing along and over the same using ordinary care and diligence, or that said scuttle hole became out of repair and unsafe and defective and that said defendant city through its authorities had no knowledge of the same, and that such defective condition had not existed a sufficient length of time or that said defective condition existed in such manner that by the exercise of ordinary care and diligence the said defendant city could not have known it, then and in that event said defendant city would not be liable, and your verdict should be accordingly."—Approved: City of Omaha v. Kochem, 74 Neb. 718, 105 N. W. 182.

§ 4636. That a Defect is Notorious May be Considered by the Jury.

"If you find from the evidence that the defendant was not negligent in the original construction of said bridge, then the defendant would not be liable for any injuries caused by the same becoming out of repair and defective, unless the defendant had notice thereof or knowledge thereof through the members of the board of supervisors, or unless the defect was so notorious that the defendant was negligent in not knowing it, or unless the bridge had been built so long that in the exercise of ordinary care and prudence the defendant ought to have known that it would, in such time, become rotten and dangerous."—Approved: Ferguson v. Davis County, 57 Iowa, 601, 10 N. W. 906.

§ 4637. And the Frequency of Travel Where it Existed.

"You are instructed that, before the plaintiff can recover, he must show by a preponderance of the evidence that he was injured by a defective and dangerous sidewalk, as alleged in his petition, and that the said defective and dangerous sidewalk was caused by the negligence of the defendant, as you are hereinafter instructed, and you must further find that the city of Cleburne had notice of such defective and dangerous condition of its said sidewalk in one of the following ways: (1) That said city of Cleburne dug and constructed the said ditch and put in and allowed to exist in the condition it was in at the time of the alleged injury; or (2) that the said city had actual notice of such defects and dangerous condition of the said sidewalk in time to have repaired the same by the exercise of ordinary care and diligence; or (3) if you believe from the evidence that the city did not construct and dig said ditch, and did not have the actual notice of the condition of said sidewalk, but you further believe that the said sidewalk was dangerous at the time of the alleged injury, and that it had existed for such length of time, considering the notoriety and the frequency of the travel over said sidewalk at that particular place, and that by the exercise of ordinary care and diligence the defendant could have discovered said defect in time to have repaired the same before the alleged injury."—Approved: City of Cleburne v. Elder, 46 Tex. Civ. App. 399, 102 S. W. 464.

§ 4638. Right of Traveler to Presume Safety of Street.

(a) "The jury are instructed, as a matter of law, that any person traveling upon a sidewalk of a municipal town or city which is in constant use by the public has a right, when using the same with reasonable diligence and care, to presume, and to act upon the presumption, that it is reasonably safe for ordinary travel throughout its entire width, and free from all dangerous holes, obstructions, or other defects."—Approved: Town of Norman v. Teel, 12 Okl. 69, 69 Pac. 791.

(b) "The court instructs the jury that it was the duty of the city of Richmond to keep the sidewalk in question in a reasonably safe condition for pedestrians throughout its entire width, but reasonably safe condition does not mean an absolutely safe condition, nor does it mean that the entire sidewalk shall be smooth and even for its entire width, nor that it shall be entirely free from obstructions, but only that it shall be in a reasonably safe condition its entire width, and that the plaintiff had a right to assume that the street in question was in a reasonably safe condition, and she was not required to keep her eyes on the pavement at every moment, but only to exercise such reasonable care in looking as a person of ordinary care would exercise in using the sidewalk of a city street. The measure of the plaintiff's duty in the premises was to use such care as a reasonably prudent person of her age and experience would ordinarily exercise under the circumstances."—Approved: City of Richmond v. Pemberton, 108 Va. 220, 61 S. E. 787.

§ 4639. But if He Knows of Defect He Must Govern Himself Accordingly.

(a) "He (the plaintiff) was bound to use ordinary care; that is, such care as the great mass of ordinarily prudent persons of his age would have exercised in riding along the highway under the like circumstances; more than this degree of care he was not bound to use. A traveler upon a highway is not bound to use the high degree of care that extremely cautious men use, who constantly fix their eyes ahead of them. Unless the traveler knows of a defect in the traveled track, he has the right to presume that it is reasonably safe; and, if the highway be along a level tract of country, he has the right to ride or drive at a pace such as the mass of ordinarily prudent persons would adopt as a safe pace, at the same place, or under like circumstances. If a traveler knows of a defect in the highway over which he is traveling, he is bound to use the same care in traveling over it that the ordinarily prudent man, having the like knowledge, would do in traveling upon it."—Approved: Wall v. Town of Highland, 72 Wis. 435, 39 N. W. 560.

(b) "If you find from the evidence that the bridge in question was in an unsafe condition, and if you further find that the deceased, John N—, knew of such unsafe condition, or had reason to know that the stringers on said bridge were cracked or broken by a previous strain, then you are instructed that the deceased would be negligent in not examining said bridge before he drove upon it."—Approved: Seyfer v. Otoe County, 66 Neb. 566, 92 N. W. 756.

(c) "Ordinary and reasonable care required of plaintiff is that degree of care which might reasonably be expected from an ordinarily

prudent person under the circumstances surrounding him at the time. If you should find from the evidence that, at the time, and prior thereto, plaintiff knew of the defective and dangerous sidewalk, and where it was located, he was required to use more care than if he had not such knowledge; and, if he neglected to do so, and such neglect contributed to the injury, he cannot recover; but if he did use more than he would be required to do in case he had no such knowledge, and was injured by reason of defendant's neglect, and no fault of plaintiff contributed to the injury, you should find for the plaintiff."—Approved: City of Lincoln v. Holmes, 20 Neb. 39, 28 N. W. 851.

§ 4640. And what is Readily to be Seen he Ought to See.

(a) "If under all the circumstances surrounding him (plaintiff) he could readily have seen, and as an ordinarily prudent and careful man ought to have seen, the wire over which he claims to have fallen, then he was guilty of contributory negligence, and he can recover nothing in this case."—Approved: Buchholtz v. Incorporated Town of Radcliffe, 129 Iowa, 27, 105 N. W. 336.

(b) "You are instructed that the only care and caution required by Mrs. B—, the plaintiff, in using the crossing in controversy, was such conduct and care and caution for her own personal safety as a reasonably prudent and cautious person would have exercised under the same condition and circumstances."—Approved: Town of Normal v. Bright, 223 Ill. 99, 79 N. E. 90.

(c) "The court instructs the jury that it is not the duty of the city to keep its streets or sidewalks in perfect order, or in such condition as to insure absolute safety to those who walk over them, and that the degree of care which is required of persons walking on the sidewalks depends to some extent upon the conditions of the weather at the time; and if you believe from the evidence that, at the time of the alleged accident in this case, water from melting snow was running upon the sidewalks, and that such condition was known to the plaintiff, or was so plainly evident that she must have seen it if she had been using ordinary care, then such condition of affairs imposes upon the plaintiff an increased degree of care, and, unless you believe from the evidence that she was exercising such care, your verdict should be for the defendant."—Approved: City of Denver v. Hubbard, 29 Colo. 529, 69 Pac. 508.

(d) "It is incumbent upon the people who are crossing the streets and sidewalks of South Omaha to use ordinary care to protect themselves from injury and accident liable to occur because of streets or sidewalks being unsafe for public use, and, if they fail to do so, they will be guilty of contributory negligence, which will prevent a recovery of damages. If you find from a preponderance of the evidence that the plaintiff did not exercise ordinary and reasonable care in stepping on said meter box, or the ground next to it, as you may find the fact to be, then your verdict must be for the defendant, even though you further find that the defendant was negligent."—Approved: City of South Omaha v. Meyers, 3 Neb. Unoff. 699, 92 N. W. 743.

(e) "Although a foot passenger on the sidewalk is not required to keep his eyes constantly on the walk before him, yet he must observe his general course on the street; and if he meets with an accident which could have been avoided by the exercise of ordinary care and prudence in observing his general course, he is guilty of contributory negligence." —Approved: Le Beau v. Telephone & Telegraph Const. Co., 109 Mich. 302, 67 N. W. 339.

§ 4641. Traveler Voluntarily Choosing Unsafe Way.

(a) "If you find from the evidence that the plaintiff, at the time that she passed over the walk, knew that the walk was unsafe, and that it was imprudent to do so at that time in consequence of the darkness or for any other cause, and with this knowledge she still persisted in passing over it, though there was another walk which she might have taken in going the direction which she desired to go, then her own negligence contributed to the injury, and she cannot recover."—Approved: Parkhill v. Town of Brighton, 61 Iowa, 103, 15 N. W. 853

(b) "Upon this branch of the case, you are further instructed that, if you find, from the evidence, that the defendant was negligent in permitting the sidewalk to remain in the condition in which you find it was at the time the plaintiff fell, and that said walk was at said time in a dangerous and unsafe condition for travel, and you further find, from the evidence, that the plaintiff, at the time he attempted to pass over the walk, well knew this fact, and that it was imprudent for him to attempt to pass over it at the time he did attempt to pass over it for any reason, and with this knowledge he still persisted in passing over it, although there was another walk which he might have taken in going in the direction which he desired to go, then his own negligence contributed to his injury, and he cannot recover. That is, if you find, from the evidence, that the plaintiff knew, at the time he attempted to pass over the walk, of the negligence of the defendant, and that the walk was in a dangerous and unsafe condition, and that it was imprudent for him to attempt to pass over it in company with B—, as the evidence shows he did attempt to pass over it, and yet, notwithstanding this fact, and the knowledge he had concerning the danger, he did attempt to pass over it, and was injured in so doing, and you find that there was another walk which he might have taken in going in the direction he desired to go, which was perfectly safe for travel, then he was negligent in so attempting to pass over such walk and cannot recover."—Approved: Barnes v. Town of Marcus, 96 Iowa, 675, 65 N. W. 984.

(c) "You may take into consideration the knowledge of the plaintiff as to the place where she was injured. If she had knowledge of the condition of the alley at the time and place of her injury, and went voluntarily into what she knew to be a dangerous place when it was so dark she could not see where she was going, she was guilty of such contributory negligence as would prevent a recovery of damages, and your verdict must be for the defendant."—Approved: Stock v. City of Tacoma, 53 Wash. 226, 101 Pac. 830.

(d) "The court instructs the jury that, although they may believe that defendant was negligent and failed to have the sidewalk upon its street where plaintiff was injured in a reasonably safe condition for the public travel, yet if they further believe from the evidence that plaintiff would not have been injured or hurt but for her own negligence, and that her injury, if any, upon said walk, was proximately caused by plaintiff's want of ordinary care for her own safety in passing over said walk, they will find for defendant."—Approved: City of Brownsville v. Arbuckle (Ky.), 99 S. W. 239 (not reported in state reports).

§ 4642. But Traveling Over a Known Defective Walk is not Necessarily Negligence.

(a) "You are to consider all the facts, including the condition of the sidewalk, the facts which were within the knowledge of the plaintiff in relation thereto, the character and nature of the defect in the walk which was the direct cause of the injury, the fact that the plaintiff was passing over the walk on a bicycle, and the manner in which he sought to pass, and then determine whether, under all the circumstances, he was in the exercise of such care and prudence as would have been used and exercised by a man of ordinary care and prudence under the same circumstances and conditions. I charge you, gentlemen of the jury, that prior knowledge of a defect in a sidewalk by one who is injured is not necessarily proof of contributory negligence; and if you believe from the evidence in this case that the plaintiff had knowledge that the sidewalk was out of repair, and even dangerous, yet because of that fact alone he would not, therefore, be bound to forego travel on such sidewalk. The real fact for you to ascertain as bearing upon the question of contributory negligence, if any you so find, is this: Did the plaintiff, by his own fault or negligence, contribute directly to produce the injury? Could he, by ordinary prudence, have prevented the injury? And if you find that he was guilty of contributory negligence, then he cannot recover, and your verdict must be for the defendant."—Approved: Gagnier v. City of Fargo, 12 N. D. 219, 96 N. W. 841.

(b) "In relation to this question of contributory negligence, you should consider the rapidity with which the testimony shows the plaintiff to have been walking, whether the night was dark or moonlight, and these things you will have to determine from the testimony. If you determine that there was sufficient light for the plaintiff to have seen the alleged defect by using his sense of sight, you have a right to say that his failure to do so is contributory negligence. You may consider whether or not the plaintiff is guilty of contributory negligence because he did not pass around the alleged defective sidewalk instead of approaching near to it or attempting to pass over it. The knowledge of the alleged defects which the testimony shows he possessed placed upon him the duty to exercise such ordinary care, to act himself carefully and prudently in view of the recognized danger, and to use such reasonable care and caution as a prudent man would ordinarily exercise in view of such fact, and in view of all the circumstances that surround

the plaintiff at the time and place of the alleged injury, taking his knowledge of the condition of the place in question into consideration." —Approved: Belyea v. City of Port Huron, 136 Mich. 504, 99 N. W. 740.

§ 4643. City Should Close or Barricade Dangerous Sidewalk.

"If the sidewalk in question was defective and in a dangerous condition for use in public travel, and the defendant knew of such defect, or in the exercise of ordinary care should have known of such condition, it was the duty of the defendant to barricade or otherwise close said sidewalk to public travel until it had placed the same in reasonably safe condition for the same. So long as the sidewalk remained open to the public, there was an implied invitation to the said Sarah L. S— to use the same, and she had the right, in the absence of knowledge or information that the sidewalk was defective at the place where the plaintiff alleges that she sustained her injuries, to assume that the defendant city had exercised ordinary care in keeping the same in reasonably safe condition."—Approved: Scurlock v. City of Boone (Iowa), 121 N. W. 369.

(b) "The court instructs the jury that while the city has a right to permit lot-owners, for the purpose of making improvements, to make excavations or holes in the public street or sidewalk, yet when it does so it is bound to take notice of the character of such holes or excavations, and the condition in which the streets or sidewalks are left, and if such excavations are dangerous it is the duty of the city to put up, or cause to be put up, and use reasonable care to keep up, guards or notices of some kind by day, and lights or guards by night, to warn travelers of the condition of the street or sidewalk at such place, and such duty cannot be shifted upon the lot-owner or person making the excavation."—Approved: City of Lincoln v. Walker, 18 Neb. 250, 25 N. W. 66.

(c) "You are instructed: (1) That this action is predicated upon the negligence alleged against the city, and unless you find from the evidence that there was some negligence of the city, or if its officers or agents, by or in consequence of which deceased received the injuries which occasioned his death, the plaintiff cannot recover. (2) If you find from the evidence that there was a traveled way ordinarily used by the public for a considerable time before the accident, over the grounds adjoining Twenty-Seventh street, and leading into that street, and which had been used generally by persons having occasion to go from one part of the city to another, or from Twenty-Sixth to Twenty-Seventh street on foot, so that it became known as a common way for travel for foot-passengers; and if you further find that it was necessary for the city, in the exercise of a reasonable and proper care when Twenty-Seventh street was excavated, to provide a barrier or railing at the termination of such traveled way or path, for the purpose of protecting foot-passengers traversing such way or path from falling into the excavation in the street; and if you find that the city unreasonably omitted to erect such barrier or railing, or to place

such signals as would serve as a warning to persons passing along such traveled way,—then, and in such case, you would be justified in finding that the city was guilty of negligence, and the plaintiff would be entitled to recover the damages suffered by reason of such negligence, provided the deceased himself was not guilty of negligence contributing to his injury. (3) If you find from the evidence that the city of South Omaha permitted Twenty-Seventh street to be excavated to such a depth as to render it dangerous to persons passing along other highways or streets in said city, and that the deceased was lawfully passing along Twenty-Sixth street in said city, and that the place where the accident occurred on Twenty-Seventh street was in such close proximity to Twenty-Sixth street, over which deceased was passing, as to render it dangerous to persons passing along said street, and that there was nothing to indicate where the line of Twenty-Sixth street was, and if you further find that there were no barriers or signals to warn persons lawfully passing along such street of the existence of such danger, and that the deceased, in the exercise of due and ordinary care, fell into such excavation on Twenty-Seventh street, and thereby received injuries which resulted in his death, then you would be justified in finding that the defendant was guilty of negligence."—Approved: City of South Omaha v. Cunningham, 31 Neb. 316, 47 N. W. 930.

§ 4644. City Permitting Obstructions in Street.

(a) "The court instructs the jury that if they believe from the evidence that the projecting stone rendered the sidewalk in question not reasonably safe and secure for pedestrians passing around the corner of Twenty-Fifth and O streets, and that by reason thereof the plaintiff while turning said corner, and in the exercise of ordinary care on her part, fell over said stone and was injured, then they should find for the plaintiff."—Approved: City of Richmond v. Pemberton, 108 Va. 220, 61 S. E. 787.

(b) "If the jury believe from all the evidence that at the time and place in the proof described, a number of boards or timbers were upon the sidewalk, curbing or gutter, on the west side of Main street south of Eighth street, opposite the bowling alley building of Jos. Y—, and that the city of Covington knew of their presence, or could, by the use of ordinary care and caution have known of the presence, of said boards or timbers a sufficient length of time before the accident to the plaintiff for the city of Covington to have removed same, and failed to do so, and that the defendant and its agents in failing to do so, if they did so fail, were guilty of negligence, and, if they further find that said curbing or gutter, or either, at the time and place described in the proof, was not in a reasonably safe condition for persons to cross over and walk upon and along, and that the plaintiff was using due care and caution at said time and place, and that the plaintiff did not know of the presence of said lumber pile, and could not, by ordinary care, have known of same, and that while the plaintiff was attempting to cross the curbing and gutter for the purpose of taking a street car, as in the proof described, and solely by reason of the unsafe condition of said

curb and gutter, if any, the plaintiff fell over said boards or timbers, causing the injuries in the proof described, they will find a verdict for the plaintiff; otherwise, for the defendant."—Approved: City of Covington v. Whitney (Ky.), 99 S. W. 337 (not reported in state reports).

(c) "You are instructed that it was the duty of the defendant city to exercise ordinary care and prudence to keep its streets in a reasonably safe condition for travel thereon. In the light of the pleadings in this case, and such of the testimony as is undisputed, it appears that, some years prior to the time when plaintiff alleged she sustained the fall in question, the said city, by an ordinance it enacted, authorized the construction of this open cellarway upon a portion of the area of one of its streets upon which persons passing along on foot were accustomed to travel. This cellarway had a guard, or railing, on the side next to the street, and at the south end, but the north end was left open. You are instructed, as a matter of law, that said city, in permitting this cellarway to be constructed on the footway portion of one of its streets, with one end of said cellarway left open, as before explained, was guilty of at least what in law is styled 'ordinary negligence.' And the fact that there may have been a portion of the area of said street, extending from the outer side of said cellarway to the street curbing, that was available for use as a sidewalk, is not, in itself, any defense to this action. The public had the right, in law, to have all of said street kept in a reasonably safe condition for travel thereon."—Approved: City of Chanute v. Higgins, 65 Kan. 680, 70 Pac. 638.

(d) "The court instructs the jury that if you find and believe from the evidence that on February 26, 1898, and for a long time prior thereto, Wyandotte street was a public street within the defendant, Kansas City, and that the sidewalk on the west side of said Wyandotte street and directly in front of No. 1012 Wyandotte street was at all said times a public sidewalk upon said street, and that at all times a coal hole, with the covering and lid thereon, was in said sidewalk, then it became the duty of said defendant, Kansas City, to exercise ordinary care in keeping said sidewalk in front of No. 1012 Wyandotte street in a reasonably safe condition for persons lawfully walking thereon; and if you further find from the evidence that defendant, Kansas City, neglected said duty by allowing the covering and lid on said coal hole to be, on said February 26, 1898, and to remain for a long time prior thereto, in an unsafe and dangerous condition for travel on account of the covering and lid of said coal hole extending above the level of said sidewalk, and if you further find and believe from the evidence that defendant, Kansas City, either knew of said condition of said coal hole, or by the exercise of ordinary care or caution could have known thereof in time to have had reasonable opportunity to have repaired said defect, if any, or had a reasonable opportunity to have caused the same, if any, to have been repaired in time to have prevented the accident to plaintiff hereinafter referred to, but failed and neglected so to do; and if you further find and believe from the evidence that on said 26th day of February, 1898, plaintiff, Stella S—, was walking south on said

sidewalk in front of No. 1012 Wyandotte street, she struck her right foot against or under the said covering of said coal hole, and was thrown to the sidewalk and injured without any negligence on her part contributing thereto,—then you are to find for the plaintiff."—Approved: Smart v. Kansas City, 208 Mo. 162, 105 S. W. 709.

§ 4645. Danger from Overhanging Signs.

"The court instructs the jury that it is the duty of every city of the second class and of the city of ———— to use ordinary care to prevent the construction or maintenance of signs which overhang the sidewalks, unless the same are constructed and suspended with ordinary care and skill, considering the dangers of such structures to the public who travel thereunder upon the sidewalks. A failure of the city to exercise this degree of diligence and care would be such negligence as would make it liable for damages which might result therefrom."—Approved: Gray v. City of Emporia, 43 Kan. 704.

§ 4646. City's Duty is Primary and not Delegable.

(a) "If the village of Bancroft had actual notice of the defective condition of said walk, it could not order it to be repaired by someone else, and pay no further attention to it, but, after having such actual notice, it should see that it was repaired in a reasonable time, and put in a reasonably safe condition for travel in the daytime and in the nighttime."—Approved: Atherton v. Village of Bancroft, 114 Mich. 241, 72 N. W. 208.

(b) "A primary duty to keep the streets and sidewalks in a reasonably safe condition for public travel devolves upon the city, and the defendant city cannot escape its liability for the lack of ordinary care in regard thereto by granting permission to the property owners to place manholes therein for their private use, under an agreement that such property owners must keep such manholes in repair and in safe condition. The city has not power to grant such privileges, and if it did so, and then depended upon the property owners to keep said manhole in a safe condition, and failed to exercise ordinary care in regard thereto, the city cannot escape liability for the reason that they may have depended upon the property owners to keep such manholes in a safe condition."—Approved: Arkansas City v. Payne, 80 Kan. 353, 102 Pac. 781.

(c) "The jury are instructed that even if they believe, from the evidence, that the crossing in question was laid or constructed by a private person in a public street of the town of Normal and was used by the public, yet the town must use reasonable care to keep it in a reasonably safe condition, and the law does not absolve the town from such obligation because the crossing or walk may not have been laid or constructed by the town itself."—Approved: Town of Normal v. Bright, 223 Ill. 99, 79 N. E. 90.

§ 4647. Sidewalks on Unfrequented Streets to be Reasonably Safe.

"The jury are instructed that it is the duty of a town or city to use reasonable care to keep all sidewalks and crossings in its public streets

in reasonably safe condition, even if the crossing or sidewalk is in the suburbs of the town or city, where less used than in the more frequented streets."—Approved: Town of Normal v. Bright, 223 Ill. 99, 79 N. E. 90.

§ 4648. No Presumption of Negligence from Injury.

(a) "The court instructs the jury that the defendant city is not liable as an insurer of the safety of those who travel along its streets. Even if you find that the plaintiff was injured upon the street of the defendant city, that fact is not sufficient in itself to enable plaintiff to recover, unless you find that the city negligently and carelessly removed the gutter or culvert on Main street and filled the same with earth or dirt, rendering the same not in a reasonably safe condition for travel upon it at the place where the plaintiff alleged he was injured, and that plaintiff was injured by such negligence, without any fault or negligence on the part of the plaintiff directly contributing thereto."—Approved: Heberling v. City of Warrensburg, 204 Mo. 604, 103 S. W. 36.

(b) "The court instructs the jury that the burden of proof is upon the plaintiff to show that the injury was caused by the negligence of the defendant, the city of Richmond. The jury cannot presume that the defendant was negligent because of an accident and because an injury has been sustained by the plaintiff. Negligence on the part of the defendant must be proved by affirmative evidence, which must show more than a probability of the negligent act. A verdict cannot be founded upon mere conjecture. There must be affirmative and preponderating proof of such negligence."—Approved: City of Richmond v. Pemberton, 108 Va. 220, 61 S. E. 787.

§ 4649. Street may be Crossed by Pedestrian at any Point.

"The jury is instructed that the plaintiff had the legal right to cross Main street at any point, either at crossings or between crossings, if she believed there were no obstructions or dangerous places on said highway."—Approved: City of Covington v. Whitney (Ky.), 99 S. W. 337 (not reported in state reports).

§ 4650. City not Responsible for Snow or Ice until it Becomes an Obstruction.

"The jury are instructed that the defendant, Kansas City, is under no obligation to the traveling public who may use its sidewalks to remove from such sidewalks sleet or ice which produces a slippery condition only. Nor is it responsible for injuries sustained solely by reason of any of its sidewalks being in a slippery condition because of ice or sleet thereon. Nor is it responsible merely because the ice or sleet is rough, or uneven. Unless you find from the evidence that the ice or sleet where plaintiff claims she fell was so rough or uneven that its roughness or unevenness made it an obstruction, and caused the sidewalk to be unsafe for travel, with the exercise of ordinary care, or find that it had been permitted to accumulate and remain upon the

walk, until, by thawing and freezing, it became an obstruction, and thereby rendered the sidewalk unsafe for travel; and that the defendant city had knowledge of such obstruction, or by the exercise of reasonable care might have had knowledge of such obstruction, long enough before the accident to have removed the same before the accident, or by the exercise of reasonable care, then the defendant is not liable, and your verdict should be for it."—Approved: Quinlan v. Kansas City, 104 Mo. App. 616, 78 S. W. 660.

§ 4651. Nor for Consequences of a Sudden Freeze.

"You are instructed that if you find that the injury sustained by the plaintiff was produced by two causes, namely, the slant of the step in question, and a coating of ice thereon, the result of the storm of the night before, the latter being a cause for which no one was responsible, the plaintiff cannot recover, unless she has shown by a preponderance of the credible testimony that the slant of the step was the real cause of the injury, and but for which it would not have happened; neither can a recovery be had if it is equally as probable that the injury came from the one cause as from the other."—Approved: Langhammer v. City of Manchester, 99 Iowa, 295, 68 N. W. 688.

§ 4652. Where Snow and Ice are Practically Level City not at any Fault.

"If you find from the evidence that the depression in the sidewalk at the point where plaintiff fell consisted of a decline or slope from east to west and west to east of not to exceed three inches in four feet, and that no unusual or extraordinary accumulation of snow or ice had taken place there, or if you find that such snow or ice as existed at such place was practically level, and was not so lumpy, rough, and uneven as, in connection with said depression, to render the walk unsafe for travelers on foot, in the exercise of ordinary care, then I charge you that you should answer the fifth question in the negative." —Approved: Koepke v. City of Milwaukee, 112 Wis. 475, 88 N. W. 238.

§4653. Repair Subsequent to Accident not Evidence of Defect Previous to Accident.

"The mere fact that, after this accident occurred, the city took up the walk in question, and, in connection with other contiguous walks, built a walk of other materials, cannot be considered as showing either knowledge or negligence on the part of the city prior to the accident." —Approved in City of Emporia v. Schmidling, 33 Kan. 488.

§ 4654. Duty of Skill and Care in Adopting a Proper Plan for a Bridge.

"In the erection of the county bridges it is the duty of the county to exercise ordinary and reasonable skill and care in adopting a plan, as well as in the construction of the bridge, and if you find that the defendant employed a competent and skillful engineer to prepare and draft the plan of the bridge in question, and that he did so, and recommended it as sufficient for that purpose, and the county authorities in good faith, believing it to be sufficiently strong and safe for the design,

adopted it, then this would be the exercise of care and skill with reference to the plan, even though the engineer erred in his judgment with reference thereto."—Approved: Ferguson v. Davis County, 57 Iowa, 602, 608.

§ 4655. Acceptance of Defective Bridge by a Municipal Corporation.

(a) "To show an acceptance by the public, binding upon the city, it is not necessary to show any formal action of the council to that effect. If the jury find from the evidence that the city of Minneapolis, or its predecessor, the town of Minneapolis, expended money in the repair of the bridge, and assumed and exercised control and supervision of the same, and that it was upon a public thoroughfare in the city, this is evidence tending to show an acceptance and assumption of the bridge by the city."—Approved: Shartle v. Minneapolis, 17 Minn. 308, 316.

(b) "If the jury are satisfied, from the testimony, that the apron or bridge where the plaintiff fell and broke his leg, has been there, and had been there a long time, say a year or six months, before the accident occurred, without any objection on the part of the city, then the city is presumed to have acquiesced in the structure and to have adopted it, and must be held liable for damages by reason of defects, just the same as if the city authorities had actually ordered it to be placed there."—Approved: Johnson v. Milwaukee, 46 Wis. 568, 573.

§ 4656. Liability to Traveler Injured by Street Obstructed in Building on Adjacent Property.

"The owners of property adjacent to a street, with the permission of the city, have a right temporarily to obstruct and use such part of a street and for such time, as is reasonable and necessary in making improvements on such property; and the city cannot be held liable for damages that may occur on such part of a street so used, when precautions and guards have been used, sufficient to notify the public, in the exercise of ordinary prudence and care, of danger into which the injured party fell. If the jury believe from the testimony that the excavation complained of by plaintiff was made by one B. F. S—, for the sole purpose of erecting a building and to drain his cellar, by the permission of the defendant, then the court instructs you that said S— had a right, during the time he was so building and improving his lot, to employ and occupy the sidewalk and a reasonable portion of the street adjacent to said lot for a reasonable and necessary time, for the purpose of aiding and facilitating said work. But it was the duty of the city to see that its sidewalk, over which the public traveled, was kept in a reasonably safe condition during such use and occupancy by B. F. S—."—Approved: Stephens v. City of Macon, 83 Mo. 345.

§ 4657. Hypothesis that Plaintiff rashly Traveled on Road Unsafe by Reason of Ice.

"If, at the time the accident happened, the defendant's road was so icy and sleek as to make it hazardous to travel over the same with a wagon loaded with saw logs, and if the plaintiff had knowledge of this

icy and sleek condition of the road, from his own observation, or from warnings given by other persons to him; and if, notwithstanding such knowledge of the condition of the road, he nevertheless undertook to pass over it, and in so doing did not use such care and means as to overcome the danger resulting from its icy and sleek condition, but in any degree acted rashly or negligently, and his rashness or negligence contributed in any degree to the injury, he cannot recover."—Approved: Wilson v. Trafalgar etc. Co., 93 Ind. 287, 290.

§ 4658. Hypothesis that Icy Condition of Road was Sole Cause of Injury.

"If you find from the evidence that the defendant's road was improperly constructed or out of repair at the place where the plaintiff was injured, but that such improper construction or want of repair did not contribute directly to the injury, the plaintiff cannot recover, if the icy condition of the road alone was the cause of the injury."—Approved: Wilson v. Trafalgar etc. Co., 93 Ind. 287.

§ 4659. Theory of Plaintiff being Intoxicated.

"Although the jury may believe from the evidence that plaintiff, on the night of and previous to the injury complained of, had been drinking intoxicating drinks, yet if they further believe from the evidence that the same had not so affected his mind and power of locomotion as to prevent him from exercising ordinary care in going to his house and passing over the bridge in question, and that he exercised such care, and would not have received the injury if defendant had placed a railing or other proper protection on said bridge; if the jury further believe from the evidence that such railing or other protection was necessary for the reasonable safety of persons passing over the bridge, the jury will still find the issues for plaintiff. The burden of proof rests upon defendant to establish the defense that plaintiff's injury resulted from his intoxication and negligence, and unless such defense is established by a preponderance of evidence, the jury will find for the plaintiff as to such issue."—Approved: Loewer v. Sedalia, 77 Mo. 431, 438.

§ 4660. Traveler Falling from Bridge having no Railings.

"The court instructs the jury that it was the duty of defendant, in erecting and constructing the bridge in question, over and across a public street in a city, to so erect and construct said bridge as to make the same reasonably safe for travel and use, for all persons passing over the same on foot or otherwise, as well in the night as in the day time; and, if the jury believe from the evidence that railing or bannistering or other guard was necessary on the sides of the bridge, to protect foot passengers by day or by night from the danger of a fall from the bridge, then it was the duty of defendant to cause to be provided and constructed on the side of the bridge such railing or bannistering, or other sufficient guard, to give protections against such danger of falls from the bridge; and the court instructs the jury, that the ques-

tion whether such railing, bannistering or other guard, were necessary, is not a question for the court to decide, but a question for the sole finding and determination of the jury; and unless the jury find from the evidence that such railing, bannistering or guard was so necessary for the reasonable safety of persons passing over the bridge, and that defendant failed to provide the same, plaintiff is not entitled to recover in this action. But if the jury find from the evidence that such railing, bannistering or guard on the sides of the bridge were necessary for the reasonable safety of passengers, by night or by day, and that defendant failed and neglected to provide the same; and further find that plaintiff, on the night of the 28th of April, 1875, was passing along a public street of said city, leading to or over said bridge, observing and using ordinary and reasonable care to pass and go over said bridge safely, when, through the fault and negligence of defendant in failing to have such railing or other guard along the side of said bridge, he stepped or fell from said bridge into the ravine below, and was thus greatly hurt and injured,—in such a case the jury will find for plaintiff."—Approved: Loewer v. Sedalia, 77 Mo. 431, 442, 443.

§ 4661. Duty to Maintain Bridge for Ordinary Usage Only.

"The court instructs the jury that in maintaining a bridge for public use the county is not limited in its duty by the ordinary business use of the structure, nor is it bound to provide for the support of extraordinary or unreasonably heavy loads, but it is only required to provide what may be fairly anticipated for the proper accommodation of the public at large in the various occupations which from time to time may be pursued in the locality where the bridge is situated. Whether or not the load which the deceased, John E. N—, drove on the bridge in question was an extraordinary or unreasonably heavy load is a question for you to determine from the evidence before you."—Approved: Seyfer v. Otoe County, 66 Neb. 566, 92 N. W. 756.

§ 4662. Duty of Corporation having Toll Bridge to Keep Same Reasonably Safe.

"If the jury find from the evidence that on the 10th day of December, 1901, the defendant was using and operating the bridge mentioned in the evidence for the purpose of carrying persons for hire over the Mississippi river, and if the jury find from the evidence that on said day the plaintiff was passing over said bridge and that he paid his fare for such passage, and if the jury find from the evidence that on said day there was accumulated on the sidewalk of said bridge provided by said defendant for its foot passengers to walk upon, ice and slush, and that whilst the plaintiff was so walking upon said bridge be stepped upon some ice and slush, and was thereby caused to slip and fall and sustain injuries mentioned in the evidence, and if the jury find from the evidence that the defendant did not exercise ordinary care in so maintaining said sidewalk with said ice and slush thereon, and in so permitting said ice and slush to be on said sidewalk, and if the jury believe from the evidence that the plaintiff was

exercising ordinary care at the time of his injury, then plaintiff is entitled to recover."—Approved: Gibler v. Terminal Railroad Association of St. Louis, 203 Mo. 208, 101 S. W. 37.

§ 4663. Hydrant Bursting and Flooding Property—Notice Actual or Presumed.

"The gist of this action is negligence, the plaintiff alleging as its claims of negligence (1) that the hydrant was originally installed in a negligent manner, and (2) that defendant negligently failed to repair the same after it became in a leaky condition; but you are instructed that there is no evidence which would warrant you in finding that defendant was negligent in placing or installing the hydrant in question, and your inquiry as to defendant's negligence will be confined to the second ground claimed by plaintiff as above stated. And on this point you are instructed that it is not sufficient for plaintiff to establish merely that the hydrant was in a leaky condition, and that it finally burst and damaged its property, but it must further establish by a preponderance of the evidence that defendant knew, or by the exercise of ordinary care ought to have known, of its defective condition and negligently failed to repair it, though you find the hydrant in question was leaky and out of repair, still, if defendant discovered its condition as promptly as ordinary care required, and repaired or replaced the same with reasonable dispatch, it would not be liable."—Approved: O'Brien Co. v. Omaha Water Co., 83 Neb. 71, 118 N. W. 1110.

CHAPTER CXXV.

CONTRIBUTORY NEGLIGENCE.

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§ 4664. Contributory Negligence Defined.

(a) "By 'contributory negligence' is meant such a want of reasonable care and caution on the part of a person injured as directly contributed and caused the injury, and without which such injury would not have occurred; and if you find from the evidence that the deceased, George S—, failed and neglected to use such reasonable and ordinary care and prudence, and that such failure contributed to the happening of the accident, and without which the accident would not have happened, you should find for the defendants."—Approved: Fritz v. Western Union Tel. Co., 25 Utah, 263, 71 Pac. 209.

(b) "Contributory negligence, as a law phrase, means such act or omission on the part of a plaintiff as an ordinarily prudent person would not do or suffer to be done under the same or similar circumstances, which, concurring with the negligent act or omission of a defendant, becomes a proximate cause of an injury."—Approved: Texas & N. O. R. Co. v. Jackson, 51 Tex. Civ. App. 646, 113 S. W. 628.

(c) "Contributory negligence, as a law term, means a want of ordinary care on the part of a person injured by the actionable negligence of another, combining and concuring with that negligence and contributing thereto as a direct and proximate cause therefor, without which the injury would not have occurred."—Approved: Texas & N. O. R. Co. v. Reed (Tex. Civ. App.), 116 S. W. 69.

(d) "You are instructed that contributory negligence is the failure to use that degree of ordinary care and caution to avert injury to him-

self which would be used by an ordinarily prudent person under the circumstances; and if you find from the evidence that plaintiff failed in any respect to use that degree of care and caution which an ordinarily prudent person would use under the circumstances, and that his failure to use such care contributed to cause his injury, so that but for his concurring negligence the injury would not have happened, your verdict will be for the defendant, and by ordinary care is meant the exercise of reasonable diligence and implies such watchfulness, caution, and foresight as under all circumstances of the particular service would be exercised by ordinarily careful and prudent persons." —Approved: Aluminum Co. of North America v. Ramsey, 89 Ark. 522, 117 S. W. 568.

§ 4665. Defendant Must Plead it as a Defense.

"I charge you, under these pleadings, that if you believe that the master, the defendant in this case, was negligent, and if you believe that the plaintiff was also negligent,—that both were negligent—then your verdict should be not for the defendant, but for the plaintiff, for the reason that the defendant in this case has not pleaded what is known as contributory negligence."—Approved: Strickland v. Capital C. Mills, 70 S. C. 211, 49 S. E. 478.

§ 4666. The burden of Showing it Rests upon Defendant.

(a) "You are instructed that the burden of proof is upon the defendant to show, by a preponderance of the evidence in the whole case, that the plaintiff was guilty of contributory negligence, provided such negligence is not shown by plaintiff's testimony."—Approved: Louisiana & A. Ry. Co. v. Ratcliffe, 88 Ark. 524, 115 S. W. 396.

(b) "If you believe from the evidence that the carelessness and negligence, if any there was, on the part of the plaintiff, contributed to the alleged injuries complained of, I instruct you that she cannot recover, but the burden of proof is upon the defendant to show that plaintiff was guilty of such contributory negligence, if any there was, and the defendant must prove that fact by a fair preponderance of the evidence. If, however, the whole evidence in the case shows contributory negligence on plaintiff's part, whether such evidence be produced either by plaintiff or defendant, or by both combined, then such defense would be made out."—Approved: Indianapolis Traction & Terminal Co. v. Miller, 43 Ind. App. 717, 88 N. E. 526.

§ 4667. Which Must be by a Preponderance of the Evidence.

(a) "If the jury believe from the evidence that the plaintiff was injured by reason of the negligence of the defendant company, a recovery cannot be defeated on the ground of contributory negligence, unless it appears from the evidence that the plaintiff himself failed in the exercise of ordinary care and prudence, and that such failure so contributed to the injury that it would not have occurred if he had been without fault. Contributory negligence will not be presumed, but must be proven by a preponderance of the evidence."—Approved: Abelson v. St. Louis, I. M. & S. Ry. Co., 84 Ark. 181, 105 S. W. 81.

§ 4668. But, if Plaintiff's Own Evidence Shows Such Negligence, this Suffices.

(a) "Plaintiff is not called upon to establish freedom from contributory negligence; on the contrary, the burden is upon the defendant to establish such contributory negligence, if it existed, but if the evidence offered by the plaintiff establishes negligence upon his part contributing to his injuries the defendant may take advantage thereof, and would not in such case be called upon to offer additional testimony upon that point."—Approved: City of Indianapolis v. Mullally, 38 Ind. App. 125, 77 N. E. 1132.

§ 4669. Or where it can be Fairly Inferred from all the Circumstances of the Case.

"The court instructs the jury that the burden of proving the defendant guilty of negligence rests upon the plaintiff, and if the defendant seeks to relieve itself of liability by reason of the plaintiff having been guilty of contributory negligence the burden of proving such contributory negligence rests upon the defendant, unless such contributory negligence be disclosed by the plaintiff's evidence, or can be fairly inferred from all the circumstances of the case."—Approved: City of Richmond v. Pemberton, 108 Va. 220, 61 S. E. 787.

§ 4670. Plaintiff Makes out Prima Facie Case by Showing Injury Occasioned by Defendant's Negligence.

"If you find from the evidence that the injury to the plaintiff complained of was occasioned by the negligence and want of ordinary care of defendant, you are instructed that the burden of proof is then on the defendant city to satisfy by a preponderance of the evidence that negligence and want of ordinary care on the part of the plaintiff contributed thereto, in order to prevent a recovery in this case."—Approved: City of Beatrice v. Forbes, 74 Neb. 125, 103 N. W. 1069.

§ 4671. Aliter—Where it is Held Plaintiff must Show he Exercised Care.

"The court instructs the jury that the burden of proof is not upon the defendants to show that they are not guilty of the specific negligence charged in the declaration, or in some count thereof, but the burden is upon the plaintiff to prove that the defendants are guilty, and also to prove that he himself was in the exercise of ordinary care for his own safety, and this rule as to the burden of proof is binding in law, and must govern the jury in deciding this case. The jury have no right to disregard said rule or to adopt any other in lieu thereof, but in considering the evidence and coming to a verdict the jury should adhere to said rule."—Approved: C. U. T. Co. v. Mee, 218 Ill. 9, 75 N. E. 800.

§ 4672. Contributory Negligence Howsoever Shown is Complete Defense, Notwithstanding Defendant's Negligence.

(a) "Notwithstanding you may believe that defendant did not use that degree of care which the law required of said defendant as set

forth in other instructions, still the court declares to you that such lack of care on defendant's part coud not and did not relieve plaintiff of the duty to use ordinary care for his own safety, and if he failed to do so, and such failure on his part directly contributed to his injury, he cannot recover, no matter how negligent defendant may have been." —Approved: Wellmeyer v. St. Louis Transit Co., 198 Mo. 527, 95 S. W. 925.

(b) "In this case you are instructed that it was the duty of the plaintiff, Jerry E—, while a passenger on defendant's train to use ordinary care for his own safety. So, if you believe from the evidence that the plaintiff, Jerry E—, in attempting to leave said train failed to use ordinary care to see whether the rear or north door of said car was fastened, and in first going back to said door and then returning to the front end of said coach, and in attempting to leave said train while the same was in motion, or in the manner in which he attempted to go down the steps and leave said train, and you believe that a person of ordinary care would not have acted in the same manner that said E— acted in any or all of the particulars above mentioned, and you believe that the failure of the said E— to use ordinary care in any or all of the particulars above mentioned proximately caused or contributed to cause his injuries, then such failure on his part to use ordinary care would amount to contributory negligence, and, if you so believe, you will return a verdict for the defendant, although you may believe from the evidence that the defendant railroad company was also guilty of negligence."—Approved: Houston & T. C. R. Co. v. Easton, 44 Tex. Civ. App. 95, 97 S. W. 833.

(c) "Although you find the plaintiff was injured as alleged, and through the negligence of defendant, still, unless you find he was not guilty of any negligence that directly contributed to his injury, he cannot recover. By contributory negligence is meant such negligence or want of reasonable care on the part of the plaintiff as was a cooperating cause, and was directly instrumental in causing or bringing the injuries in question upon him, and may consist in his voluntarily and unnecessarily exposing himself to the danger, or in failing to avoid danger when the danger is known to him, or when, by the exercise of reasonable care and prudence on his part, he would have discovered the danger in time to have avoided it. It follows from this that, although defendant may have been negligent at the time, yet if plaintiff, through his own negligence, directly contributed to his injury, he cannot recover."—Approved: Huggard v. Glucose Sugar Refining Co., 132 Iowa, 724, 109 N. W. 475.

(d) "If the jury shall believe from the evidence that at the time and place of the injury to him, mentioned and described in the evidence, the plaintiff was himself guilty of negligence which contributed to his injury, and that but for such negligence contributing thereto the accident would not have happened, and his injuries would not have been suffered, the jury will find a verdict for the defendant."—Approved: Louisville & N. R. Co. v. Cason (Ky.), 116 S. W. 716.

(e) "If the jury believe from all the evidence that upon the occasion in question, the plaintiff, L. Albin E—, failed to exercise the degree of care for his own safety which ordinarily prudent persons ordinarily exercise under the same or similar circumstances, and that the failure on his part to exercise such care contributed to all his injuries, and that but for such lack of care on his part he would not have been injured, they will find for the defendant."—Approved: South Covington & C. St. Ry. Co. v. Eichler (Ky.), 108 S. W. 329 (not reported in state reports).

§ 4673. Provided it Proximately Contributes to Plaintiff's Own Injury.

"The jury are further charged that the defendant company is not an insurer of the safety of its employees, but is only bound to use ordinary care to protect them from injury; and you are further instructed that it was the duty of plaintiff, while working in the yards of defendant company, to use ordinary care to avoid injury to himself while the cars of defendant were being operated upon its tracks in said yard; and if you find from the testimony that plaintiff failed to use such care, and that such failure, if any, was negligence, and that such negligence, if any, proximately contributed to plaintiff's injury, if any, then plaintiff cannot recover although you may believe defendant's agents and employees operating said car were also guilty of negligence in causing plaintiff's injury, if any."—Approved: Galveston, H. & S. A. Ry. Co. v. Pendelton, 30 Tex. Civ. App. 431, 70 S. W. 996.

§ 4674. It May be Shown by Passive Acquiescence in Acts of Negligence.

"The court instructs you that the plaintiff, Lee S—, was not a member of the military company on the trip to and from Frankfort on the occasion mentioned in the evidence, and that he could, without subjecting himself to any military discipline or penalty, have left the coach which was occupied by him on said trips. And if you believe from the evidence that such coach was dirty or filthy, or gave out offensive odors, or was not sufficiently heated, or the lamps gave insufficient light or emitted foul and offensive odors, or that the stoves in said coaches gave out smoke, to the discomfort of the plaintiff, if any such conditions existed, and that the plaintiff on said trip could have taken passage in another coach free from such conditions, and failed to do so, you should find for the defendant."—Approved: Louisville & N. R. Co. v. Scalf (Ky.), 110 S. W. 862 (not reported in state reports).

§ 4675. Or by Choosing a More Dangerous Method in the Performance of Duty.

(a) "The court charges the jury that, if it appears from the evidence that plaintiff could reasonably have used a less dangerous way to work the handle of the lever of the car, this will not of itself bar his recovery. It must further reasonably appear from the evidence that the plaintiff knew he was using a more dangerous way, that such use of a more dangerous way was negligence, and that this negligence was the

proximate cause of his injuries."—Approved: Southern Ry. Co. v. McGowan, 149 Ala. 440, 43 South. 378.

(b) "If it was not more dangerous for plaintiff to occupy the position he was occupying when he fell, except by reason of defendant's negligence or a defect in the handle of the car, then the fact that he did occupy that position would not bar a recovery, unless you should find that the plaintiff knew the position he was occupying when he fell was more dangerous than the one he left. Whether the defendant was negligent, as is charged in the complaint, or whether there was a defect in the handle, or whether such defect or negligence made the position occupied by the plaintiff when he was hurt more dangerous, you must determine from the evidence."—Approved: Southern Ry. Co. v. McGowan, 149 Ala. 440, 43 South. 378.

(c) "You are charged that if you believe from the evidence that plaintiff was injured while attempting to mount a moving car for the purpose of opening a knuckle on the car, and you believe that the way in which plaintiff so attempted to mount and open the knuckle was a very hazardous way, and you believe that the knuckle might have been opened in another way or in other ways which would not have been hazardous but would have been safe to the plaintiff, and you believe from the evidence that plaintiff, in exercising ordinary care for his own safety, should have chosen the less dangerous way, but failed to do so, and chose the more dangerous way, and his having done so contributed to bring about his injury, then in that event he cannot recover, and your verdict should be for the defendant."—Approved: El Paso & S. W. Ry. Co. v. Alexander (Tex. Civ. App.), 117 S. W. 927.

(d) "The court instructs the jury that if they believe from the evidence that it was the duty of the plaintiff to fix the location and length of the line of the series of dobies to be fired at the base of the quarry, and if they believe from the evidence that in the reasonable operation of said quarry the length of said line of the series of dobies to be fired could be fixed at such a length as to make the tree a safe place to fire them from, and that the said line of the series of dobies could have been located in such a length as to make the tree an unsafe place to fire them from, then it was the duty of the plaintiff to adopt the safe method and to fix the length of the said line of the series of dobies of such a length as to render the tree a safe place; and if the jury believe from the evidence that plaintiff failed to adopt the safe method, and that his failure so to do contributed to his injury, then the jury must find for the defendant."—Approved: Virginia Portland Cement Co. v. Seal, 110 Va. 484, 66 S. E. 75.

(e) "If you find from a preponderance of the evidence that plaintiff, in carrying said glass the way he did, and in said passageway, did not exercise what was reasonable prudence and care under all the circumstances, and that his want of care contributed to the happening of the injury complained of, then your verdict must be for the defendant."—Approved: Kennard v. Grossman, 2 Neb. Unoff. 743, 89 N. W. 1025.

(f) "In this case you are instructed that if you believe from the evidence a person of ordinary care, seeing a hot-box on the train, before attempting to cool the same, would have waited until the train stopped,

and then poured water on the same, and that the plaintiff was negligent in running along beside the train as he was doing at the time of his injury and such negligence contributed to his injury, you will return a verdict in favor of defendant, although you may believe from the evidence that the defendant was also negligent in the construction or maintenance of the platform at Wagoner."—Approved: Missouri, K. & T. Ry. Co. v. Rogers (Tex. Civ. App.), 117 S. W. 914.

§ 4676. Or by Chosing Another Method Than the Master Directs.

"If the jury find from the evidence that the plaintiff was directed in removing the lumber from the kiln to go behind or in the rear of the trucks and apply pressure from behind or in the rear of the trucks in order to remove the same from the kiln, and you further find that this was a safe way, and that if it had been done the plaintiff would not have been injured, and you further find that the plaintiff, instead of adopting this method, went under the truck which was to be removed from the kiln and applied force from under and below the truck, and was injured in consequence of so doing, then the plaintiff's own negligence was the proximate cause of the injury, and you should answer the first issues 'No.' "—Approved: Whitson v. Wrenn, 134 N. C. 86, 46 S. E. 17.

§ 4677. Or by Failure to Keep a Proper Look-out for His Own Safety.

(a) "If you believe from the evidence that the plaintiff failed to keep a proper look-out as he ran his train into Kyle and that such failure, if any, was negligent, and that such negligence, if any, proximately caused or contributed to cause the collision and plaintiff's injuries, you will find for the defendant."—Approved: International & G. N. R. Co. v. Brice, 100 Tex. 203, 97 S. W. 461.

(b) "If the jury believe from the evidence that the plaintiff's intestate did not use ordinary care by keeping a faithful and proper look-out for danger signals on the right of way and track, then he contributed to his death, and is precluded from recovering in this action, although the defendant (company) may be chargeable with negligence also."—Approved: New York, P. & N. R. Co. v. Wilson's Adm'r, 109 Va. 754, 64 S. E. 1060.

§ 4678. Or by Disobeying Orders, Rules or Warnings.

(a) "If you find that O— and N— were working together, and were instructed that one should keep watch to warn the other, then it was contributory negligence for them both to go under the car together; and if you find that, having been so instructed, they were both under the car together, then plaintiff cannot recover."—Approved: Olson v. Chicago, B. & N. R. Co., 38 Minn. 412, 38 N. W. 353.

(b) "You are further instructed that, if you believe from the evidence that the deceased, at the time of his death, had gone upon said tank in the discharge of his duties, but you further believe that he had gone up there alone at the time, and you further believe from the evidence that theretofore the defendant had warned and forbidden him to go upon said tank alone, and you further believe from the evidence that in going upon said tank alone, in disregard of the warning and

instructions of the defendant, the deceased did that which an ordinarily prudent person would not have done under the same or similar circumstances, then you are instructed that the deceased in so doing was guilty of contributory negligence, and, if such negligence directly and proximately contributed to his death, it is your duty to return a verdict for the defendant."—Approved: Yellow Pine Oil Co. v. Noble, 100 Tex. 358, 99 S. W. 1024.

(c) "The jury are instructed that, even though they should believe and find from the evidence that at the time of the injury to Mr. B—, the Chicago & Alton Railway Company had established the rule known as 'Rule V.,' introduced in evidence, and that plaintiff had knowledge of said rule, yet, if you further believe and find from the evidence that there was an established usage and custom on the aprt of the defendant's switchmen, at and prior to the injury to Mr. B—, to go between moving cars for the purpose of uncoupling same when the chains upon said coupling were broken, so that the pins could not be pulled with the lever and that said established usage and custom aforesaid, if any, was known and acquiesced in by the superior officers of the Chicago & Alton Company, then plaintiff, B—, cannot be held guilty of contributory negligence solely on the ground that he violated said rule."—Approved: Brady v. Kansas City, St. Louis & Chicago R. Co., 206 Mo. 509, 102 S. W. 978.

§ 4679. Servant Using Appliances in Other Ways than Intended.

"The court instructs you that the plaintiff was only justified in using the maul furnished him for the purpose for which it was intended, or for such purpose as was authorized by defendant; and if you further find from the evidence that it was not designed or intended that such mauls should be used by striking one against another, and that such use of the mauls was liable to cause pieces of one or the other of them to break and fly into the air, thereby endangering the persons using them, and that a person of ordinary care and prudence, engaged in the business of laying railroad track, would not have so used one of such mauls, unless thereto directly authorized by defendant, then if you further find from the evidence that the plaintiff was injured by a piece breaking from one of said mauls and striking him in the eye, in consequence of his striking the maul which he was using against another maul in the hands of a co-employee working with him at the time, then the plaintiff was guilty of such negligence as precludes a recovery, and your verdict must be for the defendant."—Approved: Franklin v. M. K. & T. Ry. Co., 97 Mo. App. 473, 71 S. W. 540.

§ 4680. Or by Exposure to Danger that was or should have been Known.

(a) "Under the most careful circumstances mining coal is attended with danger, and persons engaged therein are presumed to incur the risks incident thereto, and if the plaintiff in this case knew, or had the means of knowing, that a part of the roof of the room in which he worked was unsafe and liable to fall, he cannot recover in this case.

"If a part of the roof of the room in which plaintiff worked was unsafe and liable to fall, and props were needed for its support, and the defendant neglected to furnish the props when needed, and the plaintiff knew the roof was in that unsafe condition, and remained in the room or otherwise exposed himself to the danger from the fall of the roof, when he could have left the room, the plaintiff cannot recover in this case.

"If a part of the roof of the room in which plaintiff worked was unsafe and liable to fall, and props were needed for its support, and the defendant neglected to furnish the props when needed, and the plaintiff had the means of knowing the roof was in that unsafe condition, and remained in the room or otherwise exposed himself to the danger from the fall of the roof, when he could have left the room, then plaintiff cannot recover in this case."—Approved: Coal Company v. Estievenard, 53 Ohio St. 43.

(b) "If you find from the evidence that just before the accident the plaintiff's intestate was in a comparatively safe place, and that there was no emergency existing requiring him to leave said place, and if you find that an ordinarily prudent man in his position would have had reason to believe that the engine might move upon the track in one direction or the other, and under these conditions he tried to crawl out between the drivers of the engine, and in doing so placed his body across one of the rails of the track, and thus lost his life because of a movement of the engine, the plaintiff cannot recover, and your verdict must be for the defendant, 'No cause of action.' "—Approved: Condie v. Rio Grande Western Ry. Co., 34 Utah, 237, 97 Pac. 120.

(c) "If they found by the greater weight of the evidence that the plaintiff, by the exercise of that care which an ordinarily prudent man would have exercised under similar circumstances, could have discovered that the said piece of scantling was lying so dangerously near the defendant's side track as to make it probable that it would be struck by the passing train and injure the plaintiff in the way he was injured, in time to have avoided being so injured, then the court charges you that the plaintiff was guilty of contributory negligence of the defendant in bringing about his injury, and you will answer the second issue 'Yes.' "—Approved: Muse v. Seaboard Air Line Ry., 149 N. C. 443, 63 S. E. 102.

(d) "If you find from the testimony that the stick of wood or block was fast under the wheel of the car, and that the plaintiff took hold of said stick of wood or block for the purpose of removing it when the wheel should move sufficiently to release it, and that he expected the wheel to move and release it, whereupon he intended to remove said stick of wood or block, and that he was injured as a result thereof, and that a reasonably prudent person of ordinary care and caution would not have attempted to remove said stick of wood or block under the circumstances, you will find for the defendant, regardless of whether you find that the defendant or its employees were guilty of negligence or not."—Approved: Texas & P. Ry. Co. v. Johnson (Tex. Civ. App.), 118 S. W. 1117.

(e) While the law imposes a duty upon the master, it also imposes a correlative duty upon the servant. It requires him to exercise ordinary care for his own safety, to use his intelligence and his senses, and it holds him responsible if he is injured by his failure to exercise such care. It requires him to observe the machinery at which he is working and the appliances used to discover those dangers which a man of ordinary prudence would discover, and, if he fails to perform his duty and is injured thereby, he cannot recover damages, for, while the plaintiff assumes the risk incident to the working in the mill, he did not assume the risk resulting from defective machinery or from defective place or appliances to do his work, and if the plaintiff knew of the danger of the machinery when he went up to fix the 'hog,' and if in consequence thereof the danger to himself was so obvious that any man of ordinary prudence would not have gone up the way plaintiff went, then the plaintiff would be guilty of contributory negligence, and you should answer the second issue, 'Yes.' If, however, the plaintiff was not guilty of contributory negligence, you will answer this issue, 'No.' If there was a safe way to go to the 'hog' provided by the company, which intestate knew, or ought to have known, and he chose another way which was unsafe, and this was the proximate cause of the hurt, the jury shall answer the second issue, 'Yes.' That if the jury shall find that it was clear in the mind of one of ordinary intelligence that it was dangerous to go into the machinery as deceased did, and that the danger was obvious and imminent, and notwithstanding he undertook to do so, and his doing so was the proximate cause of his hurt, the jury will answer the second issue, 'Yes.' "—Approved: Midgette v. Branning Mfg. Co., 150 N. C. 333, 64 S. E. 5.

(f) "It was the duty of the plaintiff to have acted as a prudent man would have acted under similar circumstances, taking into consideration all the conditions and circumstances at the time. If, at the time the plaintiff attempted to couple the cars and was injured, great danger in doing so was manifest to him, but, notwithstanding such manifest danger, he did attempt to couple the cars and in doing so was injured, then the court charges you he was guilty of contributory negligence, notwithstanding you may find that he was told to do so by the witness F—, the defendant's agent and manager."—Approved: Liles v. Fosburg Lumber Co., 142 N. C. 39, 54 S. E. 795.

§ 4681. Or by not Anticipating Dangers Usually Incident to the Employment.

"When a person enters into the service of a railroad company he assumes all of the ordinary risks of his employment; and, when a person becomes the conductor of a freight train, he assumes all the ordinary risks arising from the jolts and jars which are incident to the handling of freight trains. The court charges you, as a matter of law, that if the jury find from the evidence that the plaintiff had signaled the engineer to stop his train, it was his (the engineer's) duty to stop his train, and the fact that the engineer proceeded to stop his train in obedience to the orders of the conductor would not be negli-

gence, unless it was done in an extraordinary and unusual manner. The court further charges you, as a matter of law, that if the jury find from the evidence that the conductor had signaled the engineer to stop his train, it was the duty of the conductor, who was on the top of the train, to be careful, and to take such steps and to do all things, which a man of ordinary prudence would ordinarily do to protect himself from any shock or jar or jolt which might be expected to occur; and, if he did not, then the negligence would not be that of defendant's lessee, but the negligence of the plaintiff himself, and you will answer the first issue 'No,' and the second issue 'Yes.' "—Approved: Bull v. Atlanta & C. Air Line Ry. Co., 149 N. C. 427, 63 S. E. 126.

§ 4682. If Accident would not have Happened, but for Plaintiff's Negligence he Cannot Recover.

(a) "Although the jury may believe from the evidence that the place, machinery, and appliances were unreasonably unsafe and dangerous on the occasion when T— was hurt, and that defendant knew it, or could have known it by the exercise of ordinary care in time to have avoided T—'s injury, still, if T—, by his own negligence or carelessness, caused or contributed to the accident in a manner but that for his own negligence or carelessness the accident would not have occurred, the jury must find for the defendant."—Approved: Trumbo's Adm'x v. Gaines & Co. (Ky.), 109 S. W. 1188 (not reported in state reports).

(b) "Although the jury may believe from the evidence that Niles M— was an incompetent sawyer, yet if they further believe from the evidence that the plaintiff by his own carelessness or negligence contributed to his injury but for which said contributory negligence on his part, if any, the injury would not have been received, they should find for the defendant."—Approved: Crane v. Congleton & Bro. (Ky.), 116 S. W. 341.

§ 4683. Or Would have been Avoided by the Exercise of Ordinary Care.

"The law places upon all persons the duty of exercising reasonable care to avoid injury, and even though the jury should believe, from the evidence, that the defendant was negligent and that plaintiff was injured thereby, if the evidence also shows that the injury would have been avoided by the exercise of ordinary care by the plaintiff, and that the plaintiff did not exercise such care, you should find the defendant not guilty."—Approved: Cullen v. Higgins, 216 Ill. 78, 74 N. E. 698.

§ 4684. Presumption of Safe Condition Does not Dispense with Duty to Exercise Care.

"While it is undoubtedly true that pedestrians using the sidewalk have a right to assume that all parts of it are in a reasonably safe condition for the purposes for which it was intended, yet the law exacts of all persons in using public streets to look where they are going, and the plaintiff in this case was bound to exercise reasonable care in passing along the sidewalk, and if they (the jury) believe from

the evidence that she did not exercise such care, and that by the exercise of reasonable care in walking along the sidewalk she would not have come in contact with the cornerstone, then she was guilty of contributory negligence, and is not entitled to recover in this case, and they (the jury) should find for the defendant."—Approved: City of Richmond v. Pemberton, 108 Va. 220, 61 S. E. 787.

§ 4685. Driving Into Water Covering Dangerous Hole in the Street.

"If the hole in the street at the time of the accident was full of water, this fact may be considered by the jury in determining the question whether plaintiff was using due care. Whether a pool of water at the time and place would have induced a prudent man to assume that it marked a deep and dangerous hole, and to run around it, is a question which the jury under the evidence may consider, with all the other facts, in arriving at a conclusion on the question of the plaintiff's case."—Approved: City of Indianapolis v. Mullally, 38 Ind. App. 125, 77 N. E. 1132.

§ 4686. Driving Across Track Without Keeping Team Under Control.

"If you find from the evidence that plaintiff at said time and place passed over said railway in a careless, indifferent or negligent manner; or if you find from the evidence that at said time plaintiff did not have his team under control, and made no effort to keep or hold his team under control, but at the time of crossing said railway permitted the lines to hang loose, or swing loose and hang down almost to the ground, and that the lines were in such position when plaintiff's team ran away; and if you find that the plaintiff was thereby guilty of negligence, as that term is hereinbefore defined, and that such negligence, if any, caused or contributed to his injury—you will find for the defendant. Railway companies have a legal right to run their trains and engines over their roads and over public crossings, and they are liable to other persons for such damages only as result from their negligence or disregard of the rights or safety of such other persons. If you believe from the evidence that at the time plaintiff drove his team over defendant's railroad the engine was sixty or more feet away from said public crossing, and was moving at a moderate rate of speed, so that plaintiff had ample time to take his wagon and team over the said railway before the said engine would reach the crossing, and if you believe defendant's servants operating the said train at the time acted as men of ordinary prudence would have acted under the circumstances, then in that event plaintiff cannot recover damages in this suit, and you will find for the defendant."—Approved: St. L. S. W. Ry. Co. v. Hall, 98 Tex. 480, 85 S. W. 786.

§ 4687. Unnecessary Interference with Electrical Wires Used by City for Lighting.

"In cities and villages where electricity is used for lighting or other purposes, all persons must take notice of the dangerous nature of the electricity and electrical machinery and govern themselves accordingly.

(But it is the duty of the city or village to construct and maintain such plant in a safe condition.) Whoever voluntarily and unnecessarily interferes with or undertakes to handle any of the wires, apparatus, machinery or attachments of such electrical property of any such village or city (for an unlawful purpose) does so at his own peril, and, if he receives any injury thereby, he cannot recover damages from the city or village for the injury so received."—Approved: Village of Palestine v. Siler, 225 Ill. 630, 80 N. E. 345.

§ 4688. Servant Boarding Swiftly Running Engine.

If you believe from the evidence that an ordinarily prudent person, situated as the plaintiff was at the time of and just prior to the accident for which he sues in this case, would not have attempted to board said engine, on account of the rate of speed at which it was moving, but would, as the uncontradicted evidence shows he had the right to do, have signaled the same to slow down before he attempted to board it, and that such attempt, if any, to board said engine while moving through the yards, on account of the rate of speed at which it was moving, was negligence on his part, and that but for such negligence on his part said accident would not have occurred, then you will return your verdict for defendant."—Approved: Houston & T. C. R. Co. v. Milam (Tex. Civ. App.), 58 S. W. 735 (not reported in state reports).

§ 4689. Jumping from Moving Engine at Principal's Order.

"If you believe from the evidence that the plaintiff, B—, was in the employ of the defendant on the date alleged in his petition, and that while being carried to his work by the defendant, and under its direction, if he was under its direction, he was injured by jumping from the car on which he was riding, while said car was in motion, as alleged by him, and striking his knee against a cross-tie, as stated in his petition, and if you believe that defendant ordered and commanded plaintiff to jump, and if you believe that said command, if any was given, was imperative, and left no time for calculation and deliberation, and if you believe that plaintiff believed that he could safely obey said order by taking proper care, and if you believe said plaintiff jumped pursuant to said command, if any, and if you believe that at said time said train was going at a rate of speed that made it dangerous to jump therefrom, and if you believe that plaintiff was inexperienced in jumping off of moving trains and ignorant of the danger, if any, arising therefrom, and if you believe that it was no part of his ordinary duty to do so, and was extrahazardous, and that defendant knew of his said ignorance and inexperience, if he was, and it did know it, and if you believe that defendant knew or could have known, by the exercise of ordinary care, of the danger, if any, from so jumping, and that defendant nevertheless, if it did, gave said order under said circumstances, and that in consequence of said order, if any, plaintiff, in the exercise of ordinary care, jumped as alleged in his petition, and was injured as therein charged, and if you further

believe that the giving of said order was, if it was given, under all the facts and circumstances, negligence on the part of the defendant, and that such negligence, if any, was the direct cause of plaintiff's injuries, if any, and that plaintiff did not by his own negligence contribute to his injuries, or assume the danger or risk, then your verdict should be for the plaintiff."—Approved: Galveston, H. & S. A. Ry. Co. v. Sanchez (Tex. Civ. App.), 65 S. W. 893 (not reported in state reports).

§ 4690. Unnecessary Exposure to Danger from Moving Train.

(a) "If from the evidence you believe that at the time Ozie B— was struck he was walking along near the side of the moving train, and that a person of ordinary care and prudence would not have walked so near the train, you will return a verdict for defendant."—Approved: Missouri, K. & T. Ry. Co. v. Brown, 46 Tex. Civ. App. 10, 101 S. W. 464.

(b) "The jury are instructed that, even if it should be proven that the defendant company occupied or blocked the road crossing in question by the switching of its engine or cars an inconvenient, or unreasonable length of time, yet as a matter of law such action on the part of defendant would not justify or excuse the plaintiff for unnecessarily going into a place of danger; and, if the jury believe from a preponderance of the testimony that the plaintiff, while the defendant company had said crossing occupied in switching back and forth, attempted to cross the track of defendant, and thereby put himself in a place of obvious danger and was injured, then he was guilty of contributory negligence, and your verdict should be for the defendant."—Approved: Louisiana & A. Ry. Co. v. Ratcliffe, 88 Ark. 524, 115 S. W. 396.

(c) "In this case take into consideration all the circumstances surrounding that transaction,—take into consideration the character of these horses. Were they an ordinary gentle team, or was there something about this off horse that should have put a man specially on his guard? Did he have any reason to apprehend any danger from that horse, from his being tough-bitted, from his being a young horse, or from any other circumstances shown in the case? You are also to take into consideration the position the man was in; that he was sitting on the hounds or reach of his wagon. You should also take into consideration the actions of the horses as he approached that place. Now, would a man of ordinary prudence, with that horse, as he knew him or ought to have known him, have driven with that wagon in that condition, sitting as he did, and attempted to pass that car as it stood there? If a man of ordinary prudence, under all the circumstances surrounding that transaction, would not have made that attempt, in view of the condition in which the horse was acting, and in view of all the circumstances surrounding the transaction, and injury was there produced, then he was guilty of contributory negligence, and he would not be entitled to recover, notwithstanding it was negligence, if you

find it, in the railroad company to leave the car there."—Approved: Peterson v. Chicago & W. M. Ry. Co., 64 Mich. 621, 31 N. W. 548.

§ 4691. Or in Alighting from Moving Train.

The jury are instructed that if you believe from the evidence before you in this case that the deceased, G. C—, left or attempted to leave the defendant's train on which he was riding before the train reached the accustomed place for stopping at said station, and while the said train was still in motion, and that in doing so, if he did, he failed to exercise that degree of care and prudence which an ordinarily careful and prudent person would have exercised under the same or similar circumstances, and that such failure, if any, contributed to cause the in-injuries to the deceased which resulted in his death, then you are instructed that the plaintiff cannot recover, and if you so find you will return a verdict for the defendant, even though you should find from the evidence that the employees of defendant negligently failed to stop said train at said station as charged by plaintiff."—Approved: Galveston, H. & S. A. Ry. Co. v. De Castillo (Tex. Civ. App.), 83 S. W. 25 (not reported in state reports).

§ 4692. Failure to Give Statutory Warning will not Excuse Such Exposure.

"The court instructs the jury that if you believe from the evidence in this case that the deceased got off of defendant's track, and beyond the reach of danger of being struck by defendant's engine, and that, after having done so, he again came suddenly back on defendant's track just in front of defendant's engine, and so close to said engine that the same could not possibly be stopped in time to avoid the accident, then the plaintiffs are not entitled to recover, and it is your duty as jurors to return a verdict for the defendant, notwithstanding you may further believe from the evidence in the case that the engine which struck the deceased was running at a speed of about eighteen miles an hour, or more, and although you may further believe that no bell was rung or whistle sounded on said engine when approaching the point where the accident occurred."—Approved: Matz v. Missouri Pac. Ry. Co., 217 Mo. 275, 117 S. W. 584.

§ 4693. Negligence in Stepping Into Elevator Shaft.

"The court further instructs the jury that it was the duty of the plaintiff to use ordinary care for his own safety when attempting to enter the elevator cage or shaft, and if the jury believe from the evidence that the plaintiff saw, or might by the exercise of ordinary care have seen, that the elevator cage was not in the proper position in the elevator shaft, and thereby have prevented the injury, and he failed to do so, and so contributed to his own injury, and but for his own negligence and carelessness the accident and injury complained of in the petition would not have happened, then the law is for the defendants, and the jury should so find."—Approved: Eilerman v. Farmer (Ky.), 118 S. W. 289.

§ 4694. Intoxication of Servant Contributing to his Injury.

"The court instructs the jury that if you believe from the evidence, that the said J. J—, at the time of the accident, was intoxicated or in a state of intoxication; and if you believe that because of such intoxication he slipped and fell in front of or underneath one or more of the wheels of said engine; and if you believe that he was guilty of negligence in being intoxicated, or in a state of intoxication, if you find he was, at said time and place; and if you believe such negligence, if any, caused or contributed to cause his injury and death—then in that event you will find for the defendant; but if you find that said J. J— was intoxicated or in a state of intoxication, that would not defeat a recovery, unless you further believe that the same was negligence, and that such negligence caused or contributed to cause the injury."—Approved: M. K. & T. Ry. Co. of Tex. v. Jones, 35 Tex. Civ. App. 584, 80 S. W. 852.

§ 4695. Intoxication Contributing to Injury to Passenger—No Excuse.

(a) "If you find and believe from the evidence that at the time of the accident complained of herein, the plaintiff was in a state of intoxication or semi-intoxication, and that such state of intoxication or semi-intoxication placed him in such condition that he was unable to and failed to exercise that caution and care required of him under instructions heretofore given, and that such condition contributed to the accident complained of herein, then you are instructed that this constituted contributory negligence on the part of the plaintiff."—Approved: Dallas Consol. Electric St. Ry. Co. v. English, 42 Tex. Civ. App. 393, 93 S. W. 1096.

(b) "The court instructs the jury that if they believe from the evidence that at the time plaintiff was injured he was intoxicated, and by reason of such condition he failed to exercise such care for his safety as might be ordinarily expected of a sober person of ordinary prudence situated as plaintiff was at the time of the injury, and but for such failure plaintiff would not have been injured, or if they believe from the evidence that an ordinarily prudent and sober person would not have been injured under similar circumstances, they should find for the defendant."—Approved: Louisville & N. R. Co. v. Payne (Ky.), 104 S. W. 752 (not reported in state reports).

(c) "The court instructs the jury that, if they should find from a preponderance of the evidence that the plaintiff was intoxicated at the time of the injury complained of, you are instructed that such intoxication, if any, does not, of itself, constitute a defense to plaintiff's right of recovery; and such intoxication, is not in itself evidence of contributory negligence, and is merely a circumstance to be considered by you in determining whether such intoxication contributed to the injury complained of. If it did not contribute to such injury, then such intoxication would be no defense to plaintiff's cause of action, and you should discard and disregard all testimony in regard to such intoxication in case you find that it did not contribute to plaintiff's

injury."—Approved: Kansas City Southern Ry. Co. v. Davis, 83 Ark. 217, 103 S. W. 603.

§ 4696. But if Known to Defendant it May Call for Different Care as to his Safety.

"The court instructs you, that if you find from the evidence that plaintiff was injured while on the track of defendant's railroad, as alleged in the petition, and when he was so injured he was intoxicated in any degree, and his intoxication was unknown to the defendant's servants in charge of the train, then his intoxication will not excuse the omission, on his part, of that same care and prudence which would have been required of a sober man, under the same circumstances and situation, to have exercised to protect himself against injuries, and if you further find from the evidence, that by reason of his intoxication, he failed to exercise that care and caution a prudent and reasonably sober man, or a man not intoxicated to the extent he was, would have exercised in the same situation and under the same circumstances; and further find from the evidence that, had he exercised such care he would have avoided the injury, then he cannot recover in this action, and your verdict must be for the defendant."—Approved: Cotner v. St. Louis & San Francisco R. Co., 220 Mo. 284, 119 S. W. 610.

§ 4697. Emergency Excusing One's Putting Himself in Danger.

"The court instructs the jury that it is not sufficient for the plaintiff to prove that his intestate may have been frightened and excited. Before he can recover under the charge in the case, he must prove by a preponderance of the evidence that the circumstances created by the defendant or its servants were such as to place a reasonable man under the immediate apprehension of danger."—Approved: Adamson's Adm'r v. Norfolk & P. Trac. Co. (Va.), 69 S. E. 1059.

§ 4698. Acts Under Emergency May Excuse Whatever Course is Taken.

(a) "The fact, if it be a fact, that plaintiff did not let go of the car, but clung to the rail and ran along the side of the car trying to get on, after it had started, will not necessarily show that he was guilty of contributory negligence. If, by reason of the starting of the car at the time and in the manner in which it was started, an emergency arose, then, even though plaintiff's action was ill judged, if, under all the facts and circumstances shown by the evidence, he acted as would a man of ordinary prudence in a like situation, and had used ordinary care in his original attempt to get on the car, then he was not guilty of contributory negligence," etc.—Approved: Burger v. Omaha & C. B. St. Ry. Co., 139 Iowa, 645, 117 N. W. 35.

(b) "The plaintiff's right to recover is not affected by the fact that he may have contributed to his injury, if he was not in fault in so doing. If the plaintiff's share in the transaction was innocent, and not incautious, it furnished no excuse for the defendant. If you find that the plaintiff was suddenly put in peril by the negligence of the de-

fendant, without having sufficient time to consider all the circumstances, he is to be deemed excusable for omitting some precautions or making an unwise choice under this disturbing influence; and, even if you find that, in his bewilderment, being otherwise innocent of contributory negligence, he ran into danger by trying to cross the track ahead of the cars, such action on his part would not be contributory negligence."—Approved: Antonian v. Southern Pac. Co., 9 Cal. App. 718, 100 Pac. 877.

(c) "When a person is in imminent danger, he is not called upon to exercise that intelligence and judgment he would be expected to exercise were he not in danger. So, if a party in imminent danger has two ways open to him, but has not the time to stop and investigate, and determine which is the right or safe way, and which is the wrong or unsafe way, his choosing the latter is not, under the circumstances, negligence on his part. So, if you should find from the evidence that McR— found himself in imminent danger, or had reasonable ground to believe that he was in such danger, and had not time to stop and consider and determine the better course to pursue, then you are instructed that his choosing to run out towards the portal, instead of back towards the bench, was not negligence on his part, even though in so doing he may have run right under the falling rock, instead of away from it."—Approved: McRae v. Erickson, 1 Cal. App. 326, 82 Pac. 209.

(d) "If you find from the evidence that plaintiff was in the employ of defendant at the time of the injury complained of, and was employed in repairing defendant's track at the point where the accident occurred; that while so employed his attention was necessarily engaged by reason of the nature of the duties he was then engaged in; that while so engaged in performing such duties a train was approaching him on said track, and that it was near to him when discovered for the first time by him; that in the emergency and hurry to get out of the way of such train so approaching plaintiff stepped back from said track, and near to the track lying next thereto, and running parallel therewith across the street crossing at C avenue; that while so standing cars had been cut loose from an engine on defendant's track, and were being kicked back with such force that they were running on said parallel track at a rate of speed exceeding six miles per hour; that no one was stationed on or near the end of said cars nearest to and approaching plaintiff, in order to check speed and warn persons on said track of their approach; that plaintiff did not, in the exercise of ordinary care and diligence, discover the approach of said cars in time to avoid injury to himself; that plaintiff was not guilty of any negligence which directly contributed to his injury,—then plaintiff will be entitled to recover, and you should find for plaintiff. If you fail to so find, then plaintiff will not be entitled to recover, and you should find for defendant."—Approved: Tobey v. Burlington, C. R. & N. Ry., 94 Iowa, 256, 62 N. W. 761.

(e) "The court further instructs the jury that if they believe from all the evidence that the deceased, Peter McC—, was, on the date of

the accident, placed suddenly and unexpectedly in a dangerous position, or what to him reasonably appeared to be a dangerous position, if he was so placed, and was so placed by the failure of the defendants, their agents and servants, to give reasonable warning of the approach of the train, or by their running said train substantially at a rate of speed greater than ordinary care for the safety of others would allow, then he was not guilty of contributory negligence, if he did not adopt the best means of escape, but made an error of judgment as to the best course to pursue; all that was required of him, under the circumstances, if it was under such circumstances he acted, being to act as a person of ordinary judgment and prudence would have done, if placed in the same situation."—Approved: Maysville & B. S. R. Co. v. McCabe's Adm'x (Ky.), 100 S. W. 219 (not reported in state reports).

(f) "When, by negligence or misconduct of one, another is suddenly put in peril, if the person so imperiled, which, under the impulse of an apparently well-grounded fear, seeks to escape, and suffers injury from another source, the author of the original peril is answerable for all the consequences which ensue, provided, that in attempting to make his escape the injured person exhibited such conduct as might reasonably have been expected from an ordinarily prudent person under similar circumstances."—Approved: Cincinnati, H. & D. Ry. Co. v. Acrea, 42 Ind. App. 127, 82 N. E. 1009.

(g) "The court instructs the jury that if the person, without fault on her part, is confronted with sudden danger or apparent sudden danger, the obligation resting upon her to exercise ordinary care for her own safety does not require her to act with the same deliberation and foresight which might be required under ordinary circumstances." —Approved: Chicago Union Trac. Co. v. Newmiller, 215 Ill. 383, 74 N. E. 410.

§ 4699. In Such Case Negligence Causing Emergency is Proximate Cause of Injury.

"The court instructs the jury that if they believe from the evidence that W. H. F., through the negligence of the defendant, was in terror of an emergency for which he was not responsible, and for which the defendant was,—he acted wildly and negligently, and lost his life in consequence,—said negligent conduct, under such circumstances, is not contributory negligence. In such case the negligent act of the defendant is the proximate cause of the injury."—Approved: B. & S. R. R. Co. v. Few's Ex'r, 94 Va. 82, 26 S. E. 406.

§ 4700. And so where Defendant's Negligence Throws Plaintiff off of his Guard.

"The court instructs the jury that it is an established rule of law that one person will not be allowed to impute a want of vigilance to another injured by his act, if that very want of vigilance were the consequence of an omission of duty on his part; that is, if the defendant, by his own act, throws a plaintiff off his guard, the plaintiff's lack of vigilance cannot be regarded as negligence, and one is not

chargeable with contributory negligence in failing to anticipate the negligence of another, and in not providing against it. Every one has a right to presume that others will act in a lawful and proper manner; consequently the law will not hold it imprudent in a plaintiff to act upon a presumption that the defendant has done or will do his duty."—Approved: Steele v. Northern Pac. Ry. Co., 21 Wash. 287.

§ 4701. The Same Rule Applies to Acts of Negligence Charged to Defendant.

"The court further instructs you that, although you may believe from the evidence that when the deceased, M—, fell or was thrown under the car, he was in great peril, and that to move the car was not the best or safest way to rescue or remove him, yet if you shall also believe from the evidence that the persons in charge of said train did in good faith, and in accordance with their best judgment, under the circumstances, as they then appeared to them, adopted that method of rescuing or removing him, provided in so doing they used ordinary care, then in that event the defendant is not liable for not having adopted some other method of removing him, and you should so find." —Approved: Matthews' Adm'r v. Louisville & N. R. Co., 130 Ky. 551, 113 S. W. 459.

§ 4702. Contributory Negligence Alleged of a Child—Care According to Age and Capacity.

(a) "By ordinary care is meant such care as an ordinarily careful and prudent person would exercise under the same or similar circumstances. Negligence is the failure to exercise ordinary care.

"If you find that Errett H— was a boy of immature age, and had not the capacity of an adult, and that he exercised such care as ought reasonably to have been expected of one of his age and capacity, then he is not guilty of contributory negligence."—Approved: Hall v. Missouri Pac. Ry. Co., 219 Mo. 553, 118 S. W. 56.

(b) "If the jury believe from the evidence that Freeborn G. H— was a boy of immature age and had not the capacity of an adult, and that he exercised such care as ought reasonably to have been expected for one of his age and capacity, then he was not guilty of contributory negligence."—Approved: Holmes v. Missouri Pac. Ry. Co., 207 Mo. 149, 105 S. W. 624.

(c) "The court instructs the jury that if they find and believe from all the evidence in this case that Metropolitan avenue at Fifth street in the city of Argentine, on February 26, 1901, was an open and public street in said city, and that at said date defendant operated an electric street railway running east and west on said Metropolitan avenue, for the purpose of transporting persons for hire from one point to another in said city, and was using the tracks and operating the railway car mentioned in the evidence, and that plaintiff was, at said date, crossing said Metropolitan avenue from the south to the north at the intersection of Fifth avenue, and that, while she was so crossing said avenue, she was run upon and knocked down by the

west-bound car mentioned in the evidence, and injured to such an extent as to cause the amputation of her foot and part of her leg, and if you further find and believe from the evidence that, at the time above mentioned, plaintiff exercised such care and caution, for her own safety, as a reasonably prudent child of her age and capacity would have exercised under the same and similar circumstances, and the defendant's agents, servants and employees, in charge of and operating said car, either saw, or by the exercise of ordinary care on their part could have seen, plaintiff moving toward and upon said tracks, if you so find, in time to have checked the speed of said car with safety to its passengers, and to have avoided running over and injuring plaintiff, if you find such were the facts, and that said servants and employees neglected and failed to do so, and that such failures, if any, directly and proximately caused the injury to plaintiff, then your verdict shall be for the plaintiff."—Approved: Heinzle v. Metropolitan St. Ry. Co., 213 Mo. 102, 111 S. W. 536.

(d) "The jury are instructed that the rule as to contributory negligence of a child is that a child is required to exercise only that degree of care which a child of his age, intelligence, capacity, discretion, and experience would naturally and ordinarily use in the same situation and under the same circumstances."—Approved: McGuire v. Guthmann Transfer Co., 234 Ill. 125, 84 N. E. 723.

(e) "The court instructs the jury that a boy of 14 years of age is only required to exercise that degree of care and caution which boys of his age, capacity, intelligence, and experience may reasonably be expected to use under like circumstances; and if the jury believe, from the evidence, that the plaintiff was, just before and at the time of receiving his alleged injuries, exercising such care, then the plaintiff was exercising all the care the law requires of him."—Approved: Peterson v. Chicago Consol. Traction Co., 231 Ill. 324, 83 N. E. 159.

(f) "It was the duty of the plaintiff at the time mentioned in the petition to exercise for his own protection from injury the degree of care usually exercised by persons of his age, experience, and intelligence under the same or similar circumstances; and if he failed to exercise that degree of care, and by reason of such failure, if any there was, helped to cause or bring about his injury, and but for such failure or contributory negligence he would not have been injured, then the law is for the defendant, and they should so find."—Approved: Louisville Ry. Co. v. Esselman (Ky.), 93 S. W. 50 (not reported in state reports).

(g) That if the law found "from the evidence that the plaintiff failed or neglected to use that ordinary and natural care which the defendant had a right to expect from a person of his age and discretion, as shown by the proofs, in and about such employment, and that the plaintiff was injured by reason of his failure or neglect to use such natural and ordinary care and discretion, then the plaintiff cannot recover; but you are instructed that the rule as to contributory negligence of a child is, that it is required to exercise only that degree of care which a person of the age of this plaintiff would naturally and

ordinarily use in the same situation and under the same circumstances." —Approved: Huff v. Ames, 16 Neb. 139, 19 N. W. 623.

(h) "The law made it the duty of the plaintiff, Joseph H—, to exercise such ordinary care for his own safety as children of his age, intelligence, and experience usually exercise under similar circumstances, but no more; and if the jury shall believe from the evidence that the plaintiff failed to exercise such ordinary care for his own safety, and by such failure upon his part so far contributed to bring about his injuries that, but for such failure, if he so failed, he would not have been injured, the law is for the defendant, and the jury should so find."—Approved: Louisville Ry. Co. v. Hofgesand (Ky.), 104 S. W. 361 (not reported in state reports).

(i) "The defendant alleges that plaintiff's injuries were the result of his own negligence, and not the negligence of the defendant. In determining whether or not the plaintiff's injuries were caused by his own negligence, you are instructed that the same degree of care is not required of a child of tender years and limited experience that is required of an ordinary grown person. Unless you find from the evidence that the plaintiff, at the time he was injured, failed to exercise that degree of care for his own safety which a person of his age, development, and experience would naturally and ordinarily use in the same situation and under the same circumstances, then you will find that the plaintiff has not been guilty of any such negligence as will defeat his recovery on that ground."—Approved: Omaha & R. V. Ry. Co. v. Morgan, 40 Neb. 604, 59 N. W. 81.

§ 4703. For Failure of Care within that Capacity there is Same Responsibility as with Adult.

(a) "It was the duty of the deceased, Estelle E—, to exercise that degree of care which persons of her age, experience, and intelligence usually exercise for their own safety in using the street, and although you may believe from the evidence that the motorman in charge of the car was negligent, as submitted to you by instruction No. 1, yet, if you further believe from the evidence that Estelle E— failed to exercise that degree of care, to wit, such care as persons of her age, experience, and intelligence usually exercise under like or similar circumstances, and that such failure on her part so contributed to bring about her injury that but for such failure she would not have been injured, then the law is for the defendant, and you should so find."—Approved: Eirk's Adm'r v. Louisville Ry. Co. (Ky.), 98 S. W. 293 (not reported in state reports).

(b) "It was the duty of Estill A— in crossing the tracks of the defendant at the place he was killed to take such care for his own safety as a reasonably prudent child of his age and experience would ordinarily have exercised under like or similar circumstances to those proven in this case, and, if the said Estill A— failed to exercise that degree of care for his own safety, and but for such neglect and failure on his part so to do he would not have lost his life, then you should

find for the defendant."—Approved: Adkisson's Adm'r v. Louisville, H. & St. L. Ry. Co. (Ky.), 110 S. W. 284 (not reported in state reports).

(c) "The evidence shows that plaintiff's minor was at the time a minor somewhere about 15 years of age. This fact, however, does not excuse him from the obligation to exercise care according to his knowledge and capacity to understand danger, as boys of that age ordinarily are, and to use ordinary care to avoid it; and, if you find from the evidence in this case that plaintiff's minor had sufficient capacity to understand the danger of crossing a railroad track in such a situation, it was his duty to use ordinary care in crossing the track, so as to avoid getting in the way of moving cars; and if he failed to use such care, and because of such failure was injured, he was guilty of contributory negligence, and cannot recover in this action."—Approved: Dubiver v. City & Suburban Ry. Co., 44 Ore. 227, 74 Pac. 915.

(d) "If you find from the evidence that the plaintiff and his brother, the same day the accident occurred, raised a panel of the snow fence that had fallen, and leaned it against the permanent fence or the other panels of the snow fence and the same was left by plaintiff and his brother in that condition, without any fastening to the permanent fence, and afterwards the same day the plaintiff went near such panel, and the same fell over on him, and if you find that plaintiff had sufficient capacity to understand and appreciate the danger surrounding him at the time of the accident, then he would be guilty of contributory negligence, and in that event he cannot recover, notwithstanding defendant may have been negligent in the erection and construction of the snow fence."—Approved: Fishburn v. Burlington & N. W. Ry. Co., 127 Iowa, 483, 103 N. W. 481.

(e) "If you should find by such preponderance of the testimony of Charles A—, the plaintiff, was guilty of contributory negligence, and that that contributory negligence directly and approximately contributed to this injury, then you should find for the defendant. In determining the question whether or not Charles A— was guilty of contributory negligence to such an extent as to directly and proximately and materially contribute to the injury which he suffered, it is the duty of the jury to take into consideration the boy's age and all of the circumstances surrounding him, his experience or lack of experience, his knowledge or lack of knowledge, the amount of prudence and care and judgment which would ordinarily and reasonably be expected of a boy of that age under the circumstances and conditions shown by the testimony in this case. That is the rule by which the question of whether or not he is guilty of contributory negligence is to be measured by the jury. You should not apply to the plaintiff in the case the same rules you would apply to a grown man. You should make allowances for his youth, and in attempting to determine the question of his contributory negligence or the lack of it inquire whether or not he exercised such care as would reasonably and ordinarily be expected of a boy of his age and intelligence and experience under like circumstances and conditions."—Approved: Akin v. Bradley Engineering & Machinery Co., 51 Wash. 658, 99 Pac. 1038.

§ 4704. Child of Very Tender Years Incapable of Contributory Negligence.

(a) "The court instructs you as a matter of law that a greater degree of care and caution will be required to avoid injury to an infant, that may be supposed to be incapable of caring for itself, than would be required in the same situation to avoid injury to an adult. A child is held only to the exercise of such degree of care and discretion as is reasonably to be expected from children of its age. A child of four years is presumed to be incapable of undertaking ordinarily the dangers and perils incident to the walking upon the railroad track. Children of very tender age are conclusively presumed to be incapable of exercising care and judgment to avert injury from themselves, and, as a matter of law, contributory negligence is not imputable to them." —Approved: Anderson v. Great Northern Ry. Co., 15 Idaho, 513, 99 Pac. 91.

(b) "The court instructs the jury that a child of tender years cannot be guilty of negligence, nor can the negligence of the parent be imputed to the child, and that if you believe from the evidence that the agents and servants of the defendant company could have seen, by the exercise of a reasonable care and diligence, that the said Mary Ellin M— was in a position of danger at the time they backed said train, and that said agents and servants of the defendant failed to exercise reasonable care and diligence to see her position, it will be your duty to find for the plaintiff."—Approved: Miles v. St. Louis, I. M. & S. R. Co., 90 Ark. 485, 119 S. W. 837.

§ 4705. Obliviousness of Danger from Absorption in Work not Contributory Negligence.

"If plaintiff's intestate was absorbed in the performance of the duties of his employment, and was thus oblivious to danger and did not see, and did not hear, the train approaching him, and if a man of ordinary prudence and care for his own safety situated as plaintiff's intestate was would have been so absorbed so oblivious to his surroundings, and would not have seen and would not have heard the train approaching, then plaintiff's intestate was not guilty of contributory negligence which would bar a recovery in this case. But plaintiff's intestate was required to use his own senses, and to take notice of those things which an ordinarily careful and prudent person situated as he was, would have observed, by a proper use of his senses, in connection with his duties as an employee of defendant, pursuing his labor in defendant's behalf."—Approved: St. Louis, I. M. & S. Ry. Co. v. Jackson, 78 Ark. 100, 93 S. W. 746.

§ 4706. Exposure by Acting on Sudden Impulse to Save a Human Life.

"Now, therefore, if you believe, from a preponderance of the evidence, that a person, called in plaintiff's petition a stranger was standing at the corner of the platform of the freight depot in this city, on or about December 2, 1902, and between the platform and the house track, which ran alongside of the platform; that the backing of the

engine and cars across Pearl street exposed such person to the danger of being caught between the forward end of said car and the platform, and thereby crushed and killed; that the exercise of ordinary care in backing the said engine and cars across said Pearl street required that the switchman, A—, should keep a lookout for the purpose of discovering persons who might be exposed to injury by moving cars, if any such persons there were; that the said A— did keep such a lookout, and saw the said person, and realized that he was exposed to danger of being caught between the forward end of the car and the platform, and crushed and killed, if he was; and you further believe from the evidence that the said A—, after discovering the said person's peril, if he did discover same, could, by the exercise of the care that a person of ordinary prudence would have used under the same circumstances, and should, in the exercise of such care, have caused the said car to be stopped before reaching the said person; and you further believe, from a preponderance of the evidence, that the said S— saw and realized the danger to which the said person was exposed, if any, and that, acting upon the sudden impulse to save human life, if he did, he attempted to rescue the said person, if he did, and in so doing received injuries substantially at the time and place and in the manner alleged in his petition, which thereafter, on the same day, caused his death; and that under the attending circumstances the said attempt at rescue, if made, was not rash or reckless in the judgment of men of ordinary prudence—you will return a verdict for plaintiffs. But unless you so find you will return a verdict for defendant."—Approved: Texas & N. O. R. Co. v. Scarborough (Tex. Civ. App.), 104 S. W. 408 (not reported in state reports).

CHAPTER CXXVI.

PARTNERSHIP.

§ 4707. What Constitutes a Partnership.
4708. As Between Members there Must be an Express or Implied Agreement.
4709. One Permitting Another to Hold Him out as Partner.
4710. Agreement to Engage in Business and Participating Therein.
4711. Power of Partner to Convey Property of Firm.
4712. Each Partner Agent of the Other in Respect to Firm Property.
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4718. Sufficiency of Notice of Dissolution Question of Fact.
4719. Appropriation by Partner not Embezzlement.
4720. Agreements Between Partner Outside of Partnership Accounting Subject of Suit.
4722. Breach of Agreement as Upon Dissolution may Authorize Action of Law.
4723. Note Given Upon a Settlement May be Sued on.

§ 4707. What Constitutes a Partnership.

"To constitute a partnership there must be an agreement between the parties, both consenting thereto, that they will, from a certain day or time, share the profits and be responsible for debts and losses and carry on the business for their mutual benefit; and there must be an entering upon or conducting or doing business under such agreement, or some business preparatory thereto, to make them or either of them liable to third parties as partners."—Approved: Lucas v. Cole, 57 Mo 143.

§ 4708. As Beween Members there Must be an Express or Implied Agreement.

"A partnership can only exist as between the parties themselves, in pursuance of an express or an implied agreement to which the minds of the parties have assented; the intention or even belief of one party alone, cannot create a partnership without the assent of the other."—Approved: Phillips v. Phillips, 49 Ill. 437.

§ 4709. One Permitting Another to Hold Him Out as a Partner.

"If you believe from the evidence that the contract between Ed. B— and E. E— was that defendant E. E— delivered to B— certain young mules, to have said mules broken, and furnish the harness for said mules, and that B— was to work said mules and break them, and, in case said B— made any money on a contract of work in which said mules were worked, then said B— was to pay said E— one-half of what was made with said mules as for hire of said mules, then said E— and B— would not be partners, and you will find for defendant, unless you further believe that said E—, by statements made to the plaintiff, or by some act done or performed by said E—, induced the plaintiffs to believe he was a partner, and that in consequence thereof the plaintiffs parted with their goods, believing him to be a partner; and in this connection you are further charged that E— was not bound to make inquiries as to whether his name was being used as a partner with B—; so that, if you believe from the evidence that B— was purchasing goods in the name of Emberson & Ballew, and holding out that the defendant, E—, was a partner, this would not make defendant, E— liable as a partner unless defendant E —knew that said B— was so holding him out as a partner, and did not, as soon as he made the discovery, disavow and deny the partnership."—Approved: Emberson v. McKenna (Tex. Civ. App.), 16 S. W. 419 (not reported in state reports).

§ 4710. Agreement to Engage in Business and Participating therein.

"The jury are instructed that before they can find that A— was a partner of B— and C— they must first find that the three entered into a contract whereby they agreed to and were entitled and bound to take part in the conduct of the business of mining and smelting and did so engage in mining and smelting, each participating therein."—Approved: Simmons v. Ingram, 78 Mo. App. 603, 608.

§ 4711. Power of Partner to Convey Property of Firm.

"That said D. J. M—, as managing partner, had authority to convey the property in controversy to plaintiffs for and in the name of D. J. Maher & Co., either to satisfy or secure the indebtedness of said firm to plaintiffs, providing said transaction was in good faith, and without any intent to hinder, delay, or defraud the other creditors of the firm, or his copartner, Martin M—, and cannot be set aside or annulled on the sole ground that the said Martin M— was not present, and did not personally join in or consent to such conveyance."—Approved: Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321.

§ 4712. Each Partner Agent of the Other in Respect to Firm Property.

"If you find from the evidence that H. S. B— and S. S. B— were partners respecting the land mentioned in the evidence and the crops to be grown thereon, then, and in that event, any contract made in the line of said partnership by either of them would be binding on both, and the first transfer, made in good faith, and for a valuable consideration, by either of them, respecting the leases in controversy,

would be binding on all parties concerned, and the party taking such first assignment would acquire the first and best title thereto."—Approved: Ulrich v. McConaughey, 69 Neb. 773, 96 N. W. 645.

§ 4713. Goods Purchased by Partner must be within Scope of the Business.

"The jury are instructed that if the pianos were sold to A— alone, they must be satisfied that the business of buying and selling pianos was within the scope of the partnership business, or that defendants jointly, and as copartners, specially ordered the pianos before a joint liability was incurred."—Approved: Boardman & Gray v. Adams & Hackley, 5 Iowa, 224, 229.

§ 4714. Partner Giving Firm Note for Private Debt, Payee Must Show Authority.

"The jury are further instructed that where a note is given in the name of the firm by one partner, in payment of his own individual debt, the law raises a presumption that it was done without the knowledge or consent of the other partner, and the burden of proving said knowledge and consent is upon the party alleging it."—Approved: Levi v. Latham, 15 Neb. 509, 19 N. W. 460.

§ 4716. Moneys Furnished to Partner and Used by the Partnership.

"The court instructs the jury that the plaintiff is entitled to recover in this case if he has proved, by a preponderance of all the evidence, that he advanced and paid out the money sued for as charged in the bank book in the account of J. E. M— therein, and that these moneys were used in the business carried on in the name of J. E. M— or of the Manlove Wool & Fur House, and that during the time when these moneys were being so advanced and paid out and so used, if they were, the defendant William B. M— was a partner of the said J. E. M— or Joseph E. M— in the said business."—Approved: Metzger v. Manlove, 241 Ill. 113, 89 N. E. 249.

§ 4717. Burden on Partner to Prove Dissolution and Notice Thereof.

(a) "The jury are instructed to find for the plaintiff, if they find from a preponderance of the evidence that W. H. R— was a member of the firm of Purdom, Roberson & Co. at the time that firm commenced business, or afterwards, before the indebtedness sued on was incurred, and the plaintiff extended the credit for the claim sued on in the faith of his belief that W. H. R— was such a partner, then and in that event the said W. H. R— would be liable for the amount of the note sued on and interest, unless he gave actual notice to the plaintiff or gave notice generally by advertisement in some newspaper published in the locality or county of the partnership before said indebtedness was incurred."—Approved: Rector v. Robins, 82 Ark. 424, 102 S. W. 209.

(b) "The jury are instructed that the burden of proof is on the plaintiff, in the first instance, to prove that there was a partnership of which the defendant, W. H. R—, was a member, before he will be liable in this action. And if the jury find from a preponderance of the

evidence in the case that the defendant, W. H. R—, was a member of the firm of Purdom, Roberson & Co. before the plaintiff indorsed or became surety on the note in controversy, the burden will then shift to the said R—, and it will devolve on him to establish, by a preponderance of the evidence, a notice of withdrawal or dissolution in the manner set out in these instructions."—Approved: Rector v. Robins, 82 Ark. 424, 102 S. W. 209.

§ 4717a. Purchase by Partner after Notice of Dissolution of Partnership.

"You are further instructed that the old firm of S— & W— would not be liable for any goods purchased in this case after the dissolution of the firm, purchased by defendant R—, after the plaintiff had received notice of the dissolution of the partnership."—Approved: Paxton & Gallagher Co. v. Starkweather (S. D.), 128 N. W. 479.

§ 4718. Sufficiency of Notice of Dissolution Question of Fact.

"The jury are instructed that if they should find from the evidence that there was trouble between A— and B— prior to the sale of goods and the giving of the note by A—; that B— informed A—, in substance, that he would have no more dealings with him as a partner; that he took possession of all the goods (jewelry) and locked them up and from that time they ceased to do business, then the partnership was dissolved; that B— was not bound to publish notice in any of the newspapers of another city and was only bound to give actual notice to such parties in said city as had dealt with the partnership and also to use all fair means to publish as widely as possible the fact of a dissolution; that publication in a newspaper is one of the means of giving notice but it is not absolutely essential, and whether B— gave such notice of dissolution as was fair and reasonable was for the jury to say. If he did your verdict should be for the defendant, and if not for the plaintiff."—Approved: Solomon v. Kirkwood et al., 55 Mich. 256, 21 N. W. 336.

§ 4719. Appropriation by Partner Not Embezzlement.

"It appears without dispute that W. L. G— was a partner in the banking firm of Gary & Wheaton, hence the use or appropriation of the funds of the partnership to his private use, or the advancement of such funds by him to John E. G—, would not constitute the crime of embezzlement, nor would it be a criminal act. Hence, if you find from the evidence that E. H. G—, by himself or by any other person acting for him, represented and stated to plaintiff that said W. L. G— was guilty of embezzlement or any other crime, by reason of the wrongful diversion or appropriation of the funds of the firm, and requested or demanded of her that she make such assignment to avoid criminal proceedings against W. L. G—, or to save said W. L. G— from punishment for such alleged crime, and she, believing and relying on such statements and representations, complied with such request or demand, and made the assignment now in controversy, such facts would amount to a fraud upon the plaintiff, and she could rightfully repudiate

and avoid the writing so made by her. And if you so find, and further find that she did repudiate said assignment, and notify the defendant thereof before it had paid to E. H. G— the amount upon said certificate, such notice will be binding upon the defendant, and your verdict will be for the plaintiff."—Approved: Gary v. Northwestern Masonic Aid Ass'n, 87 Iowa, 25, 53 N. W. 1086.

§ 4720.—Agreements Between Partners Outside of Partnership—Accounting Subject of Suits.

"The jury are instructed that contracts between partners in respect to matters which, though relating to the partnership business, are separate and distinct from all other matters in question between the partners, and can be determined without going into partnership accounts, may be the subject of a suit at law between the partners; and if you believe from the evidence that the $131 note sued upon, though relating to partnership matters, is separate and distinct from the partnership accounts, and can be settled without going into the accounts of the partnership, you will find for plaintiff on said note."—Approved: Halleck v. Streeter, 52 Neb. 827, 73 N. W. 219.

§ 4722. Breach of Agreement as Upon Dissolution May Authorize Action of Law.

(a) "Gentlemen: So far as the law of this case is concerned, it being an action between co-partners or persons that were co-partners, and in and about co-partnership funds, the right of recovery depends entirely upon whether this action is based upon some special agreement or undertaking between the co-partners aside from the scope of the partnership business. I have a case I will read from: 'A specific promise or arrangement between partners, though in respect to a part of the common funds thereof, takes it out of the general account in equity, and makes it the subject of an action at law.' That is what this is. This suit is brought by the plaintiff to recover from the defendant the amount alleged by him to have been paid in discharge or part discharge of the sum of $4,500, which they allege the defendant assumed and agreed to pay as his portion of the general indebtedness of the company, at the time the company was dissolved, or finished up or quit its general business. Upon this point I have written out and charge you as follows:

"That if you find that the members of the company met together for the purpose of dissolving the same, and of ascertaining the amount of the company's indebtedness, and then ascertaining its indebtedness to be $20,000, and thereupon apportioned among the several members the just and fair proportion thereof which each should assume and pay and keep the others harmless, paying the respective sums so assumed by each, and each assumed and then promised to pay the sum so apportioned to him, and that the defendant's proportion was $4,500, which he then assumed and promised to each of the several members to pay; and if you further find that the defendant afterwards refused and neglected to pay the same, and that the plaintiffs, being liable thereon, were obliged to and did pay the amount assumed by the de-

fendant, or any portion of it, then you should find for the plaintiffs as your verdict, the sum so paid by them on defendant's assumed proportion, with interest on the amount so paid by them, the plaintiffs, up to the time of said trial.

"On the other hand, if you should find there was no apportionment of the indebtedness of the company, or even if you should find there was an apportionment of the indebtedness among the several members, but that the defendant refused to accept, refused to promise to pay the same, then you should find for the defendant.

"But if you should find that he assented to it,—assented to pay the proportion, promised the other members he would pay, and neglected to pay, and the plaintiffs thereafter paid it, or any part of it, the amount they so paid they are entitled to recover, with interest."—Approved: Edwards v. Remington, 51 Wis. 336, 8 N. W. 193.

(b) "If you believe from the evidence that the defendant, C—, rendered plaintiff, H—, a statement of the partnership affairs, (after the sale of the cattle), showing a balance due the plaintiff, and accompanying said statement with a letter wherein the said C— agreed to be individually responsible to the plaintiff for said balance, you will find for the plaintiff."—Approved: Henry v. Chapman (Tex.), 16 S. W. 543 (not reported in state reports).

§ 4723. Note Given Upon a Settlement May be Sued On.

"If you believe from the evidence that plaintiff and defendant had a final settlement and adjustment between them of their partnership accounts and transactions and after said settlement and adjustment executed the two notes described in plaintiff's petition, then you will find for the plaintiff $1,169.40 with interest at 6 per cent. etc."—Approved: Dyer v. Adams (Tex. Civ. App.), 120 S. W. 946.

CHAPTER CXXVII.

PRINCIPAL AND AGENT.

§ 4724. Principal Estopped to Deny Agent Held out as Such.
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4744. Agent With Right to Collect Cannot Accept Own Debt in Payment.
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4747. Unless There is a Known Usage to the Contrary, or His Principal Receives the Money.
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4756. Ratification by one Member of Unincorporated Association of Another's Acts.

4757. Ratification by Acquiescence in a course of Dealing.
4758. And by Acceptance of Benefits of Agent's Contract.
4759. Ratification Where Agent Exceeds His Authority.
4760. Ratification Must be Entire, or Not at All.
4761. Ratification with Full Knowledge of Agent's Act.

§ 4724. Principal Estoppel to Deny Agent—Held out as Such.

"If you find from the evidence in this case that defendant K—, at the time of their first conversation concerning the purchase of the machine, told plaintiff's agent, M—, that any contract that C— might make with plaintiff through its agents would be all right with him, and used such language as would reasonably give the plaintiff to understand that he would stand by such agreements or contracts relative to the purchase of such machine, then plaintiff would be justified in dealing with him (K—) by and through C—, and the acts and contracts, if any, made by him for himself and K—, would bind K—. Any orders or directions by K— to C— would not affect plaintiff until such time as it (the plaintiff) had notice or knowledge. If K— authorized C— to act for him, and plaintiff had knowledge of it, then he could have withdrawn such authority by notifying plaintiff of his desire to do so, but not by giving C— alone the notice to that effect. C— could not bind K— without authority from K—."—Approved: Belle City Mfg. Co. v. Kemp, 27 Wash. 111, 67 Pac. 580.

§ 4726. This Holding out Inferred From Authority in Similar Transaction.

"If you believe from the evidence and under the instructions that in the course of the defendant's business S— made exchanges of property similar to the one in controversy here, and assuming to act for defendant therein, and for so long a period prior to the making of the transaction in question, and during the times Exhibit B—1 and Exhibit B—2 were in force, as to fairly satisfy your minds, and to fairly justify the inference that this defendant company had given him such authority, or authority to so do, then you should resolve this question in favor of the plaintiffs."—Approved: Eggleston v. Advance Thresher Co., 96 Minn. 241, 104 N. W. 891.

§ 4727. Thus Husband Acting as Wife's Agent in Contracts About Her Property.

"That, if the jury believe from the evidence that at the time the contract is alleged to have been made the defendant knew that her husband was doing business, and was employing parties to take care of her stock, in her name, as her agent, and made no objections to his so doing, the defendant would be bound by any contract within the apparent scope of such business."—Approved: Small v. Poffenbarger, 32 Neb. 234, 49 N. W. 337.

§ 4728. And a Bank-teller Certifying Checks as "Good."

"The court instructs the jury that unless they find from the evidence that Frank P. J—, the person whose name appears on the face of the writing offered by the plaintiff, was authorized or held out to the public

by the defendant company as being authorized to certify or mark 'Good,' writings or checks of the character of the paper sued on by plaintiff, they will find for the defendant. And the court states to the jury that the fact that the said Frank P. J— signed himself as 'teller' or was designated or called 'teller,' or 'paying teller,' of the defendant company, is not of itself sufficient to justify the conclusion that the said J— was clothed with any such authority."—Approved: Muth v. St. Louis Trust Co., 94 Mo. App. 94, 67 S. W. 978.

§ 4729. Money Paid Bank Authorized to Collect Binds its Principal.

"If you find from the evidence that the plaintiff authorized the Capitol National Bank to receive the money for him from the defendant, and sent the deed to the land purchased to be delivered to defendant upon payment of the purchase price, then the bank will be authorized to receive the money from the defendant for the plaintiff, and an unreserved payment by the defendant to the bank of the money in question would be a payment to the plaintiff."—Approved: Hammond v. Edwards, 56 Neb. 631, 77 N. W. 75.

§ 4730. Principal Retaining Benefits of Agent's Services are Bound by His Acts.

"The law is that where all the parties who unite in the promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several; and if you believe from the evidence in this case that at the time that the plaintiffs in this action were employed by Col. J. H. S— to render the service sued for in this action, if you find he did employ them, the said S— was the attorney for the defendant the Iowa Land Company, Limited, in the state of South Dakota, and was one of the attorneys for the Sioux City Safe Deposit & Trust Company, trustees, in the suit in the United States court for foreclosing the trust deed mentioned in the evidence, then I instruct you that the employment of the plaintiff by the said S— was binding upon the parties who had a beneficial interest in the mortgaged property, whom Col. S— was acting for in making the promise, if you find said defendant the Iowa Land Company, Limited, received any benefit from the plaintiffs' services."—Approved: Fowler v. Iowa Land Co., 18 S. D. 131, 99 N. W. 1095.

§ 4731. Act of Agent Inures Not to His but to Principal's Benefit.

"The law is that a trustee cannot enforce any claim against the trust property which he may acquire after his appointment as trustee. Therefore C. W. Benson & Co. could not and did not acquire any interest in the bonds of the Dakota Hot Springs Company purchased by it at the pledge sale mentioned by the witnesses, and such purchase of the bonds by C. W. Benson & Co. inured to the benefit of the defendant the Iowa Land Company, Limited, upon the undisputed evidence that C. W. Benson & Co., was acting as the manager and agent of the defendant the Iowa Land Company, Limited."—Approved: Fowler v. Iowa Land Co., 18 S. D. 131, 99 N. W. 1095.

§ 4732. Agent May Bind Principal as to What is Incident to Agency.

"You are instructed that if you believe from the evidence that Col. J. H. S— was in charge of the litigation of the Iowa Land Company, Limited, in the state of South Dakota, and if you further find from the evidence that the said S— was the attorney for the defendant the Iowa Land Company, Limited, in the action brought on behalf of that company in the United States Circuit Court for the District of South Dakota to foreclose the trust deed on the property of the Dakota Hot Springs Company, and if you further find from the evidence that said S— employed the plaintiffs to perform services, to recover for which this action was brought, then I instruct you, as a matter of law, that said Swan had authority to employ the plaintiffs to perform such services as they did perform, and that the defendant the Iowa Land Company, Limited, became, and now is, liable to the plaintiffs for the reasonable value of such services, if you believe from the evidence such services were an incident to services which said J. H. S— was directed to do in and about the foreclosure of said trust deed."—Approved: Fowler v. Iowa Land Co., 18 S. D. 131, 99 N. W. 1095.

§ 4733. Even for Torts Committed in Course of Employment.

"The jury are instructed, that if a tort is committed by an agent, in the course of his employment while pursuing the business of his principal, and it is not a willful departure from such employment and business, the principal is liable, although done without his knowledge."—Approved: Noble v. Cunningham, 74 Ill. 51.

§ 4734. Promise by Agent to be Personally Liable is Binding.

"If the jury believe from all the evidence that any one or more of the defendants promised the plaintiff that they would be individually responsible to plaintiff for the payment of the work and materials sued for, and that relying upon such individual promise or guaranty the plaintiff performed the work and furnished the material as set out in the petition, and if the jury should find such individual promise to be established by a preponderance of all the evidence on that subject, then you might find for the plaintiff against the one or more of said defendants whom you should find made such promise, if you find any such promise or guaranty was made."—Learn v. Upstill, 52 Neb. 271, 72 N. W. 213.

§ 4736. Liability of Agent of Undisclosed Principal.

"I further instruct you that whether or not the defendant, Dee A—, was acting in his capacity as vice president of the Michigan Traction Company in ordering the said lumber, and whether or not he was acting as its agent in the purchase of said lumber, that the plaintiffs would not be bound by such fact, unless the defendant, Dee A—, did something to bring the fact of such alleged agency to the attention of the plaintiffs at or before the time that the credit was extended to the defendant, Dee A—, and the lumber was delivered to him, which delivery was made at the time that the lumber was loaded upon the cars at the station in Battle Creek. An agent who orders goods without

legal authority for his principal binds himself, and, if an agent orders goods for a principal without disclosing the name of the principal to the party from whom he orders the goods, such party may charge the goods to the agent, and sue and collect from him; and I instruct you that whatever may have been understood by the defendant, Dee A—, as between himself and the officers of the Michigan Traction Company, it would be wholly immaterial, unless the same was communicated to the plaintiffs, and the plaintiffs were instructed by the defendant, Dee A—, or the defendant Dee A—'s actions, conduct, or statements were such that the plaintiffs, Stephen J. R— and Arthur J. K—, might have inferred from such actions, conduct, and statements made at or before the credit was extended and the lumber was delivered, that such credit was not to be given to Dee A— himself, but was to be given to the Michigan Traction Company."—Approved: Rathbun v. Allen, 135 Mich. 699, 98 N. W. 735.

§ 4737. Circumstances Showing Liability of Agent of Undisclosed Principal for Acts of Sub-Agent.

"In arriving at a determination as to whether or not the plaintiffs would have a right to extend this credit, and where authorized by the defendant, D. A., to extend such credit, you are to take into consideration the acts and declarations and statements of the defendant, D. A— made at or about the time this credit was extended to him; and I instruct you that if you find, as a matter of fact, that the defendant, D. A—, together with Mr. B—, went to the plaintiffs on or about ———, and obtained an estimate upon a bill of lumber, and that the defendant, D. A—, authorized Mr. B— to order the lumber at such time as he might want it, and if you further find as a fact that the defendant, D. A—, did not state that the lumber was to be charged to the Traction Company, and if you find as a fact that the defendant, D. A—, did not say anything to the plaintiffs about whom they should charge the lumber to, they would have the right, as a matter of law to charge it to the defendant D. A—."—Approved: Rathbun v. Allen, 135 Mich. 699, 98 N. W. 735.

§ 4738. Notice to Agent in Scope of Agency is Notice to Principal.

"If you believe from the evidence that the care of the animals in defendant's zoo was intrusted to employees of the defendant, and that said employees were notified and knew that the camel in question had vicious propensities, the defendant had notice and knowledge of such vicious propensities of said camel."—Approved: Gooding v. Chutes Co., 155 Cal. 620, 102 Pac. 819.

(b) "If it appears that the goods in controversy were marked and designated as household goods, and had been used by plaintiff and her husband in their housekeeping, and were intended to be so used, then you will be authorized to find that plaintiff's husband was her agent in the shipment and control of said goods, from slighter evidence than would be required to establish such agency between strangers or parties not standing in the relation of husband and wife; and if you find that plaintiff's husband was her agent in respect to the shipment

and control of said goods, then notice to him of the attachment of the goods would be notice to her.

"If it appears that plaintiff's husband was present at, and superintended or looked after, the shipment of the goods in controversy at Chicago, and that plaintiff herself was not present at such shipment, and saw none of the agents or employees of the defendant in relation thereto, then the defendant had the right to consider him (the husband) as plaintiff's duly authorized agent in regard to the shipment and control of said goods, unless notified to the contrary."—Approved: Furman v. Chicago, R. I. & P. Ry. Co., 62 Iowa, 395, 17 N. W. 598.

§ 4739. Mistakes of Agent are Those of His Principal.

"The court instructs the jury that a broker for the purpose of signing bought and sold notes is the agent of each and both of the parties to the contract which he makes; but in all other respects he is and remains the agent of the party who originally employes him. If, therefore, the jury find in this case that the defendant first employed the broker, Mr. T—, or first set him in motion on the business involved in this controversy, they are instructed that he was and remained the agent of the defendant, so far as any agency resulted from the above facts, and that any mistakes which he may have made in conveying to plaintiffs the directions of defendants as to the manner of punching these rails, are the mistakes of defendant's own agent, and that the plaintiffs are not responsible therefore."—Approved: Schlesinger v. Texas, etc. R. Co., 87 Mo. 149.

§ 4740. Want of Authority of Canvassing Book Agent to Receive Payments from Subscribers.

"If the court finds that Du P— was a canvassing agent, obtaining subscriptions for the plaintiff for books published by him and sold by subscription, and that said Du P— was restricted by the terms of his employment from collecting for any books or parts of books, except such as were delivered by him—and they further find that said canvassing agent never had possession of the parts and works for which this suit is brought, and did not deliver the same to the defendant,—then it declares the law to be that his employment as canvassing agent gave him no authority to collect the money for which this suit is brought, and it devolves upon the defendant to show that he had such authority."—Approved: Chambers v. Short, 79 Mo. 204.

§ 4742. Right of Agent to Collect a Question of Fact.

"You have a right to say whether, under the testimony in this case, there was anything in the conduct or behavior of Mr. W— at the time he had the interview with the defendant or the defendant's wife which justified them in believing, exercising due caution and care on their part, that Armstrong was the authorized agent of the firm of Clough & Warren. If you say from the evidence that he was not, and there is nothing in the conduct or language or statements or behavior of Mr. W— (I think he is the only member of the firm they claim to have talked with) that would lead them fairly and honestly to believe that

A— was the agent and authorized to collect this money, then your verdict in this case must be for the plaintiffs; but if you shall find that in this conversation or talk there was such action or conduct or behavior on the part of Mr. W— as justified them in believing that A— was the agent authorized to collect, and that in good faith he made this payment under these circumstances, then the title of property passed to the defendant in this case, regardless of the consideration paid for it."—Approved: Warren v. Halley, 107 Mich. 120, 64 N. W. 1058.

§ 4743. Liability for Acts of Agents Within the Scope of his Authority.

"A corporation such as defendant can only act through its agents and servants; but such a corporation is not liable for all the acts of its agents or servants. It is liable, however, for the acts done in the scope of their employment and agency, and is also liable for the acts of its agents which it has authorized such agents to perform; and it is also liable for the unauthorized acts of its agents, if any, which have been knowingly acquiesced in or ratified by the governing body of said corporation."—Approved: Waters-Pierce Oil Co. v. State, 48 Tex. Civ. App. 162, 106 S. W. 918.

§ 4744. Agent With Right to Collect Cannot Accept Own Debt in Payment.

(a) "An agent, known to be such, who has express authority to collect bills from the debtors of his principal for goods sold, through him or otherwise, cannot accept in part or full payment of such bills the satisfaction of his own debts, without the express or implied assent of his principal, and the fact of his agency does not imply assent."—Approved: Crenshaw v. Shapleigh Hardware Co., 82 Ark. 182, 100 S. W. 882.

(b) "The testimony in this case shows without dispute that the authority of the said P—, as agent of this defendant company, was to sell orders for railway tickets for cash only, and if you find that the said P— in the month of April, 1904, issued to the plaintiff herein an order for railway tickets, and such order was given to the plaintiff, not for cash, but as security for a debt, and that the order involved in this action and introduced in evidence in this case was issued to take up the first order aforesaid, then you are instructed to find that the issue of the second order was without authority, and does not bind the defendant company. An agent of a corporation, having power to sell prepaid coupon ticket orders belonging to his employer, for cash, has no authority to bind his company by a transaction in which he deposits the orders of the said company as security for his own debts, and, if he does so deposit said orders, the action on his part is without legal authority, and the company he represents is not bound by his action. And it is the duty of a person dealing with such an agent to know that the agent in so transacting business is acting within the authority conferred upon him by his principal."—Approved: Albright v. Atchison, T. & S. F. Ry. Co., 137 Iowa, 631, 115 N. W. 219.

§ 4745. Nor Receive Anything in Payment but Money.

"When an agent has authority to collect bills for goods sold by his principal, through him or otherwise, he cannot receive anything other than money in payment, unless expressly or impliedly empowered to do so by the principal; and, when not so empowered, the receipt of checks or anything else than money in payment, unless expressly or impliedly empowered to do so by the principal, and, when not so empowered, the receipt of checks or anything else than money in payment is not binding upon the principal, unless he ratifies his acts in so accepting and receiving something else than money, when advised thereof."—Approved: Crenshaw v. Shapleigh Hardware Co., 82 Ark. 182, 100 S. W. 882.

§ 4746. Agent Taking Orders Subject to Approval no Right to Collect in Advance.

"An agent so employed to take orders for the purchase of the goods of his principal not in his possession, the goods to be delivered by the principal upon his approval of the price and terms proposed in the order, in no event, without express authority, can receive money from the parties giving the orders in advance of such approval, and thereby bind his principal. In such case the sale is incomplete, and the purchaser, in intrusting the agent with the money in advance of his purchase, to be applied when completed, makes him his agent, and if the money is not paid by the agent to his principal it is the purchaser's loss, and no payment has been made."—Approved: Crenshaw v. Shapleigh Hardware Company, 82 Ark. 182, 100 S. W. 882.

§ 4747. Unless There is a Known Usage to the Contrary or His Principal Receives the Money.

"An agent employed to take orders for the purchase of the goods of his principal, the goods not being in his possession, and to be delivered by his principal upon his approving a sale at the prices and upon the terms proposed in the order, to the party giving it, has not authority to receive the price for the goods when so sold and delivered; and such payment by the purchaser to the agent soliciting such order will not discharge the purchaser from his liability to the principal, unless there is a known usage of trade or course of business to justify him in making it, or unless the principal is shown to have actually received the money so paid by the purchaser to the agent."—Approved: Crenshaw v. Shapleigh Hardware Co., 82 Ark. 182, 100 S. W. 882.

§ 4748. Principal Bound by Usage in Agent's Market.

The jury are instructed that a person dealing at a particular market will be taken to have dealt according to the custom and usage of that market, and if he employs another to act for him in carrying on business dealings on such market, he will be held as intending that the business should be conducted according to the general usage and custom of such market; and this is the rule, whether he in fact knows of the custom or not."—Approved: Stock Yards Co. v. Mallory S. & Z. Co., 157 Ill. 554 (567), rvg. 54 Ill. App. 170, 48 Am. St. Rep. 341.

§ 4749. Agent Concealing Facts From Principal in His Own Interest Forfeits Compensation.

"An agent ought, as far as possible, to represent his principal; and, to the best of his ability, he should endeavor to successfully accomplish the object of his agency. It is also his duty to keep his principal fully and promptly informed of all the material facts or circumstances which come to his knowledge, and, since he is expected to represent his principal, he cannot have a personal interest adverse to the interest of his principal; and if he deals with the subject-matter of the agency the profits will, as a general rule, belong to the principal, and not to the agent. In all things he is required to act in entire good faith towards his principal. There are duties which the law imposes upon an agent, without any express stipulations on the subject; and one of these duties of an agent is to keep his principal informed of his acts, and to inform him within a reasonable time of sales made, and to give him a timely notice of all facts and circumstances which may render it necessary for him to take measures for his security. An agent cannot act for his principal and for himself in the same transaction, by being both buyer and seller of property, and has no right to act as the agent for others for the purchase of property without the knowledge or consent of such owner, nor to take any advantage of the confidence which his position inspires to obtain the title in himself. If you find that the defendants were the agents of the plaintiff for the sale of the property mentioned in the petition, and that in making the sale they purposely kept from the plaintiff any of the material facts touching said sale, for the purpose of subserving their own interest, and intended to and did keep the plaintiff in the dark as to such facts until after the said sale was consummated, and deed executed by said plaintiff, then I instruct you that they are not entitled to a commission for selling the same."—Approved: Jansen v. Williams, 36 Neb. 869, 55 N. W. 279.

§ 4750. Agent's Authority Cannot be Delegated.

"The jury are instructed that, by the employment of an attorney-at-law to conduct a case in court, a personal confidence and trust is imposed in said attorney which cannot be by him delegated to another attorney, except by the consent of the client, or by the client's own ratification of such employment; and though said ratification shall not be in express terms, it must be of such a character that the jury can reasonably believe, from the client's actions, that he consented to the employment. If, therefore, the jury believe, from the evidence in this case, that the defendant never authorized his attorney, M. K—, to employ the plaintiff, nor ratify any such employment, they will find for the defendant, and to enable the plaintiff to recover, he must prove by a preponderance of the evidence that such authority was given, or that such employment was ratified by the defendant."—Approved: Young v. Crawford, 23 Mo. App. 432.

§ 4751. Authority of Agent of Insurance Company to Receive Notice of Additional Insurance.

"That the matter of McK— being the agent of defendants, is a question of fact for them (the jury) to determine from the testimony; and,

in aid of their investigation, they are instructed that an agent may be created by long acquiescence on the part of the principal, with knowledge of his acts as agent for said principal, as well as by express appointment; and that if, by express agreement, it is so arranged between parties that one shall be advertised as the agent, but that another shall actually do the business, and this third person does transact the business, and becomes known as the agent of the principals by transacting their said business, then the said third person is their agent and the principal is estopped from denying it as to those who have acquired rights against said principal because of the acts of said agent. * * * A corporation cannot affirm an act of its agent in part, and disaffirm as to the residue. And the defendants herein are not to be allowed to avail themselves of the benefits of McK—'s acts, wherein they enure to their benefit, and to ignore and disaffirm the acts of said McK— when they may operate to their prejudice, provided he has acted within the scope of such agency. * * * When there is no evidence of the written appointment of an agent, the fact and extent of his agency must be determined by what he testifies and did, and also by the acts of the company recognizing him. If either party must suffer from the mistake of an agent, it must be the party whose agent he is. * * * If the plaintiffs procured the written permission of the agent to get other insurance, and the agent neglected to indorse the same on the policy, or inform the company, then the plaintiffs cannot be affected by such neglect; if such agent had authority to give the permission, which is a fact for the jury."—Approved: Insurance Co. v. Lyons, 38 Tex. 258, 259.

§ 4752. Knowledge of Agent that of Principal.

"If you find from the testimony that Edward B— was the agent of Albert E. H— in the transfer of the property mentioned in plaintiffs' complaint from the Saginaw Logging Company or from M. L. J— or Thomas J— to Albert E. H—, and that said B— knew the terms and conditions upon which the Saginaw Logging Company, M. L. J—, or Thomas J— had possession of the property mentioned in plaintiffs' complaint from the plaintiffs, and that the plaintiffs were the owners and entitled to the possession of such property at the time, and only consented that the Saginaw Logging Company, M. L. J—, or Thomas J— should have the temporary use of the property in securing certain saw logs in Clallam county, Washington, then you are instructed that the knowledge of the agent, Edward B—, was the knowledge of Albert E. H—, and Albert E. H— could not be an innocent purchaser of the property, and Albert E. H— could not transfer a valid title to said property to the defendants, or either of them."—Approved: Carstens v. Earles, 26 Wash. 676, 67 Pac. 404.

§ 4753. But Not in Transaction in Which He is Defrauding His Principal.

"That while the knowledge of an agent is ordinarily imputed and charged to his principal, there is an exception to this rule in cases of such conduct on the agent's part as to raise a clear presumption that he would not communicate the fact in controversy; as when the agent

acting nominally as such is in reality acting in his own or another's interest, and adversely to that of his principal, or when the communication of such fact would ordinarily prevent a consummation of a fraudulent scheme which the agent was engaged in perpetrating."—Approved: Knobeloch v. Germania Sav. Bank, 50 S. C. 259, 27 S. E. 962.

§ 4755. False Arrest by a Detective Agent.

"The court instructs you that the defendant in this case may employ agents to procure the arrest and prosecution in a lawful way of those who have or are supposed to have stolen money or goods from the company, and, if in the course and scope of the general employment of such agents he negligently and willfully commits an assault and battery and falsely imprisons an innocent person, the company is liable."—Approved: Grand Rapids & I. Ry. Co. v. King, 41 Ind. App. 701, 83 N. E. 778.

§ 4756. Ratification by One Member of Unincorporated Association of Another's Acts.

"Parties to unincorporated associations are not holden to contracts made in their names by others without authority. The authority, however, may be given in any of the ways known to the law of agency, or the act may become binding by ratification. Mere membership, or the fact, if shown, that defendant performed some duties at said fair, would not create liability. But such facts may be considered with others as tending to show liability. In this case, if you find that defendant, W—, was a member, and held an office, in said fair association, or if you find that he performed some duties at said exhibition, neither of these facts would create liability on his part to plaintiff, but it will be necessary for you to further find that he offered the premiums promised, or authorized some person to make said offer, or that he ratified the act of such other person in making such offer by adopting such act as his own after it was done. But in order to amount to a ratification it must be shown that defendant not only knew of the fact that the offer of said premiums was made by some third person, but it must further appear that said offer purported to be made in part on behalf of defendant as a member of said association, and that, knowing this fact also, he adopted and approved said act."—Approved: Murray v. Walker, 83 Iowa, 202, 48 N. W. 1075.

§ 4757. Ratification by Acquiescence in a Course of Dealing.

"If you find from the evidence that the debt from Beal-Doyle Company to James Freeman Brown Company was pledged to plaintiffs, and that the goods for the purchase of which the debt was created were delivered to Beal-Doyle Company with notice to pay the price therefor to plaintiffs, and Beal-Doyle accepted the goods with said notice, then an implied promise arose on the part of Beal-Doyle to pay plaintiffs therefor, and payment to James Freeman Brown would not discharge that promise, and your verdict will be for plaintiffs, unless you find from the evidence that Landenburg Thalman & Co., the plaintiffs, prior to the payment of the accounts in question to James Freeman

Brown Company, knew that Beal-Doyle Dry Goods Company were making payments to James Freeman Brown Company as agent of plaintiffs on accounts assigned to plaintiffs, or had knowledge of such circumstances as would put a reasonably prudent person upon inquiry as to whether such payments were being made, and the prosecution of such inquiry would have led to the disclosure of the fact that Beal-Dole Dry Goods Company were making payments to James Freeman B—, as agents of plaintiffs, and with such knowledge or knowledge of such circumstances plaintiffs made no protest against such payments, but acquiesced therein, then plaintiffs, by their acquiescence to such course of dealings between defendant and James Freeman B—, waived the right to insist upon payments being made to them, and under such circumstances they cannot recover against Beal-Doyle Dry Goods Company for the accounts sued on, if you find they were paid to James Freeman B—."—Approved: Ladenburg, Thalman & Co. v. Beal-Doyle Dry Goods Co., 83 Ark. 440, 104 S. W. 145.

§ 4758. And by Acceptance of Benefit of Agent's Contract.

"It is the law that any act of an assumed agent, and a recognition of his authority by the alleged principal, may, in a proper case, prove the agency to do other similar acts."—Approved: State v. Ames, 90 Minn. 183, 96 N. W. 330.

§ 4759. Ratification Where Agent Exceeds His Authority.

"If plaintiff exceeded his authority, both as to the initial payment of $50 per 160 acres and $14 per acre purchase price, or if he exceeded his authority in either of such particulars, and if you further find that defendant gained a knowledge of all the material facts in connection with the acts of plaintiff in so exceeding his authority, and the defendant adopted such acts of plaintiff, and accepted the benefits resulting from such acts of plaintiff, then such conduct upon the part of defendant would be ratification of the unauthorized acts of plaintiff, and such ratification would bind defendant to the same extent as though plaintiff acted within the terms of his authority, and in case of such ratification, defendant would not be entitled to any allowance or verdict for such sums as were paid out in excess of authority and afterwards ratified."—Approved: Mahon v. Rankin, 54 Or. 328, 102 Pac. 608.

§ 4760. Ratification Must be Entire or Not at All.

"You are instructed that if, at the time the note in suit was given, Charles M. E—, the agent of A. N. Schuster & Co., the payee of said note, agreed with defendant that said A. N. Schuster & Co. would make to defendant the allowance, as claimed by defendant, on account of unsaleable goods, and goods not ordered by defendant, charged against defendant by said A. N. Schuster & Co. in the account for which said note was given, and thereby obtain said note from defendant, such agreement is valid and binding against said A. N. Schuster & Co., and defendant is entitled to set off any amount the evidence may show to be due from A. N. Schuster & Co. to defendant on account thereof against the amount due upon the note sued on in this action."—Approved: Walker v. Hagerty, 30 Neb. 120, 46 N. W. 221.

§ 4761. Ratification with Full Knowledge of Agent's Act.

"The jury are instructed that the advance of $——— to B— by the defendant and the reception by defendant of a note and mortgage for $——— from B— cannot operate to exonerate defendant in this action, unless the jury shall believe that the plaintiff previously authorized the defendant, as his agent, to invest his money in said note and mortgage for his account, or that the plaintiff, after he was informed of said investment, approved of or accepted the same, with full knowledge of all the facts as to the value of the property and the extent of the liens thereon."—Approved: Bannon v. Warfield, 42 Md. 22, 32.

CHAPTER CXXVIII.

SALES.

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§ 4764. Sale Defined and Distinguished from Barter.

"The jury are instructed that to sell property is to transfer it from one to another, in consideration of a price paid or agreed to be paid in current money. A sale differs from a barter in this: that in a barter the consideration, instead of being in money, is paid in goods or merchandise susceptible of a valuation. If the jury find from the evidence that the transfer to L— by Westover & Williams of the notes in controversy was not made for money, then the same was not a sale, under the meaning of that word in the bond; and, if the transfer of said notes to L— was made for a consideration other than money, that would be a barter for which the bondsmen of Westover & Williams would not be liable under their bond."—Approved: Laboree v. Klosterman, 33 Neb. 150, 49 N. W. 1102.

§ 4765. An Agreement to Sell Requires Delivery to Pass Title.

"Though you may believe that A— made the written contract introduced by the plaintiff, whereby he was to deliver timber therein described, to plaintiff as it should be gotten out receiving an advance of three hundred dollars, about one-third of the estimated value of the timber to be gotten out, and afterwards went to work under said contract and was supplied by plaintiff with provisions while he was getting out the timber; and although he did get out timber, which at the time he got it out, he intended to deliver to plaintiff, yet, if before he made any delivery to plaintiff, or did anything else, besides the getting of it out, to vest title in the plaintiff, he sold or conveyed it to the defendant, then the mere fact that A— had once intended the timber for plaintiff would not, if that be the only evidence of title in plaintiff's favor, enable the plaintiff to recover."—Approved: Robinson v. Hirschfelder, 59 Ala. 504, 505.

§ 4766. Where Something Remains for Seller to do there is no Sale.

"The court instructs the jury that the existence of a mining location as contemplated by the United States law (that is, discovery of a mineral-bearing lode in place, and the marking and staking upon the ground of the claim) for the claims described in the contract herein and to be conveyed by such deed as is provided for is a condition precedent for plaintiff's right to recover the contract price. And if you find that the plaintiff did not have all the claims so properly located at the time of the making of the contract and the execution of the deed, then plaintiff is not entitled to recover."—Approved: La Grande Inv. Co. v. Shaw, 44 Ore. 416, 72 Pac. 795.

§ 4767. Contract Governed by Law of Place.

"You are further instructed that the bill of sale introduced in evidence was executed and delivered in the state of Missouri, and that the transaction relating to the purchase of the property described herein was had in the state of Missouri and is governed by the laws of that state, and, under the laws of the state of Missouri, the taking possession of said property at the time or within a reasonable time after the purchase of said property was all that was necessary for the said C. H. S— to do in order to complete said purchase, and give him a right thereto as against subsequent purchasers of creditors of the seller of said property."—Approved: Burke v. Sharp, 88 Ark. 433, 115 S. W. 145.

§ 4768. Mortgagee Estopped Where He Consents to Sale by Mortgagor.

(a) "The jury are further instructed that if by the terms of the mortgage the property described therein is left in the possession of the mortgagor, and the mortgagee knowingly consents that the mortgagor may sell said property and receive the proceeds therefor, then the mortagor becomes the agent of the mortgagee to sell said property, and a person buying the same will acquire the said property free and clear of any incumbrance of said mortgage."—Approved: Drumm-Flato Commission Co. v. Barnard, 66 Kan. 568, 72 Pac. 257.

(b) "A purchaser of property upon which a mortgage lien is claimed has a right to rely upon the statement of the holder of that claimed

lien, and if you find that the defendants in this case, through their agents, stated to the plaintiff that they wanted a release from said mortgage for the cattle purchased by defendants from said H— and covered by said mortgage, and you should further find that the plaintiff, after an investigation from a source it deemed proper, stated that forty head of cattle were all it claimed of said cattle, and the defendants, being induced by said representations to believe said statements, and relying thereupon, fully consummated said sale and paid out all of the purchase price for said cattle, a part of which was paid this plaintiff, being the amount claimed by plaintiff as due them, then in that case the plaintiff would be estopped from claiming a further lien on the property.

"If you find from the evidence in this case that defendants purchased from P. L. H— certain cattle which had been mortgaged by said H— to the plaintiff, and on which plaintiff at that time held a mortgage, and that afterwards the defendants paid or caused to be paid to plaintiff a certain amount of money, which it was intended by defendants and plaintiff should be in full payment for a release of the interest that plaintiff had therein, by reason of a chattel mortgage thereon, given by said P. L. H— to plaintiff, and that the cattle in controversy are a part or all of said property so intended to be released, then in that case the cattle in controversy would be fully released, although the release in writing failed to describe fully the cattle intended to be released."—Drumm-Flato Commission Co. v. Barnard, 66 Kan. 568, 72 Pac. 257.

(c) "And if you find from the evidence that the defendants purchased said mortgaged barley in open market upon the public streets, of said D—, mortgagor, without any actual knowledge of plaintiff's mortgage, that plaintiff at the time, with full knowledge that said D— was hauling said mortgaged barley, and selling it to the defendants, consented to, authorized, and permitted the said D— to haul and sell said grain to defendants without objection, knowing that D— was selling the same, and defendants purchased, and that plaintiff had such knowledge, and so consented before defendants paid said D—for said grain, and in no way notified defendants of his claim or lien, but with such knowledge stood by and permitted the sale and delivery of the grain and the payment of the purchase price to D—, then you will find that the plaintiff is estopped from claiming a lien under his mortgage against the defendants on account of said barley, and return a verdict for the defendants."—Approved: Gardner v. Roach, 111 Iowa, 413, 82 N. W. 897.

§ 4769. Bill of Sale for Security is Mortgage.

(a) "If you find from the evidence that the agreement between D. J. M— and V— on the 14th day of May, 1888, was that plaintiffs should take possession of the goods conveyed, and satisfy their claim of $1,201, and turn over account to D. J. Maher & Co. or their creditors any balance remaining, the transaction would, in law, be merely a mortgage, and not a sale."—Approved: Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321.

(b) "If you find from the evidence that plaintiff advanced to the defendant money to pay for making and hauling bolts, and to secure the

same took a bill of sale from the defendant covering certain bolts, then the bill of sale is in law a mortgage; and, if you find from the evidence that the defendant has shipped to the plaintiff all of the bolts in the form of heading, so included in said bills of sale, then your verdict should be for the defendant."—Approved: Dunham v. Williams Cooperage Co., 83 Ark. 395, 103 S. W. 386.

§ 4770. Sale of Land Includes Growing Crops.

"Upon the question of ownership of growing wheat while it is growing upon the land, I instruct you that a sale or transfer of the title to the land without any reservation as to the growing crops carries with it the ownership in the crops growing thereon at the time of the transfer of the title to the land."—Approved: Abbott v. Abbott, 68 Kan. 822, 75 Pac. 1040.

§ 4772. Delivery to Common Carrier in Ordinary and Usual Course.

"The court instructs the jury, as a matter of law, that where goods are delivered to a common carrier for transportation over its line, and the contract of purchase is silent as to the person or mode by which the goods are to be sent, a delivery by the vendor to a common carrier in the usual and ordinary course of business transfers the property to the vendee."—Approved: Mette & Kanne Distilling Co. v. Lowrey, 39 Mont. 124, 101 Pac. 966.

§ 4773. Constructive Delivery by Storage and Delivery of Storage Receipts.

"If the jury find from the evidence that the defendants Morse & Lilly purchased corn in controversy under and in pursuance of the contracts which have been introduced in evidence, and that they placed the corn in cribs, and marked said cribs in the name of David Dows & Co., and executed and delivered to said David Dows & Co. the crib receipts which have been admitted in evidence, such acts would amount in law to a delivery of the corn to David Dows & Co., and defendants Morse & Lilly would have no right of possession in said corn, except to handle the same in shelling and shipping such corn with the consent of David Dows & Co.; and if Morse & Lilly undertook to remove said corn from such cribs, without the consent of David Dows & Co., or any part of the same, or against their direction or protest, such taking or disposition of the corn would constitute a wrongful taking of the same."—Approved: Dows v. Morse, 62 Iowa, 231, 17 N. W. 495.

§ 4774. Presumption of Ownership in Holder of Indorsed Warehouse Receipt.

"The jury are instructed that the possession of the instrument in writing produced in evidence and called a warehouse receipt covering this wheat in controversy, together with the plaintiff's indorsement thereon, is of itself presumptive evidence of the ownership of the grain by the person having such possession of such receipt so indorsed."—Approved: Davis v. Russell, 52 Cal. 611, 614, 28 Am. Rep. 647.

§ 4775. Refusal to Designate Place of Delivery—Breach of Contract.

"In view of all the testimony about the situation of the subject of this contract, and of the parties to it, and their conduct in respect to the construction, the court will construe this contract set forth in the complaint as making it the duty of the defendants to designate the place of the delivery of the hops under the contract either at Independence or at Murphy's Landing; and their failure to designate the place of delivery within a reasonable time, or as soon as it could be conveniently done after they were notified to do so by plaintiff, would constitute a breach of the contract on their part. It was their duty under the contract to designate the place of delivery, and to be present at the place of delivery to receive the hops under the contract. If they refused to do that, that would constitute a breach of the contract, for which they would be liable in damages if the plaintiff had performed its part of the contract.

"If you find under the rules of law that I have announced to you that the defendants broke their contract, and that the plaintiff was in a situation to comply with its contract, and was ready, able, and willing to comply with it within the rules I have given you, you would proceed to assess the damages in favor of the plaintiff."—Approved: Krebs Hop Co. v. Livesley, 51 Or. 527, 104 Pac. 3.

§ 4776. Delivery Without Payment as Waiver of Condition.

"It is a general rule of law that when goods are sold on condition of payment being made, or some other condition precedent being performed before or on delivery, then an absolute and unconditional delivery of the goods without requiring, at the time of the delivery, payment or performance, would be a waiver of such payment or performance as a condition precedent, and a complete title would pass to the purchaser, provided that at the time of such delivery it was the intent of the parties that it should be absolute and unconditional delivery. Though it is important, it is not absolutely imperative, that the vendor declare that he does not waive any condition of the sale at the time of a delivery to the vendee,—the situation of the parties, the nature of the transaction, the presumptions of honest dealing, and like considerations may be taken into account in determining whether any of the conditions of the sale have been waived. It is a rule of law that a sale and a delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the purchaser until the condition is performed; and the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both as against the vendee or one purchasing from such vendee with notice. When goods are delivered to the vendee, the intention of the parties determines the interpretation to be given to the delivery. If, after a full consideration of all the evidence before you, you shall find that there was delivery of the goods in question, and that such delivery was absolute and unconditional, and was by the parties so intended, then the property vested in the plaintiff, and he should be entitled to recover. If, on the other hand, you should find that there was a delivery to plaintiff of the goods in question, but that such delivery was coupled

with the condition that the property should not pass until the purchase price was paid, and that you further find that the purchase price, as agreed upon, was not paid, and that defendants repossessed themselves of the property, then, as a matter of law, I charge you, that then the conditions are not complied with on the part of the purchaser, if the seller has done all he agreed to do on his part; then the seller has a right to repossess himself of the property, and such repossession is a rescinding of the sale,and defendants would be entitled to recover."—Approved: Albright v. Brown, 23 Neb. 136, 36 N. W. 297.

§ 4778. Where Sale is For Market Value Assumpsit Lies.

"If, however, you shall believe from the evidence in this case that the heading mentioned and described to you in instruction No. 1 herein was shipped by plaintiff to defendant, and that the same was used and worked up by defendant, under an agreement that it would pay plaintiff the reasonable market value therefor, and that the reasonable market value was only and not more than $676, then the law is for the defendant, and you will so find. But if you shall believe from the evidence that the reasonable market value of said heading so shipped by plaintiff to defendant was more than $676, then you will find for the plaintiff whatever sum you may believe from the evidence said heading was reasonably worth, in excess of said sum of $676, if anything."—Approved: Paducah Cooperage Co. v. Hazel Heading Co. (Ky.), 118 S. W. 931.

§ 4779. Where Sale is upon Agreed Price Court Directs Amount of Recovery With Interest.

(a) "Gentlemen of the jury: It is undisputed evidence that defendant has paid plaintiff $676 on the heading sued for in this action, and if you shall believe from the evidence in this case that the plaintiff, at the instance and request of the defendant, sold and delivered to defendant on June 1, 1906, 3,132 whiskey heads at 10 cents per head, amounting to $313.20, June 14, 1906, 4,080 whiskey heads at 10 cents each, amounting to $408, June 16, 1906, 2,350 whiskey heads at 10 cents per head, amounting to $225, June 16, 1906, 2,050 oil heads at 6 cents per head, amounting to $123, and in all $1,079.20, then the law is for the plaintiff, and you will find for them $403.20, the balance claimed by plaintiff, and the amount sued for in this action, with interest thereon from the 16th day of August, 1906."—Approved: Paducah Cooperage Co. v. Hazel Heading Co. (Ky.), 118 S. W. 931.

(b) "The court instructs the jury that in the first count of the plaintiff's petition it sues for $16,981.77 as the contract price of 961,550 pounds of bar iron sold and delivered to defendant under the contract mentioned in the first instruction given you, and if you believe from the evidence that the plaintiff under said contract delivered to the defendant, according to specifications furnished it, certain bar iron, then you will find in favor of the plaintiff and against the defendant on the first count of plaintiff's petition, for the amount due plaintiff at the prices named in said contract as set forth in instruction No. 1 for whatever amount of bar iron the plaintiff so delivered to the defendant under

said contract less such sums as have been paid by the defendant to the plaintiff, and credited on said account, or which the jury under the other instructions given you credit thereon, and to the amount, if any, thus found, you will add interest at the rate of six per cent per annum from the date the plaintiff made demand on defendant for the amount, if any, so due it, if you find from the evidence such demand was made, up to the present day, and if from the evidence you cannot determine the date of such demand, if any was made, then you will allow said interest from the date of the bringing of this suit, viz., February 17, 1904."—Approved: Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co., 210 Mo. 715, 109 S. W. 47.

§ 4780. Claim for Shortage Must be Made within Reasonable Time.

"You are instructed that it was the duty of the defendant, if it claimed a shortage, to report the same within a reasonable time; and, if you find it failed to do so, you may consider that fact, together with all other facts in the case, as to whether or not it received all the goods with which it is charged."—Approved: Hamilton-Brown Shoe Co. v. Choctaw Mercantile Co., 80 Ark. 440, 97 S. W. 284.

§ 4781. Pre-existing Debt Good Consideration for a Sale.

"A pre-existing debt, already due, is a good consideration for a chattel mortgage or bill of sale to secure the payment of the same, and protects the party taking such security to the same extent as would a new consideration given at the time of the making of the mortgage or bill of sale."—Approved: Chaffee v. Atlas Lumber Co., 43 Neb. 224, 61 N. W. 637.

§ 4782. Burden on Seller to Prove Performance.

"The burden is upon the plaintiff to prove by a fair preponderance of the evidence that he has performed his part of the contract, and delivered the goods of the kind, character and quality specified in the contract, before he can recover the purchase price from the defendants, unless you find from the evidence that said goods were received without objection."—Approved: American Standard Jewelry Co. v. Hill & Son, 90 Ark. 78, 117 S. W. 781.

§ 4783. Acceptance Without Previous Contract Implies a Sale.

"The plaintiff requests the court to charge the jury that if they find, from the testimony, that the plaintiff delivered to the defendants the flax and wheat in controversy, and there had been no previous contract for the sale or purchase of it, the reception of the same by defendant would be sufficient to entitle the plaintiff to recover the market value of the same.'—Approved: Milligan v. Butcher, 23 Neb. 683, 37 N. W. 596.

§ 4784. Acceptance and Appropriation to Own Use Amounts to Sale.

"You are instructed you will consider solely the one question of whether or not the defendant, M—, accepted or made use of the trees, or any portion thereof, mentioned in the contract attached to plaintiff's petition, after they were left at his place by the plaintiff in October of

1906. If he did so accept, or at any time thereafter exercise dominion or control over said trees, or any portion thereof by covering them up for protection during the winter, or in any manner treating them as his own, then your finding and verdict should be for the plaintiff; but, if he did not make use of any of said trees, or exercise dominion or control over them, then your finding and verdict should be for the defendant."—Approved: Backes v. Madsen, 86 Neb. 509, 125 N. W. 1069.

§ 4785. Acceptance of Proposition to be in a Reasonable Time.

"If, however, you shall believe from the evidence in this case that the written proposition from defendant to plaintiff, made on the 3d day of August, 1905, in Paducah, Ky., and read to you in evidence, was not accepted by plaintiff's purchasing agent, McC—, as the contract between plaintiff and defendant, but same was forwarded to the plaintiff, J. T. P— Company, for its acceptance or rejection, then it became the duty of the plaintiff in law to accept or reject said proposition within a reasonable time—that is to say, within such time as was reasonably in contemplation between the parties at the time same was made and delivered to said agent; and if you shall believe from the evidence in this case that the plaintiff, J. T. P— Company, failed to accept or reject said proposition within a reasonable time, as defined by this instruction, then the law is for the defendant, and you will so find; or if you shall believe from the evidence in this case that the plaintiff, J. T. P— Company, failed to accept said proposition in the terms as made by defendant, if he did make it as a proposition, but in accepting same materially changed same by adding to or taking from the terms thereof, and returning it to the defendant for acceptance, then the law is for the defendant, and you will so find.

"If, however, you shall believe from the evidence in this case that plaintiff accepted said proposition within a reasonable time and the terms of said proposition as made by defendant, and mailed notice of same to defendant before it received any notice of the withdrawal by defendant of said proposition, if notice of such withdrawal by defendant was given by defendant to plaintiff, then the law is for the plaintiff, and you will find for it damages as defined by instruction No. 11 herein."—Approved: Paducah Packing Co. v. Polk Co. (Ky.), 99 S. W. 929 (not reported in state reports).

§ 4786. Machinery Subject to Test, This to be in Good Faith and Prompt.

"Before rejecting said separators, it was the duty of the defendant company in good faith to subject them to a fair and reasonable test as to their ability and capacity to do good and satisfactory work, and in so doing it was its duty to exercise in the management of such machinery, including such separators, such care and prudence as a person of ordinary care and prudence, capable of managing like machinery, would use under like circumstances. It was not bound to bring to its aid experts especially versed in running such particular kind of separators. Neither was it bound to continue such test for the full period of the 60 days allowed it by said contract, unless such time was necessary

in order to make a fair and reasonable test of such separators."—Approved: Haney-Campbell Co. v. Preston Creamery Ass'n, 119 Iowa, 188, 93 N. W. 297.

§ 4787. Alternative Conditions in Such Sale of Plaintiff's Right to Recover.

"To entitle the plaintiff to recover for the gas-producing machine made to furnish fuel for the defendant's boilers and annealing ovens, the jury must be satisfied by a fair preponderance of the evidence of one of the following propositions: First, that such machine was furnished by the plaintiff to the defendant without the condition that it was to do the work for which it was constructed satisfactorily; second, that the trial or test thereof was made which was satisfactory to the defendant; third, that by or through the fault of the defendant, to which the plaintiff neither contributed nor assented, such trial or test was not made within the time contemplated by the parties."—Approved: Turner v. Muskegon Machine & Foundry Co., 97 Mich. 166, 56 N. W. 356

§ 4788. Dissatisfaction of Purchaser Must be Bona Fide.

"The defendants, in determining whether or not they were satisfied with such separators, must have acted honestly, and in good faith, and after making a fair and reasonble test of such separators. They had no right to base their action on any whimsical, fictitious notion or mercenary motive. Whether or not the defendants were honestly and in good faith dissatisfied with said separators and their work is a question of fact for you to determine. In coming to a conclusion on such question, involving as it does the intention and motives of said company, you may and should take into consideration the acts and conduct of said company done through its officers, together with all other facts and circumstances shown in the evidence which may aid you in coming to a just conclusion."—Approved: Haney-Campbell Co. v. Preston Creamery Ass'n, 119 Iowa, 188, 93 N. W. 297.

§ 4780. Sale by Sample—Buyer Cannot Reject Except for Substantial Difference.

"The court instructs you that if defendants, by themselves or their agent thereto authorized, examined said macadam, or had full opporunity to examine said macadam, before they purchased, then in such case the defendants become and were liable to pay to the plaintiff for all said macadam so delivered to and received by defendants under said contract, provided the same was such macadam as had been exhibited to the said defendants or to their said agents prior to the making of the contract."—Approved: Penn v. Smith, 104 Ala. 445, 18 South 38.

§ 4790. If Goods are up to Sample and Prove Unsatisfactory, Purchaser to Return.

"The court tells you that if you find from the evidence that the jewelry delivered to the defendants under the contract sued on was of the same grade shown by the agents as samples when the sale was made, and as described in the contract, then, if any of said jewelry

proved unsatisfactory, the defendant cannot resist the suit by showing that the same was unsatisfactory, unless they returned the same under the terms of the contract."—Approved: American Standard Jewelry Co. v. Hill & Son, 90 Ark. 78, 117 S. W. 781.

§ 4791. Re-Sale by Seller Where Buyer Notifies Residue will not be Accepted.

"If you believe from the evidence that the defendants agreed to receive and pay for ———— pictures, and that, before all of said pictures had been delivered, defendants refused to receive the residue of said pictures, and told plaintiffs that they might do what they pleased with the residue of said pictures, then plaintiffs might re-sell the residue of said pictures without giving defendants any notice of the sale."—Approved: Wrigley v. Cornelius, 162 Ill. 92 (95), aff'g 61 Ill. App. 279, 44 N. E. 406.

§ 4792. Where Contract is Severable, Recovery to Extent Goods are Satisfactory.

"You are instructed that the instrument upon which this action is founded is what is known as a severable contract, and it is therefore necessary for the defendants to prove that each and every item of goods received by them from plaintiff was not as represented in the contract before a verdict can be rendered for the defendants. Therefore, if you should find that some articles were as represented and some of them were not, then you should give a verdict in favor of the plaintiff for the contract price of such as you find were as represented."—Approved: American Standard Jewelry Co. v. Hill & Son, 90 Ark. 78, 117 S. W. 781.

§ 4793. Modification Waiving Prior Conditions.

"If you believe that A— & Co. consented and agreed to a change in the contract, to the extent that they would accept shipments direct from Velasco without having the samples forwarded, and that they would take the state's guaranty that the shipments should equal to strike No. 43 from Harlem, such agreement, in legal effect, dispensed with the necessity of submitting samples to H— and S—. And if you further believe that, in pursuance of said agreement, and relying upon the same, the defendants did ship or tender to the plaintiffs sugar equal to what the plaintiffs agreed to receive, and that plaintiffs refused to accept the same, and believe that all the balance of the sugar the defendants had all ready to tender was of like quality as what they did tender, and as sufficient to complete the 3,000 barrels, they (then) by such tender, if made in compliance with the understanding and agreement, the defendants complied with their undertaking; and, if you so find the facts to be, you will find for the defendants, except as to such sugar as you are instructed concerning in next preceding paragraph 6, in connection with which you will construe this paragraph."—Approved: Aaron & Co. v. Smith Co., 45 Tex. Civ. App. 203, 100 S. W. 347.

§ 4794. Duty of Vendor to Care for Property Purchaser Refuses to Accept.

"That notwithstanding they may believe that the plaintiffs shipped the furnace in question, under the contract in evidence, in good faith, to perform their part, and still if they further find from the testimony that the defendant refused to take and accept the furnace, and refused to allow it to be placed in his building, and notified plaintiffs that he would not pay for it until the plaintiffs got a judgment therefor, this conduct on the part of the defendant was a breach of his contract, and notwithstanding this the plaintiffs could not then dump said furnace in the alley, and allow the same to become worthless, and then sue for the contract price thereof. They should have stopped at once when notified, and they cannot recover for any expenses incurred or damages sustained after such notice."—Approved: Hale v. Hess, 30 Neb. 42, 46 N. W. 261.

§ 4795. Rescission Where Purchaser Does Not Intend to Pay.

"For the purposes of this case, if a party is insolvent or in failing circumstances—one or the other, or both—at the time he purchases property, and has no reasonable expectation of receiving money from some source that he has a right to receive it from to meet the obligations, and does not intend to pay for it, under such circumstances the buyer would have a right to rescind the contract, and take the property into his own possession and treat the sale as void, although he may have delivered the property to the buyer. Insolvency alone is not sufficient. It is not the law that because a man is insolvent he cannot do business. It sometimes occurs that a man may be insolvent, yet he may be doing business while in a state of insolvency—that is, his assets may be less than his liabilities—and yet he may continue business and continue the struggle to maintain himself and his credit and his business; and from the very fact that he continues with the struggle, and finally he emerges from it successfully, it is not the law that because a man is insolvent he must lie down and do nothing, so that that (insolvency) alone is not sufficient to warrant the seller in rescinding a contract of this character; but this is an important circumstance to be taken into consideration by the jury relative to other facts that are necessary to be found by the jury, before a sale can lawfully be rescinded. These other facts must be these in addition to insolvency. He must have at the time he makes the order no reasonable expectation of receiving money to pay for the goods so purchased within the lifetime of the account. He must also have no reasonable expectation of receiving it. That additional circumstance must appear; and then in addition to that— that this is the central or main purpose of the law—he must at that time have in his own mind that intention not to pay for it; in other words, to cheat and defraud the owner of the property."—Approved: Weidman v. Phillips, 159 Mich. 380, 124 N. W. 40.

§ 4796. Buyer Returning Goods Not Merchantable.

"The jury are further instructed that, notwithstanding the contract of sale of the goods stipulated that any article failing to wear satisfactorily would be duplicated free, if returned within 5 years, and that

such might be exchanged for new goods within 12 months from date of invoice, and that purchaser waived all rights to claim failure of consideration, or not according to order, unless defendant had exhausted the terms of warranty and exchange, it is a good defense that the articles are not merchantable and had been returned, or offered to be returned, within a reasonable time after goods were received, and that goods purchased by the defendant were never shipped, and that the goods furnished by the plaintiffs were not the goods ordered."—Approved: Main & Co. v. El Dorado Dry Goods Co., 83 Ark. 15, 102 S. W. 681.

§ 4797. Right to Reject Goods to be Exercised in Reasonable Time.

"The defendants claim that when they gave the order for the goods in question that they gave it on condition, and it was expressly stipulated and agreed between the traveling salesman for the plaintiffs and the defendants that the order was subject to change and cancellation. I instruct you that if you believe from the evidence in the case by a preponderance thereof that, when the order was given by the defendants, it was given subject to change and cancellation, then the defendants could exercise such right of change or cancellation, if they did it within a reasonable time after the giving of the order. As to what would be a reasonable time under the circumstances of the case is a question to be determined by the jury. In considering this question as to what would be a reasonable time, I instruct you that you have a right to take into consideration all the facts and circumstances of the case, including the fact that the plaintiffs were the manufacturers of the goods ordered and the proximity of the alleged countermand of the order to the time of shipment, and all the facts and circumstances in evidence that will assist you in determining that question. If you believe from the evidence by a preponderance thereof that the order was given subject to countermand and that the defendants did countermand the order within a reasonable time, then the defendants would not be liable; and your verdict should be for the defendants."—Approved: Bauman & Sons v. McManus Bros., 79 Kan. 766, 101 Pac. 478.

§ 4798. Countermand of Order to be Within Reasonable Time.

"Now, gentlemen, whose goods were they at that time? If these goods were shipped and reached the defendant within a reasonable time, under all the circumstances of the case, the title passed to the defendant, and the defendant ought to pay this claim; and the loss would fall upon the owner, whosoever the owner is, in the destruction of these goods. If, on the other hand, these goods were not shipped within a reasonable time, and the party promptly—And as you will see, this shipment did not take place until the 11th, and on the 18th or 19th the defendant writes that the goods would not be accepted. I say, if they had not been delivered within a reasonabe time, he had a right to refuse to accept them, and to say to the plaintiff that he would hold the goods subject to his (the plaintiff's) order; and, if a loss occurred, the loss would fall upon the plaintiff, the owner of the property, for the goods would not have become the property of the defendant. So

that is all there is of it. Under all the circumstances in the case, taking into consideration that it was contemplated when the order was made that this bill of goods—this order of goods—might be filled by a jobber, and you will say whether that naturally would take a little time, to get the order into the hands of the jobber, and to ship. Taking into consideration all these facts and circumstances were the goods shipped within a reasonable time? If they were shipped within a reasonable time, then the plaintiff has complied with his contract and the contract of his assignor, as you might say—it was simply assigned down to him by the house that took the order—and the plaintiff ought to recover. But if, on the other hand, you will say, under all the circumstances of the case—that the time was an unreasonable one; that a reasonable time in which these goods should have been delivered had passed—then the defendant was not obliged to accept the goods, and he could hold them subject to the order of the plaintiff."—Approved: Conkling v. Nicholas, 133 Mich. 651, 95 N. W. 745.

§ 4799. Payment Before Test of Guaranteed Plant Does not Affect Right to Sue Upon Warranty.

"It is admitted in the pleadings that plaintiff paid for the heating plant. If you find from a preponderance of the evidence that, at the time of the payment by the plaintiff, the plaintiff had not had the opportunity to test said plant to ascertain whether the plant would heat as guaranteed, then you are instructed that the fact of payment would in no way affect plaintiff's right to recovery on the guarantee."—Approved: Cooper v. Scott Co. (Iowa), 120 N. W. 631.

§ 4800. Where Articles Manufactured for Special Purpose There is an Implied Warranty.

"As to the regulator boxes, you are instructed that if you believe from the evidence that the defendant submitted to the plaintiff a design for said boxes, and informed the plaintiff of the use to which they were intended to be put, and the conditions they must meet in order to perform the intended service, then the plaintiff in undertaking to make and sell such boxes in accordance with such design, impliedly warranted their sufficiency for and adequacy to the service for which it was intended they should be put, under the necessary conditions of that service, unless you find from the evidence that the plaintiff objected to such design as inadequate, or protested against it, or otherwise relieved itself from responsibility therefor."—Approved: Moran Bros. Co. v. Snoqualmie Falls Power Co., 29 Wash. 292, 69 Pac. 759.

§ 4801. If Used Without Returning in Reasonable Time Such Warranty is Waived.

"The court instructed the jury substantially, that, if they found it to be as alleged by the plaintiff, there was an implied warranty that the machine was suitable for the work it was intended to do; and, if not suitable therefor, defendant had the right to return it to plaintiff within reasonable time after discovering its defects.

"If the jury find that the defendant, after he knew or ought to have known from the test he made that this machine was an unsatis-

factory machine on —— or ——, and, after determining that he was not satisfied with it, nevertheless went on and worked with it on ————, for the purpose of completing his harvest, the law would consider that an acceptance of the machine.

"The court further instructed the jury that, if they found defendant's version of the contract the correct one, he had the right to return the machine if not satisfied with it, unless he had theretofore accepted it under the rule of acceptance above stated; and, if he did thus accept it, the right to return it was lost."—Approved: Palmer v. Banfield, 86 Wis. 441, 56 N. W. 1090.

§ 4802. To Recover on Warranty it Must Have Been Relied on.

(a) "The court further instructs the jury to entitle the plaintiff to recover in the suit it is not only necessary for the jury to find from the evidence that the defendant warranted the animal in question as alleged in the petition, but it must further appear from the evidence that the plaintiff relied upon said warranty in making the purchase of the horse, and was induced to make said purchase by said warranty, and it must also appear from the evidence that the horse was not as warranted at the time of the sale; and, unless all of these facts appear from the evidence, the jury should find for the defendant."—Approved: Watson v. Roode, 30 Neb. 256, 46 N. W. 490.

(b) "You are instructed that, if you should find from the evidence that the plaintiff, at the time of the making of the sale of the stallion to the defendants, or either of them, stated that said horse was sound, and that the lameness from which the horse was suffering at the time of the sale was not of a permanent character, and that the horse would recover from said lameness within a short period of time; and if plaintiff intended that defendants should rely upon such statements as true; and if made to induce defendants to buy; and if you should further find from the evidence that defendants relied upon said statements of plaintiff, and were induced thereby to purchase said stallion; and if you should further find from the evidence that the lameness from which the said stallion was suffering at the time of said sale was of a permanent character, and impaired the usefulness and value of said horse,—then your verdict should be for defendants: provided, you further find that, by reason of the lameness, the value of said horse was depreciated in an amount equal to or exceeding the face of the note in suit."—Approved: Erskine v. Swanson, 45 Neb. 767, 64 N. W. 216.

§ 4803. What Constitutes a Warranty in the Sale of a Chattel.

"In order to constitute a warranty, there must be an affirmation as to the quality or condition of the thing sold (not asserted as a matter of opinion or belief) made by the seller at the time of the sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, which is so received and relied on by the purchaser, and that the purchase money was paid for the undertaking of the seller, that the article sold was of a particular quality."—Approved: Wallace v. Wren, 32 Ill. 146, 148.

§ 4804. Not Necessary that the Word Warranty be Used.

"The jury are further instructed that it is not necessary that, in a contract of warranty, that the word 'warranty' should be used by the seller in making of the said contract of warranty, but that any language which implies that the animal referred to is sound, and adapted to the purpose for which it is sold, if such words were used by the seller with the intent to lead the buyer to believe that a certain condition existed with reference to the chattel sold, and if the buyer relied upon such statements, and was induced thereby to purchase the said property, this will constitute a warranty that the property is as represented. And in this case, if you should find from the evidence that the plaintiff, at the time of making the sale of the horse referred to in the evidence, stated to the purchasers, or either of them, that the horse was alright, and that he would recover in thirty to sixty days from the lameness from which he was suffering, and that said lameness was caused from being stepped upon; and if such statements were made with the intent to induce defendants to buy, and they did thereby induce them to buy; and if you should further find from the evidence that the lameness referred to was of a permanent character, and existed from causes which did not arise from being stepped upon, but from disease or ailment with which the horse was then suffering, and which rendered the horse unfit for the purpose for which it was purchased, and rendered the stallion less valuable, to the extent equal to or exceeding the face of the note in suit,—then your verdict should be for the defendants."—Approved: Erskine v. Swanson, 45 Neb. 767, 64 N. W. 216.

§ 4805. Mere Praise or Commendation Does Not Amount to a Warranty.

"What the law calls naked praise or simple commendation, a mere expression of opinion or belief, a bare affirmation, not intended or understood as a warranty, as to the quality or character of the goods, or what could be done with them, or where there was a market for them on their value, does not amount to a warranty. The question to be answered in determining whether any particular representation was a warranty, or a mere expression of opinion or belief, is: what was the undertaking and intention of the parties? And it is alone for you to determine whether the language which you shall find from the evidence to have been used in this case was intended by the parties to have the effect of warranty, or to be merely the expression of an opinion."—Approved: Patrick v. Leach, 8 Neb. 530, 1 N. W. 853.

§ 4806. But Assertion of Condition Intended to Effect a Sale and Relied on May.

"If during the negotiation for the sale of the horse, the defendant made an assertion of soundness, which assertion was intended to cause the sale of the horse, and was operative or effectual in causing such sale, then such assertion would constitute a warranty. But a mere expression of an opinion is not enough to constitute a warranty."—Approved: Little v. Woodworth, 8 Neb. 283.

§ 4807. An Unsound Animal Defined.

"The rule of law as it is laid down in the books in this class of cases is, that if, at the time of the sale, an animal has any disease which actually does diminish the actual usefulness of the animal so as to make it less capable of work of any description, or which, in its ordinary progress, will diminish the natural usefulness of the animal; or if the animal has, either from disease or accident, undergone any alteration of structure which either actually does at the time of sale, or in its ordinary effects will diminish the usefulness of the animal, such animal is unsound."—Approved: Van Hoesen v. Cameron, 54 Mich. 609, 20 N. W. 609. See also Dunbar v. Briggs, 18 Neb. 94, 97.

§ 4808. "Texas Itch" in a Horse is a Disease Constituting Unsoundness.

"If it is true that Briggs [warrantor] himself, and also several witnesses for him, who had in various ways been connected with the herd, neither knew nor had observed that the horses sold said Dunbar were diseased; yet, if you are satisfied from the evidence that said horses were at the time of said sale, in fact infected with said disease, known as the 'Texas itch,' this will be sufficient to show a breach of the warranty of the soundness of said horses; if you believe from the evidence there was in fact any such warranty, made by said Briggs, as claimed by said defendant."—Approved: Dunbar v. Briggs, 18 Neb. 94.

§ 4809. Express Warranty Required as to Quality in Ordinary Sale of Chattel.

"On the sale of an article of personal property, no action can be maintained for any difference in quality between the thing contracted for and the thing delivered, unless there be an express warranty made by the seller, or there be fraud on his part. Without an express warranty by the seller, or fraud on his part, the buyer must stand all losses."—Approved: Wallace v. Wren, 32 Ill. 148.

§ 4810. What is Reasonable Time for Rescission After Breach.

"That in considering the question whether W— offered to return the horse within a reasonable time after he became satisfied that the representation as to soundness was not true, you are to understand that it was W—'s right to retain the horse a sufficient length of time to fully establish, by trying the horse, whether or not the horse was unsound, and, if unsound, whether the unsoundness was of such a nature as to seriously affect his value for the use for which he purchased him; and, if he took no longer time for this than was reasonable under the circumstances, his offer to return the horse was seasonable."—Approved: Gridley v. Globe Tobacco Co., 71 Mich. 528, 39 N. W. 754.

§ 4811. That Seller Believed in Truth of the Warranty is no Defense.

"You are instructed in this case that if you find from the evidence that the horse in question was purchased by plaintiff from the defendants under the warranty that he was a standard bred stallion of Clydesdale stock, or was represented by defendants to plaintiff to be of a standard and pure bred Clydesdale stock and entitled to registration, and that plaintiff purchased said animal from the defendants relying

upon such representation and warranty, then the defendants are liable to plaintiff for any damage caused by reason of the failure of such warranty or the falsity of such representation, even though the defendants believed them to be true at the time they were made."—Approved: McCabe v. Desnoyers, 20 S. D. 581, 108 N. W. 341.

§ 4812. Warrantor Bound to Know Whether Representation is True.

"You are instructed that as a matter of law, when a seller of personal property gives a warranty or makes representations in respect to the kind or quality of the goods or chattels sold, that he is bound to know whether as a matter of fact his warranty or representations are true, and that, if a buyer buys from him upon the strength of such representations or warranty, he has a right to hold the seller responsible and accountable if such warranty fails or such representations are untrue. It is the duty of a person giving a warranty or making representations as to the kind or quality of goods sold to ascertain and know whether such warranty or representations are true or not."—McCabe v. Desnoyers, 20 S. D. 581, 108 N. W. 341.

§ 4813. Burden on Buyer to Prove Breach of Warranty.

(a) "This is an action for a breach of warranty, and you are instructed that the burden is upon the plaintiff to prove by a preponderance of the evidence that such warranty has been broken. The burden is upon the plaintiff to prove that the heating plant was properly fired and handled. If you find that the plaintiff has proven by a preponderance of the evidence that the plant was properly fired and handled, and with such proper firing and handling that said plant would not heat the rooms to a comfortable degree of temperature as warranted, then your verdict will be for the plaintiff."—Approved: Cooper v. Scott Co. (Iowa), 120 N. W. 631.

(b) "Now gentlemen, with these preliminary instructions upon that branch of the case, you will be prepared to take up or consider the question as to whether or not this guaranty has been, in either of its respects, violated by the plaintiff,—be able to take up and determine whether or not the guaranty of condition, quality, and efficiency was true or false. Upon this branch of the case, the defendant, Mrs. B—, has the burden of proof, and is not entitled to prevail, unless she satisfied you by a preponderance of the evidence that the guaranty was not true,—that it was broken. Now, this involves proof of these propositions, which are included in the conditions of the guaranty: First, that the material and workmanship used in the construction of said heating plant was not the best of their respective kinds, as provided in the contract; second, that the apparatus as a whole is not capable of warming all the rooms in the building to a temperature which the guaranty provides, when suitable coal is used and the heaters properly managed. Now, gentlemen, if neither one of these propositions has been established by the defendant by a preponderance of the evidence, you should consider that the defendant has failed to establish her contention upon this branch of the case, and make up your verdict accordingly. On the other hand, if one or both of these propositions has been

established by the evidence, and a preponderance of it, you should consider the guaranty as untrue,—broken,—and the defendant would be entitled to be credited in your verdict with the damages which actually and necessarily resulted from that cause. Now, gentlemen, if the defendant prevails upon this branch of the case, you should award her such damages as, under the evidence and the rules of law now given you, she would be entitled to."—Approved: Avery v. Burrall, 118 Mich. 672, 77 N. W. 272.

(c) "In reference to the issues presented by the third count of the second division of the answer, you are instructed that if you find from the weight of the evidence introduced upon the trial that, at the time of the purchase of the interest of the horse in question, the said horse was not reasonably suited for breeding purposes, then you shall find for the defendant on the issues presented by this count; but, if he was reasonably well suited for the purposes of use for breeding, the defendant cannot recover on this account."—Approved: Bowers v. Hanna, 101 Iowa, 660, 70 N. W. 745.

(d) "If you find from the evidence in this case the party or parties who sold the windmill and pump to defendants, for balance of payment of which the due-bill sued on in this case was given, and when the pump and mill was sold the vendor or vendors of said pump and mill guaranteed that the same was to be first class in every respect, and to be erected in good workman-like manner, and warranted to give satisfaction, and you find defendants relied upon such guaranty or warranty when they purchased the said pump and mill, and you find there was a breach of such guaranty and warranty, and you find the said pump and mill were worthless, as averred in the answer, or not such a pump and mill as guaranteed, you will assess the damages occasioned to defendants by breach of said guaranty or warranty, bearing in mind the measure of damages with the difference in value of said pump and mill in the condition they actually were in at the time of sale of same, and the value of such a pump and mill as was warranted."—Approved: Brown v. Rogers, 20 Neb. 547, 31 N. W. 75.

(e) "A person who sets up the defense of warranty, as in this case, must establish by greater weight of evidence that the defendant relied upon that warranty in making the purchase, and, if he has failed to do so, you must answer the third question 'No.' "—Approved: Smith v. Reed, 141 Wis. 483, 124 N. W. 489.

§ 4814. Rule of Damages for Breach Where Article Sold for Special Purpose.

"If you find from the evidence in this action that the defendant knew the purpose for which this cement sold to the plaintiff was to be used, and warranted the same to be good cement, suitable for the purpose for which they knew it was to be used, and you further find from the evidence that the cement in question was not good cement, and was not suitable for the purpose to which the defendant knew it was to be put, then your verdict should be for plaintiff, and you will determine from the evidence what damage the plaintiff has sustained, and allow him by your verdict such amount as the evidence shows is

the damage so sustained, bearing in mind that the plaintiff is entitled to recover in that event such damages as may be reasonably supposed to have been contemplated by the plaintiff and defendant at the time the cement in question was sold, as appears from the evidence and pleadings in the action."—Approved: Nye & Schneider Co. v. Snyder, 56 Neb. 754, 77 N. W. 118.

§ 4815. Implied Warranty Where Seller Trusted to Select Goods.

"If you find from the evidence that plaintiffs sold the bill of goods to defendant which is sued for in this action, and that defendant did not have the opportunity of inspecting the goods before the sale, but relied on the plaintiffs' knowledge of the goods and the representations in regard thereto as contained in the written contract between the parties, then the law implies a warranty on the part of the plaintiffs that the articles shall be merchantable and reasonably fit for the purpose for which they were intended; and if you further find that the goods were not merchantable and reasonably fit for the purpose intended, and that defendant refused to accept them because thereof, then defendant would not be liable in this case."—Approved: W. F. Main & Co. v. El Dorado Dry Goods Co., 83 Ark. 15, 102 S. W. 681.

§ 4816. Implied Warranty is That Seller Knows of No Latent Defects.

"When one sells personal property he impliedly warrants that it is merchantable and reasonably suited to the use intended, and that the seller knows of no latent defects. 'Latent defects' mean such defects as are hidden. The implied warranty, however, does not cover such defects which can be discovered by ordinary prudence and caution. As to those, the law presumes the buyer to exercise his own judgment. If you find that the cattle referred to in the evidence in this case, or a portion of them, were infected with Texas fever ticks, and that such infection rendered the cattle unmerchantable, or unfit for the purpose for which they were purchased, and that such infection was a latent defect, and was not such a defect as could be discovered by ordinary prudence and caution, then the seller will be held to have impliedly warranted them to be free from such defects. Upon the other hand, if you find from the evidence that the cattle at the time they were purchased by the plaintiff were infected with Texas fever ticks, but that such defect, if you find same to be a defect, was such that could have been discovered by the plaintiff by ordinary prudence and caution, and that he failed to exercise the same, then he cannot hold the defendant to any implied warranty as to the cattle being free from such defect."—Approved: Puls v. Hornbeck, 24 Okl. 288, 103 Pac. 665.

§ 4817. Implied Warranty of Title.

"When a man sells personal property to another, he impliedly warrants that he has title, that is, that he has a right to sell it, that it is his property and he has a right to sell it, and there is an implied warranty that he has such right. There is no implied warranty that nobody will make a claim against it, because whatever property you have, there may be somebody who will make a claim against it, and there is no warranty on the part of the seller of goods that somebody

won't claim it, and if the party who buys it yields to somebody's unauthorized claim, it does not give him a right to damages against the party who bought it. It is only when he yields to a legal claim that he has any rights to damage against the party from whom he purchased it, to recover back either the purchase price or the value of the goods; and so, a party yielding up property to another who demands it without process of law, that is, without a judicial determination, that is, when nothing comes from any court, does so at his peril, and can only recover in case he shows in court at the time of the sale there was an implied warranty of title on the part of the seller, and that the seller didn't have any right to sell it."—Approved: Hartley v. Rotman, 200 Mass. 372, 86 N. E. 903.

§ 4818. Implied Warranty of Fitness for Purpose Intended.

"In this case the defendant files a counterclaim for damages growing out of an alleged breach of warranty, alleged to have been entered into with the plaintiff, and as to this counterclaim the court instructs you as follows:

"If you find and believe from the evidence that, at the time and purchase of the pipe and fittings in controversy, the plaintiff knew that said pipe and fittings were purchased to be used in the manufacture of certain ice machines, and were required to be of a certain strength and character, and the plaintiff agreed with the defendant to furnish pipe and fittings of that strength and character, and if you find from the evidence that the plaintiff failed to furnish pipe and fittings of the strength and character ordinarily used in the manufacture of ice machines, then you will find for the defendant.

"The court instructs you that the burden of proof is upon the defendant to show by a preponderance of the testimony—that is to say, by evidence which you deem more credible and of greater weight than that offered by the plaintiff—that it agreed to furnish pipe and fittings of the strength and character ordinarily required in the manufacture of ice machines, and also that it failed to furnish pipe and fittings of such strength and quality as are ordinarily used in the manufacture of ice machines, and that it was damaged thereby; and unless you believe that the defendant has established these facts by a preponderance of the testimony, you will find for the plaintiff upon defendant's counterclaim."—Approved: National Tube Works Co. v. Ring Refrigerating & Ice Mach. Co., 201 Mo. 30, 98 S. W. 620.

§ 4819. Same as to Cured Meat, a Manufactured Article.

"The sale of hams or bacon, which is the curing of pork in a particular manner, involves * * * the same principles of law which are applicable to manufactured articles, involving knowledge, skill, and fitness on the part of the manufacturer, who is also the seller, where he manufactures and sells his own goods; and a purchaser who makes a contract or gives an order for articles manufactured by the vendor is entitled, when he relies upon the vendor's and not his own judgment, and has no opportunity of inspection or examination, to receive an article of the kind ordered, of quantity and quality; * * * and if he has

paid for them before delivery to him, and before he has had an opportunity to inspect and examine them to determine their quality, and he afterwards discovers that they are not of the quality or kind ordered, or merchantable, he may recover back the amount paid, if they are wholly worthless; and, if not wholly worthless, he can recover the difference between their actual value and the price paid. * * * I will therefore instruct you in this case that if you find from the evidence that when the plaintiff ordered the hams that the defendant was a manufacturer of the same; that they were of his finish; that he also knew the purpose or particular use for which the plaintiff bought them, and that the vendee would not buy an inferior or non-merchantable article of that kind; and if you find the hams furnished were not bought upon the judgment of the vendee, the plaintiff, but in reliance upon the judgment of the vendor to furnish a merchantable article; and if you find it to be true that the hams so delivered were at the time they were delivered unmerchantable, and that the plaintiff paid for them, and that he had no reasonable opportunity to inspect or discover the defects before paying for them,—he would be entitled to recover the difference in value between the price paid and the market value of the article at the time they were received, if you find that the hams had any value. If they were not according to the contract, the plaintiff should have returned them within a reasonable time, or notified the defendant of the defects, and abided his order in relation to their disposition. If they were entirely worthless, and of no value, it would not be necessary to return them; but the burden of proof in such a case would be on the plaintiff to establish by a preponderance of evidence that they were of no value. If you find that they were not entirely worthless, but of some value, then you would have to deduct from the plaintiff's claim, if you find for him, the value of such defective hams."—Copas v. Anglo-American Provision Co., 73 Mich. 541, 41 N. W. 690.

§ 4820. Same as to Communicable Disease in Cattle Sold for Shipment.

"If the jury believe from the evidence that the cattle which the defendant S. T. H— sold the plaintiff, P—, had Texas fever ticks upon them at that time, and that the defendant knew that fact, or knew that they had ticks upon them, but was uncertain as to whether such ticks were fever ticks or ticks that were harmless, and if defendant also knew that plaintiff was buying such cattle for shipment to market, and defendant did not disclose the fact of such cattle being infected by such ticks, then the defendant would be liable to plaintiff for all the damages sustained by plaintiff occasioned by the depreciation in value of the cattle in the market by reason of being infected with fever ticks; and the defendant would, under such circumstances, be liable to the plaintiff for all damages sustained by the plaintiff resulting from the commingling of the cattle he bought from H— with plaintiff's other cattle."—Approved: Puls v. Hornbeck, 24 Okl. 288, 103 Pac. 665.

§ 4821. Same as to Condition of Fruit Shipped.

"Gentlemen of the jury, you are instructed that under the contract as shown by the evidence on this case, the plaintiff was required to

load into the car at Portland, N. Y., grapes which were in such condition as to bear shipment to Ft. Smith, Ark., and be in merchantable condition upon arrival in Ft. Smith, Ark., that is, the shipper must have in mind the time ordinarily consumed in the means of transit employed, and the fruit must be in such condition as, under the ordinary conditions, to reach the point of destination in merchantable condition. Now if you find from the evidence that the grapes loaded into this car were in proper condition to stand shipment to Ft. Smith, Ark., and reach Ft. Smith, Ark., in merchantable condition, your verdict should be for plaintiff, if not, your verdict should be for defendant."—Approved: Truschel v. Dean, 77 Ark. 546, 92 S. W. 781.

§ 4822. Same as to Steam Boiler for Special Purpose.

"It was the duty of the plaintiff to furnish a steam boiler reasonably suitable for the purpose for which it was to be used, as already explained, eleven feet six by fourteen feet, and if you find that such a boiler was not furnished, then the plaintiff was guilty of a breach of the contract on its part."—Approved: Detroit Shipbuilding Co. v. Comstock, 144 Mich. 516, 108 N. W. 286.

§ 4823. Sale upon Condition—Reservation of Title.

"You are further charged that, if you believe from the evidence, that W. F. H— sold the mules, wagon, and harness to Virge M—, and that by the terms of the sale said H— reserved the title to the said property as security for the payment or part payment of the said property, then under the law such reservation of title would be void as against the mortgage of C. E. Slayton & Co.; and if you believe from the testimony that such mortgage was taken by Slayton & Co. in good faith, then you will find for the defendants."—Approved: Slayton & Co. v. Horsey (Tex. Civ. App.), 91 S. W. 799 (not reported in state reports).

§ 4824. Purchase from Vendee under Conditional Sale.

"The court instructs the jury that if the piano was delivered into the possession of A— under the agreement between her and plaintiffs whereby she had the option to apply all installments called rent as payments on purchase, and it remained in her possession from that time until she sold and delivered it to the defendant, if the jury believe she sold it to defendant for a valuable consideration and he was ignorant at the time of the claim of the plaintiffs, they should find for the defendant."—Approved: Geer v. Church & Co., 13 Bush (Ky.) 430, 433.

§ 4825. Defective Seed for Perennial Crop—Measure of Damages.

"The rule of damages in such cases is that he would be entitled to recover from the person or corporation liable for the damage the fair value of the crop which he lost, or the crop which would have been produced under ordinary circumstances if the seed had been as represented, this crop being a perennial crop or plant, as stated; that is, one lasting from year to year. You may also take into consideration the question of whether or not he should be entitled under such circumstances to the cost of reseeding, which would be the cost of recultivation and the cost of the new seed sown."—Approved: Depew v. Peck Hardware Co., 105 N. Y. Supp. 390.

CHAPTER CXXIX.

TELEGRAPHS AND TELEPHONES.

§ 4826. Telegraph Company Bound to use Ordinary Diligence to Deliver Message.
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4839. Failure to Deliver Promptly as Proximate Cause of Injury.
4840. Mental Anguish as Element of Damage.

§ 4826. Telegraph Company Bound to use Ordinary Diligence to Deliver Message.

(a) "The court instructs the jury that it is admitted by the evidence of the defendant that it received the telegram specified in the pleadings and proof for delivery, and was paid in advance therefor. It then became the duty of defendant to use ordinary diligence to deliver same to the address and party named therein, and, if you believe from the evidence that it negligently failed to deliver to the addressee or his house as per direction, then the law is for the plaintiff, and the jury should so find."—Approved: Postal Telegraph Cable Co. v. Terrell, 124 Ky. 822, 100 S. W. 292.

(b) "The jury are instructed that upon receipt of the message it became and was the duty of the defendant to use reasonable effort for the prompt delivery of the same, and if you believe from a preponderance of the evidence that it failed to use such effort, then, and in that event, you are told that it was guilty of negligence. As to whether, under the facts and circumstances detailed in evidence by

the witnesses, the defendant company was negligent in the delivery of this message is a question to be determined by you, from all the evidence in the case."—Approved: W. U. Tel. Co. v. Wilson (Ark.), 133 S. W. 845.

§ 4827. But is not Insurer of Accuracy in Transmission.

"You are charged that, if the mistake made in the transmission or delivery of the message was caused or brought about on account of or by reason of negligence on the part of the defendant, or its agents or servants, then, in that event, the conditions and stipulations pleaded by defendant cannot avail it anything in this action. The telegraph company is not an insurer of absolute safety and accuracy in the transmission of messages."—Approved: W. U. Tel. Co. v. Odom, 21 Tex. Civ. App. 537, 52 S. W. 632.

§ 4828. For Failure To Deliver Message there is Liability to him for Whose Benefit it was Sent.

"It is the duty of a telegraph company to use ordinary care to transmit and deliver to the person addressed all messages accepted by it for transmission over its wires, and, in case it fails to exercise such care and diligence in transmitting and delivering such a message, it is liable to the person for whose benefit the message is sent for all damages he may sustain by reason of such failure."—Approved: Western Union Telegraph Co. v. Johnsey, 49 Tex. Civ. App. 487, 109 S. W. 251.

§ 4829. That Addressee may Reside Outside of Corporate Limits no Excuse for Lack of Diligence to Deliver Message.

"The jury are instructed that the mere fact that the plaintiff lived outside the corporate limits of the town of Nashville is no excuse for the failure of defendant to deliver the message promptly, provided such delivery could have been made within said corporate limits by the exercise of ordinary diligence on the part of the employees of the defendant."—Approved: Arkansas & L. Ry. Co. v. Stroude, 82 Ark. 117, 100 S. W. 760.

§ 4830. Burden on Plaintiff to Show Error in Transmission of Message Fault of Company.

"And in this connection the jury are further charged that, in determining whether or not the error in transmission is such an error as would warrant the jury in finding a verdict for plaintiff in any sum, the jury is charged that the burden of proof is upon the plaintiff to show by direct testimony or by facts and circumstances of the case that the error was caused by the misconduct, fraud, or want of due care on the part of the defendant company, its servants or agents, and, unless the plaintiff has made this proof, then the jury must find for the defendant."—Approved: Postal Telegraph-Cable Co. v. Sunset Const. Co., 102 Tex. 48, 114 S. W. 98.

§ 4831. Where Mistake in Initial is not Cause of Failure to Deliver Defendant is Liable.

"Although the jury may believe from the evidence that a mistake was made in plaintiff's initial by the Western Union Telegraph Company in transmitting to defendant company the message in controversy, yet if you further believe that if the message as received by the defendant company had been shown to the plaintiff he would have known it was intended for him, and would have acted upon it, or would have gone to his wife, then the mistake in plaintiff's address cannot avail defendant as a defense to this suit, unless you further find that the failure to deliver the message was caused thereby or contributed to same."—Approved: Arkansas & L. Ry. Co. v. Stroude, 82 Ark. 117, 100 S. W. 760.

§ 4832. If Incorrect Address Causes Delay there is no Liability.

"The jury are instructed that if from the evidence they believe that M—, who delivered the message in question to the defendant company for transmission, gave to the defendant an incorrect or insufficient address, and that in so doing he was guilty of negligence, as that term has been hereinbefore defined, and if the jury further believe from the evidence that such negligence on his part, if any, contributed to cause the failure to deliver the message to H—, then the plaintiff cannot recover, even though the defendant may have also been negligent."—Approved: Hargrave v. W. U. Tel. Co. (Tex Civ. App.), 60 S. W. 687 (not reported in state reports).

§ 4833. Delay in Delivery Resulting in Damage.

"If you believe from a preponderance of the evidence that a message signed by the plaintiff's brother-in-law, J. D. C—, of Mohawk, Tenn., and addressed to the plaintiff at Nashville Ark., notifying him that his wife was not expected to live, and asking him to come home, came to the defendant's Nashville office on the forenoon of September 30, 1903, and that by the exercise of reasonable diligence said message could have been delivered to the plaintiff on said day, and that if it had been delivered to him on said day he could and would have gone to his wife and been with her at her death, funeral, and burial, and that said message was not in fact delivered to plaintiff, and that by reason thereof he was deprived of the opportunity of attending his wife in her last moments and of attending her funeral and burial, then you will find for the plaintiff and assess his damages at whatever sum you conclude resulted from the negligent failure to deliver said message, if you should find there was a negligent failure to deliver the same."—Approved: Arkansas & L. Ry. Co. v. Stroude, 82 Ark. 117, 100 S. W. 760.

§ 4834. Error in Transmission Within Rule Limiting Liability.

"If there were such rules and regulations, so assented to, the mere fact that there was an error in the message as delivered would not, of itself, without further proof of carelessness, be sufficient to author-

ize the plaintiff to recover anything beyond the price of the message and interest thereon."—Approved: Becker v. Western Union Telegraph Co., 11 Neb. 87, 7 N. W. 868.

§ 4835. Recovery as Affected by Notice of Purpose in Sending a Telegram.

"You are further instructed that if you believe from a preponderance of the testimony that plaintiff delivered to defendant's agent at Hempstead, Tex., on or about the date alleged in the petition, a telegram in terms substantially as alleged in his petition, and you further believe that at the time of such delivery to said agent at Hempstead plaintiff advised and informed said agent that the purpose of such telegram was to have the said L— to meet himself, as well as his wife, at the depot in Bremond, Tex., and you further believe that said defendant failed to use ordinary care in the transmission and delivery of said telegram and that plaintiff was not guilty of contributory negligence, as those terms are hereinbefore defined to you, and you further believe that the injuries or damages complained of by plaintiff, if any, were the proximate result of the negligence of defendant, if any, you will find for the plaintiff, and assess his damages in such sum as if paid now will reasonably compensate him for the physical suffering of himself and wife, if any you believe they suffered because of the failure to transmit and deliver said telegram, for such loss of time, if any, as you believe plaintiff sustained by reason thereof, for such expense, if any, for medicines for himself and wife by reason of such failure, if failure you believe there was, and for the sum of 25 cents paid for such telegram, but in this connection you are charged to exclude all other elements of damages from your consideration than those hereinabove enumerated, and also limiting your consideration of damages or injuries, if any, to those which you believe from the evidence to have resulted proximately from the defendant's negligence, if you believe it was negligence, as submitted in this charge. You are also instructed that unless you believe from a preponderance of the testimony that plaintiff advised and informed defendant's agent at Hempstead that the purpose of said telegram was to have said L— meet himself, as well as his wife, Ollie, at Bremond, you will not consider any injuries you may believe he suffered or sustained by reason of his own physical or mental suffering, or loss of time or expenses for medicine for himself, if any, but you will only consider such injuries or suffering, if any, of his wife, and such money, if any, expended for medicine for his wife, which was the proximate result of the negligence, if any, of defendant in transmission and delivery of said telegram, and the price paid for said telegram."—Approved: Western Union Telegraph Co. v. Powell (Tex. Civ. App.), 118 S. W. 226.

§ 4836. Injury Not Attributable to Delay in Delivery of Message.

"You are further instructed that, after the plaintiff received the message that his mother was dead, it was the duty of the plaintiff to exercise ordinary care to leave Roff on the first train going towards

Greenville, and the evidence shows that he received such information before such train arrived at or left the town of Roff, Ind. T. Therefore, if you should find that an ordinarily prudent person under the circumstances surrounding plaintiff at the time he received such information could and would have gone to the depot at Roff in time to catch said train, and leave thereon, then you should find for the defendant."—Approved: Western Union Telegraph Co. v. Johnsey, 49 Tex. Civ. App. 487, 109 S. W. 251.

§ 4837. Error in Transmission on Connecting Line.

"It is a question for the jury to find from the greater weight of the evidence whether the line from Beaufort to Newport was owned and operated by the defendant, and, if the jury found that the line from Beaufort to Newport was not owned or operated by the defendant, it would not be liable for any error that may have occurred on that line, the burden of proof as to who owned the line from Beaufort to Newport being on the plaintiff."—Approved: Willis v. Western Union Telegraph Co., 150 N. C. 318, 64 S. E. 11.

§ 4838. To make Company Liable for Delay it must Appear This was Proximate Cause of Loss.

"Where, in an action against a telegraph company for failure to deliver a message, it is sought to recover damages for losses which would have been prevented by a sale which the message was designed to complete, it must appear that the delivery of the message to the party to whom it was directed would have effected valid and binding contract. It does not mean, though, that the contract would not have been binding. It does not mean that there might have been a defense between A— and B—, the persons to whom the goods were to be sold, if one complained by reason of the fact that he did not make a contract, as the result of the non-delivery of the telegram. Matters of defense they might set up you cannot consider here, but if the persons fairly intended to complete and perfect the sale contract, that is enough. It is for you to say in any given case whether or not that was the purpose, and, if it had gone, how far; and I so charge you. Where one partner, who has received an offer in the usual course of trade, telegraphs his co-partner for advice as to accepting it, and, not hearing from him, on account of the negligent failure of the telegraph company to deliver the message, voluntarily acts upon his own judgment and declines the offer, such negligence of the telegraph company is not the proximate cause of the loss sustained by failure to consummate the trade, and the defendant is not liable in damages upon proof that if the message had been reasonably delivered the co-partner would have advised acceptance, and the trade would have been made."—Approved: Wallingford v. W. U. Tel. Co., 60 S. C. 201, 38 S. E. 443.

§ 4839. Failure to Deliver Promptly as Proximate Cause of Injury.

"If you believe from the evidence that the telegram referred to in this charge was sent and was delivered to plaintiff, or that he had

knowledge of the contents of said telegram, in time for him to have reached the bedside of his father by the usual mode of travel before his death, or if you believe that the failure of plaintiff to have been with his father in his last sickness was the negligence of the plaintiff, and not the negligence of the defendant, and if you further believe that, after plaintiff received said message, he failed to use such diligence as an ordinarily prudent person would have used under the same circumstances to reach his father before his death, and if such failure contributed directly or proximately to his failure to see his father before his death, then you will find for the defendant."—Approved: Western U. Tel. Co. v. Mack (Tex. Civ. App.), 128 S. W. 921.

§ 4840. Mental Anguish as an Element of Damage.

"If you find from the preponderance of the evidence that defendant company was negligent in delivering the telegram, then you will find for the plaintiff in whatever amount you consider a reasonable compensation for the mental anguish and suffering sustained by her, by reason of said negligence."—Approved: Western U. T. Co. v. Wilson (Ark.), 133 S. W. 845.

CHAPTER CXXX.

WATER COURSES.

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§ 4841. Riparian Owner—Right to Usual and Ordinary Flow of Stream.

"The plaintiff had the right to have the water of the south branch of the Chippewa river flow into and through his pond in its usual and ordinary mode of flowing, and any detention of the water by defendants, for the sole purpose of securing a flood, in such a manner that

it could not be used by plaintiff in the running of his mills, was unreasonable and unlawful as to plaintiff, and entitles him to compensation for the resulting damages. If you find from the evidence that by reason of defendants' holding back the water by means of the dam, that plaintiff was thereby prevented from obtaining a sufficient supply with which to operate his mills, he is entitled to recover such damages as he has suffered by reason of being deprived of the use of his mills."—Approved: Woodin v. Wentworth, 57 Mich. 278, 23 N. W. 813.

§ 4843. Changing Course or Channel to his Injury is Actionable.

"Where the owner of land wrongfully changes the natural drainage course or channel for the discharge of surface water over his land in such a way as to cast it upon the adjoining land either in a different manner or a larger volume than would have passed upon such land in a natural state, to the injury of such adjoining land, then the person so diverting or changing the natural water course or drainage channel is liable for the injury occasioned thereby to such adjoining proprietor. So, likewise, the owner of lands has no authority to carry water from his own land along the public highway, by ditches, drains, or otherwise, and to cast it upon his neighbor's land. And, if he does so, he is liable for any damages ensuing from his wrongful act."—Approved: Mulvihill v. Thompson, 114 Iowa, 734, 87 N. W. 693.

§ 4844. Lower Owner may Obstruct Flow of Waters Wrongfully Diverted.

"If you find that the natural water course for the water from B—'s land, in a state of nature, was to the west, and not to the east, then I charge you that the plaintiff had no right by any artificial means to change the course of such water so as to throw it upon the lands of the defendant, unless he had acquired such right by user or prescription, as above set forth, and that if the plaintiff did flow upon the lands of the defendant waters from the B— land which did not naturally flow upon defendant's land, if you find such to be the case, without having acquired the right so to do by user or prescription, then the defendant would have the right to obstruct the flow of such waters, either by erecting dams or otherwise, even if in so doing it would obstruct the flow of waters upon his land that naturally flowed in that direction, and if in so doing the plaintiff's crops were injured, and would by so doing not subject himself to any liability for damages to said plaintiff."—Approved: O'Connor v. Hogan, 140 Mich. 613, 104 N. W. 29.

§ 4845. Choking Mill Race with Refuse Cast into Stream.

"If the jury find from the evidence in this case that the defendant, ————, its agents or servants, during the campaigns (so called) of said company from ———— to ————, have deposited into B. Creek, and from thence into the pond, race, flume, and water wheel, of the water power and mill of the plaintiff, such quantities of beets, beet roots, lime mud, lime, sand, and dirt, and other refuse from its

sugar plant, as to materially and unreasonably lessen, diminish, injure and damage such pond, race, and mill property, then such use and such acts of the defendant with the said waters of B. Creek would be an unreasonable use thereof, and would render it liable in this action to the plaintiff for the damages it has occasioned him, if any."—Approved: Neely v. Detroit Sugar Co., 138 Mich. 469, 101 N. W. 664.

§ 4846. When Stream Encroaches Riparian Owner may Restore to Channel, but not Cast it on Opposite Bank.

"A riparian owner has no right to obstruct the natural channel of a river to cause a change of its course. When a river encroaches upon his land, he may take the necessary steps and use the necessary means to restore it to its original channel, to maintain his bank in its original condition, and to that extent protect his property from the incursion of the water. The restoration of a river to its original channel and the maintenance of one of its banks to its original and natural condition may often be to the prejudice of the riparian owner upon the other side of the stream, both in times of high and low water; but a riparian owner on the opposite side of a stream is not required to sit still until his property is swept away by an encroaching river. He has the right to protect his property against such encroachment, and to turn the current of the stream into its original channel. And the owner upon the opposite side has the same right to protect his bank. But neither owner has the legal right to do more than to maintain the bank in its original condition, or to restore it to that condition. If, from a consideration of all the evidence in the case, you are of the opinion that defendant has done no more in the construction and maintenance of said dykes than to protect its property under the law stated, your verdict should be for defendant. Upon the other hand, if you believe from a preponderance of the evidence that the defendant, in the construction of the dykes, did more than was necessary to maintain its bank of the stream in its original condition or to restore it to that condition, and to bring back the stream to its original course as it existed when defendant went into possession, and that such acts, if any, were in excess of its right as herein defined, and that they were the direct and proximate cause of the damage to plaintiff's land, as alleged in her complaint, in that event your verdict should be for the plaintiff for whatever amount of damage you may be satisfied she is entitled to from the evidence, with interest at the rate of 6 per cent. per annum from the date the damages were inflicted. If you find for the plaintiff, you can only assess the damages that have accrued within three years prior to the commencement of this suit."—Approved: Gulf, C. & E. F. Ry. Co. v. Moseley, 6 Ind. T. 369, 98 S. W. 129.

§ 4847. Pollution—Irrigator may Recover of Quartz Mill for.

"You are instructed that if you believe from the preponderance of the evidence the plaintiff has acquired the right to use the water of Mineral Creek for the irrigation of his farm prior to the pollution of the same by defendant corporation by allowing the tailings from its

quartz mill to flow therein, then you are instructed that it devolved upon the plaintiff, before using the said water for irrigation, to use ordinary care in determining whether said water, so polluted, would injure the vegetation on his farm or would injure the soil thereof, and, failing to exercise said ordinary care, he cannot recover in this case, unless you further find from a preponderance of the evidence that he was compelled to use said water for irrigation, and in the exercise of ordinary care and prudence he elected to use said water in its polluted condition, as calculated to result in less injury to him than to fail to irrigate his said land at all, in which event you will not refuse to award plaintiff such damages as he has suffered, notwithstanding he may have known, or with ordinary care should have known, the damaging results of such use of such water in such polluted condition; but in no event would the plaintiff be entitled to greater damages than would have accrued by not using the water so polluted."—Approved: Mogollon Gold & Copper Co. v. Stout (N. M.), 91 Pac. 724 (not reported in state reports).

§ 4848. Same by Deposit in Stream of Tailings and Gravel Cast on Lower Land.

"One engaged in mining has a right to deposit his tailings in a running stream to a reasonable extent, but he has no right to flood a lower owner's land, and by depositing tailings and debris thereon to substantially injure or ruin the latter's property, although he may have used all reasonable means to prevent such damage. No person or corporation has a right, directly or indirectly, to cover his neighbor's land with mining debris, sand, and gravel, or other material so as to injure or damage the same. So I instruct you that if you find upon the evidence that the plaintiffs are in the possession of the land described in the complaint, and were in such possession at and during the times therein mentioned, and if you further find that while they were in such possession the defendant caused to be placed in the channel of Camp creek and upon the lands of plaintiffs a large obstruction, by placing in said creek and upon said land a large mass of earth, gravel, rocks, and boulders, which caused the waters of said creek to flow upon and against plaintiffs' land, washing it away and damaging and injuring it, and if you further find that said defendant, after making such obstruction, commenced mining operations by the hydraulic process upon its land and above plaintiffs' land and in so doing caused to be placed into Simm's Gulch a large mass of earth, detritus, debris, gravel, rocks, and boulders, tailings from its mine, and if you further find that said detritus, debris, gravel, rocks, and boulders came down said gulch into Camp creek and were thence carried by the waters of Camp creek down stream to said obstruction and were there by reason thereof diverted to and upon the said land of plaintiffs, damaging and injuring the same, then you should render a verdict for the plaintiffs."—Approved: Salstrom v. Orleans Bar Gold Mining Co., 153 Cal. 551, 96 Pac. 292.

§ 4849. Same—Contaminating Water in Reservoir of Waterworks Plant.

(a) "The court instructs the jury that, if they believe from the evidence that the water obtained by the plaintiff for use in his waterworks plant on his lot, and obtained from the Big Spring creek, was of such quality that same could be and was profitably used by the plaintiff in his waterworks plant, up to the time the sewers constructed by the city were turned into said creek, and that the connecting of the sewers by contaminating the water in the creek depreciated the value of plaintiff's waterworks plant by rendering it unprofitable to operate it, then the jury will find for the plaintiff."—Approved: Kevil v. City of Princeton (Ky.), 118 S. W. 363.

(b) "The court instructs the jury that the plaintiff, Thomas N—, at the time of the commencement of this suit, and from November 1, 1899, was entitled to the use of the old pond (so called) and his race in the same manner as before November 1, 1899, and was entitled thereto free from any material amount of refuse and pollution therein, except the amount that would naturally come therein; and if the defendant, its agents or servants, during said time, in the conduct of business, so used the waters of Paint Creek as to deposit therein at or near its sugar plant, and the flow of said creek carried into the old pond and race of the plaintiff, such quantities of beets, tops of beets, beet roots, lime mud, sand, and dirt, and other refuse, as to materially and unreasonably lessen and diminish the quantity of water therein, and thereby injure, lessen, diminish, and damage the capacity, power, and operation of plaintiff's flour and feed mill, then such acts of depositing into and such user of said stream by the defendant was and would be an unreasonable use and user thereof, and would render it liable in this action—liable to the plaintiff for the damages it has occasioned him, if any."—Approved: Neely v. Detroit Sugar Co., 138 Mich. 469, 101 N. W. 664.

§ 4850. Same—Contaminating Spring Used for Domestic Purposes.

"You will find for the defendant in this case, unless you shall believe from the evidence that prior to the 10th day of July, 1907, the time of the filing of this action, the defendant so operated and managed its railway as to cause quantities of oil or other polluting substance to escape from its cars or premises, and run into and so pollute plaintiff's spring as to make it unfit for use for domestic purposes, and, if you so believe from the evidence, you will find for the plaintiff."—Approved: Cincinnati, N. O. & T. P. Ry. Co. v. Gillispie, 130 Ky. 213, 113 S. W. 89.

§ 4851. Flooding from Railroad Failing to Provide Culverts and Sluices.

(a) "You are instructed that it is provided by the statute laws of Texas, 'that in no case shall any railroad company construct a roadbed without first constructing the necessary culverts or sluices, as the natural lay of the land requires, for the necessary drainage thereof.'

In applying this law to the facts now before you in evidence you will consider in the light of the evidence the natural lay of defendant's right of way and the natural lay of plaintiff's land, as related to each other and to defendant's roadbed. The expression 'necessary drainage,' in this statute relates to surface water as well as any other water. The term 'surface water' is applied to rainwater falling from the clouds and running over the surface of the earth not in any established and definite channel, but scattered over it and running according to the natural lay of the land."—Approved: Missouri K. & T. Ry. Co. v. Green, 44 Tex. Civ. App. 247, 99 S. W. 573.

(b) "If you find from the evidence that, in the construction and maintenance of its roadbed, ditches, and culvert, the defendant changed the flow of surface water so that, after the construction of the roadbed and ditches, the surface water no longer naturally flowed as it naturally did before the roadbed and ditches were made, but were concentrated on the north side of the embankment and in the barrow pits, as alleged in plaintiff's petition, and that they were discharged through the culvert and escaped from the barrow pits to and upon the plaintiff's land, as described in said petition, and produced the injuries complained of, then you are instructed that it was the duty of defendant to see to it that such change, if any, in the natural flow of the surface water, should not operate to the injury of the plaintiff's land, and if you further find from the evidence that such change, if any, was injurious to the plaintiff's land, then, and in that event, you are further instructed that the plaintiff would be entitled to recover of the defendant such damages, if any, as you may believe from the evidence the plaintiff's wards have sustained thereby, provided you also find from the evidence that such injuries are permanent. In determining whether or not such injuries, if any, are permanent, you should find from the evidence that they have been repeated from time to time within the period of two years next prior to the date of the institution of this suit, at irregular but certainly recurring intervals, on occasions of heavy, and especially on occasions of protracted, rainfall, that the causes of such injury, if any, are themselves permanent, and are entitled by the defendant to be and remain permanent, that similar results to the land in question will, in reasonable probability, continue to result hereafter whenever, in the course of nature, there falls in that locality heavy rain, and especially in cases of protracted rainfall, then and in that event you may consider and find said injuries to be permanent. And, if you further find from the evidence that such injuries, if any, are not only permanent, but that the market value of said 81.8 acres of land was depreciated thereby within two years next prior to the institution of this suit, you will find for the plaintiff."—Approved: Missouri, K. & T. Ry. Co. v. Green, 44 Tex. Civ. App. 247, 99 S. W. 573.

§ 4852. Same from Defective Culverts for Ordinary Rainfalls.

"If the jury believe from the evidence that the culvert under defendants' railroad track dividing plaintiffs' lands was so negligently

and defectively constructed, or after its construction was negligently permitted by defendants to become so filled with mud or sand, as to render it inadequate to carry off the water that accumulated upon plaintiffs' lands from the usual and ordinary floods and rainfalls in that vicinity, and shall further believe from the evidence that, by reason of the defectiveness and inadequacy, if any, of the culvert, and within five years before December 24, 1905, the water from such usual and ordinary floods and rainfalls was caused to overflow plaintiffs' land in unusual volume or quantity, thereby injuring it, destroying the growing crops, or injuring the fencing or buildings thereon, they should find for plaintiffs the damages thereby sustained, not to exceed $1,500 to plaintiff R. W. W— for the overflows to the land south of the railroad track, or $490 to the plaintiff Maggie W— for the overflows to the land north of the railroad track."—Approved: Wallingford v. Maysville & B. S. Ry. Co. (Ky.), 107 S. W. 781 (not reported in state reports).

§ 4853. Same—Caused by Extraordinary Rains or Floods.

"On the other hand, if the jury believe from the evidence that the culvert was so constructed and maintained by defendants as to render it adequate to carry off the water accumulated upon plaintiffs' lands from usual and ordinary rainfalls and floods in that vicinity, they should find for defendants. Or if they believe from the evidence that the overflows to plaintiffs' lands complained of were caused by extraordinary rains or floods—that is, such floods or rainfalls as were of unusual occurrence in that vicinity, and could not have been anticipated by persons of ordinary experience and prudence—they should find for defendants."—Approved: Wallingford v. Maysville & B. S. Ry. Co. (Ky.), 107 S. W. 781 (not reported in state reports).

§ 4854. Same—Duty of Railroad to Construct Sluices as the Lay of the Land Requires.

(a) "If you find from the evidence that, at the time the railway company constructed its roadbed, there was an old road situated where the ditch is now located on the west side of its railroad, if you find there was such a ditch, and if you further find the water, if any, that reached the right of way was carried to such point along said old road and at the point where it now does, then you are instructed that it was the duty of defendant company, when it constructed its roadbed, to have constructed necessary sluices and water ways as the natural lay of the land required for the necessary drainage thereof, and to have maintained the same since said date in such condition as the natural lay of the land required for the necessary drainage thereof."—Approved: Missouri, K. & T. Ry. Co. v. Arey (Tex. Civ. App.), 100 S. W. 963 (not reported in state reports).

(b) "It is the duty of a railroad company, when it constructs a roadbed, to construct the necessary culverts or sluices as the natural lay of the land requires for the necessary drainage thereof, and to maintain the same in reasonably good condition. If you find from the evi-

dence that the natural flow of the surface water on the west side of defendant's roadbed and northwest of plaintiff's premises is towards the railroad, and to the southeast in the same direction that the railroad runs, and if you further find that the surface water west and northwest of plaintiff's premises flows to the railroad, and thence on the right of way in a southeasterly direction, and if you further find that the same, if not obstructed, would pass through and beyond the plaintiff's premises, and if you further find that within two years prior to the 5th day of May, 1904, the defendant negligently and carelessly constructed a dam or embankment across its right of way between the 36 acres and 20 acres of land, as above set forth, and if you further find that said embankment, if there was such embankment, obstructed the natural flow of the water that had accumulated on its right of way, or you further find that said embankment caused the water at each rainfall thereafter to accumulate and be concentrated at that point, and be banked up the right of way; and if you further find that said water was caused to overflow plaintiff's premises, and his said land and premises was thereby injured, as alleged in the petition, and if you further find that the defendant, in constructing said dam or embankment, if it did, was guilty of 'negligence,' as that term is defined in the first paragraph of this charge, and that such negligence, if any, was the proximate cause of said injuries, if any, then you will find for the plaintiff."—Approved: Missouri, K. & T. Ry. Co. v. Arey (Tex. Civ. App.), 100 S. W. 963 (not reported in state reports).

§ 4855. Same—Embankment and Culverts Diverting Water from Natural Course.

"That if said dam, embankment, and culverts diverted the water or any part thereof from its natural and usual course, and caused it to flow over and upon said land leased by plaintiffs as alleged by them, and by reason thereof plaintiffs' cotton, corn, potatoes, and alfalfa were destroyed, and if you further believe that all or any of said damage, if any, was caused by said dam, embankment, and culverts or openings which caused the water, if any, to flow over and upon or remain on plaintiffs' land so leased and crops thereon, which otherwise would not have flowed over and upon or remained on said land and crops, then in either event you will find for plaintiffs, if you do not so find you will find for defendant. Defendant cannot be held liable for any damage, if any, caused by the rain and overflows of water of Sulphur creek which would have flowed over and upon said land and crops or remained thereon had there never been constructed any dam, embankment, and culverts by the defendant and not caused thereby."—Approved: Moss v. Gulf, C. & S. F. Ry. Co., 46 Tex. Civ. App. 463, 103 S. W. 221.

§ 4856. Same—Dirt and Stone Thrown in Stream and Diverting Course.

"You will find for the defendant, the Louisville & Nashville Railroad Company, unless you believe from the evidence the defendant, by its

agents, servants, or employees, in the years 1900, 1901, 1903, or 1904, threw dirt, rocks, or other obstructions into Round Stone Creek, and thereby diverted the stream of said creek, and caused the water to overflow and wash the lands of plaintiffs, in which latter state of case you will find for the plaintiffs."—Approved: Louisville & N. R. Co. v. Ponder (Ky.), 104 S. W. 279 (not reported in state reports).

§ 4857. Same—Railroad Must Foresee Unusual Storms which Occasionally Occur.

"It is the duty of the railway company in building its railroad, when it crosses a stream or low land, to provide passageways for the water reasonably sufficient to allow it to flow through without being diverted from its natural course, or, being backed up, so as to cause damage to the property of another. It must anticipate and make provision for such floods as may occur in the ordinary course of nature. It must foresee and provide for unusual storms such as occasionally may occur, whether they are called ordinary or extraordinary. But a railroad company in building and constructing its road, bridges, and culverts is not bound to provide for unprecedented floods, nor is the railroad company guilty of negligence in failing to provide for a flood which is not only extraordinary, but unprecedented, and could not reasonably have been foreseen."—Approved: Blunck v. Chicago & N. W. Ry. Co. (Iowa), 115 N. W. 1013 (not reported in state reports).

§ 4858. Where Land Nearly Level Railroad not Bound to Provide for Escape of Surface Water.

"If the jury find, from a fair preponderance of the evidence, that the land west of Big Whisky creek, over which defendant's embankment and railway track were constructed and located, is nearly level, that there is no natural or artificial stream crossed by said embankment, and no defined channel or way in which the water, coming onto said land to the north of said railway track, could pass to the south, even if defendant's right of way and railway embankment had not been constructed, and if you further find that, by reason of the character and condition of the land at the time defendant's embankment was originally constructed, such railway construction would necessarily interfere with the flow of surface water and cause it to accumulate and stand on the land from which the right of way is taken, then, if you so find, you are instructed that for such necessary interference with the flow of surface water as was occasioned by the proper construction of said railway over said land no recovery in this action can be had."—Approved: Blunck v. Chicago & N. W. Ry. Co., 142 Iowa, 146, 120 N. W. 737.

§ 4859. Water Leaving Stream and Forced Back by Embankment not Surface Water.

"You are instructed that if Rock Creek was a flowing stream the year around, with well-defined banks, and that defendant constructed over said stream a culvert for the purpose of enabling its railway to

pass over said water-course, and if you further find from the evidence that in times of high water at a point five hundred feet above said culvert, more or less, any portion of the water flowing in said creek in times of high water left its banks at such point above said culvert, and then, for a short distance, flowed over the land of plaintiff, but that the same was forced, by the embankment of defendant, back into the creek again, above said culvert, then such waters are not surface waters, but must be regarded by you, in the determination of this case in determining the sufficiency of said culvert, in the same light as if they had continuously flowed in said creek."—Approved: Sullens v. Chicago, R. I. & P. Ry. Co., 74 Iowa, 659, 38 N. W. 545.

§ 4860. Tide Lands are Public Property for Purposes of Navigation.

"I instruct you that the United States government has reserved the tide lands for the common purposes of navigation, commerce, and fishery; and no one can acquire by possession, occupation, or use, any exclusive rights in these lands superior to the public and general right, common to all, of commerce, navigation, and fishery. By the words 'tide lands' I mean that portion of the shore or beach covered and uncovered by the ebb and flow of an ordinary tide."—Approved: Pacific Steam Whaling Co. v. Alaska Packers' Ass'n, 138 Cal. 632, 72 Pac. 161.

§ 4861. Right of Fishery in Public Waters Common to All.

"If you find that the waters adjoining Karluk Island and Tanglefoot Beaches on Kodiak Island are waters of the sea, or of a navigable arm of the sea, where the tide ebbs and flows, then I instruct you that the plaintiff had the right, common to all persons, to fish in those waters, and the defendant had no right of fishing therein superior to that of plaintiff."—Approved: Pacific Steam Whaling Co. v. Alaska Packers' Ass'n, 138 Cal. 632, 72 Pac. 161.

§ 4862. And this is True Irrespective of Ownership of the Shore.

"I instruct you that the right to fish in the waters of the sea and of the navigable arms of the sea, where the tide ebbs and flows, adjacent to the shores of Alaska and of the island belonging thereto, including Kodiak Island, is a right public and common to every person; and I instruct you that this right extends to all such waters, irrespective of the question of the ownership of the adjoining shore."—Approved: Pacific Steam Whaling Co. v. Alaska Packers' Ass'n, 138 Cal. 632, 72 Pac. 161.

CHAPTER CXXXI.

WILLS.

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§ 4863. Right to Dispose of Property by Will.

"Every one has the right to dispose of his property according to his own desires, and if there is no defect of testamentary capacity the law must give effect to his will, irrespective of its provisions, or of his reasons or motives for making such disposition; and the jury are not at liberty to consider the character of its provisions, but are solely to determine whether it was his will."—Approved: In re Higgins' Estate, 156 Cal. 257, 104 Pac. 6.

§ 4864. Due Execution—Requisites of.

"In this State it is provided by statute that any person of full age and sound mind may execute a will, which, to be valid, must be in writ-

ing, witnessed by two competent witnesses, and signed by the testator, or by some person in his presence, and by his express direction.

"It therefore devolves upon the proponent (that is, the party seeking to have the will established) to show by the evidence that at the time of the execution of the will or instrument in question the testator, Lawrence C—, was of sound mind; that he signed said instrument as and for his last will, and that such will was witnessed by two competent witnesses.

"While the onus of showing a compliance with the statute as above explained devolves upon the party seeking to establish the will, yet the formal execution may be shown by persons other than the subscribing witnesses, or may be inferred from circumstances, as well as established by the direct and positive testimony of the attesting witnesses, and it is sufficient if the statute was substantially complied with.

"The statute does not require that the subscribing witnesses shall see the testator write his name to the will; but it is sufficient if he did in fact sign the will, provided he afterwards acknowledged it as his will, and requested them to sign as witnesses.

"The attestation clause to the will is as follows: 'The said will was signed, and at the request of the testator we signed the same as witnesses in his presence, and in the presence of each other.' Now, if you find from the evidence that this attestation clause was read in the presence of the testator, and the witnesses at the time they signed the same, and was understood by the testator, this is sufficient presumptive proof, not only of publication, but also that the witnesses signed at his request."—Approved: In the Matter of the Will of Lawrence Convey, Deceased, 52 Iowa, 197, 2 N. W. 1084.

§ 4865. Same—Details of Facts Under Alternative Proposition.

"If you find from the evidence and by the weight of the evidence that P. A. F— and J. J. L— signed their names as witnesses to the paper offered in evidence at the time they say they signed or subscribed their names as witnesses to the paper writing, that William B— was in a position where he did or could have seen them sign or subscribe their names, this would be a signing in the presence of William B— in compliance with the law, if you find the facts to be as herein cited. In order to make a valid will, it was not necessary that Mr. B— sign in the presence of the subscribing witnesses at the time they subscribed their names to it, provided he had signed the same when he handed it to them to witness the paper. If you find that the two witnesses signed their names to the script that has been offered in evidence, and that the same was already signed by William B— before these parties signed their names to the paper, and if you find from the evidence that at the time the two witnesses signed the paper that William B— was standing between the gap in the counter and within three or four feet of the desk upon which the witnesses were signing the paper, and if you find from the evidence, further, that Mr. B— had his face in the direction of where the witnesses were signing the paper and actually saw them, and also the paper writing that they were signing, and if you find that he was standing close enough to them to see them

and the paper writing, if he desired to do so, and there was nothing obstructing the view between him and the witnesses as they were signing the paper and the paper they were signing, and if you find that at the time when they were thus in a position to see them and see the paper writing he was in a position to see the paper writing and see them, and see what it was they were subscribing their names to, and you find that they, under these circumstances, did sign their names to the paper—this would be a signing of the paper agreeable to the requirements of the statute, and, nothing else appearing, you would answer this issue in favor of the propounders—that is to say, you would answer it 'Yes.' If at the time they signed this paper, if you find they did sign it, if you find that he was in a position where he could not see them nor see the paper nor see them sign the paper, and you find that under these circumstances they did sign this script—that is to say, at a time when he was not in a position where he could see them nor the paper writing nor see them sign it—this would not be a signing of the paper in his presence as required by the statute, and you would answer it 'No.' If you find from an examination of the evidence that Mr. B— was standing on the porch not far away from where the witnesses F— and L— were, and that he was in a position that he could see the witnesses and the paper writing in controversy, and could see them sign their names to the paper writing, and if you further find that he was only a few feet away at the time, and you further find that he had himself prior to that time signed the paper writing, these facts, if you find them to be so, would be a compliance with the statute, and nothing else appearing, you would answer the issue 'Yes.' But if you find that he had signed the paper and the witnesses themselves had subscribed their names to it, but at the time that they did so that he was on the porch and at a place where he could not see them nor the paper they were signing, this wouldn't be a compliance with the statute, and, if you find the facts so to be, your answer to it would be 'No.' If you find from the evidence that W. B— was in the store at the time the paper writing was witnessed by Mr. F— and L—, and that he was in such a position that he could see the instrument as it was placed upon the desk and at the time they subscribed it as witnesses, and if you find that they did so, and further find he was in such a position at the time that he might see them sign their names to the instrument, and see the instrument and see them sign it, and you further find he had previously signed the instrument himself, these facts, if you find them so to be, nothing else appearing, would be a compliance with the statute, and you would answer the issue 'Yes.' You may consider also whether this was openly done, whether the room where the alleged signature was made was light at the time, and whether the said witness returned the said paper to Mr. B—. The jury will also consider the evidence that relates to the size of the room, of the distance of Mr. B— from the subscribing witnesses, the position of the window and that of the counter, and especially of the desk, the localities of the parties, both the witnesses and Mr. B—, and all of the other facts and circumstances that

have been given in evidence by the defendant's witnesses. If, after reviewing all the evidence, your minds reach the conclusion from the evidence, and by the greater weight of it, that the paper writing was executed by the said William B—, witnessed by F— and L— in his presence, you would answer the issue 'Yes.' That the deceased, William B—, must actually have seen, or been in a position to see not only the witnesses, but the paper writing itself at the time the witnesses signed the same, and that if the jury shall believe from the evidence that he did not see the paper writing and the witnesses at the time that the witnesses signed it, they should answer the issue 'No.' "—Approved: Umstead v. Bowling (N. C.), 64 S. E. 368.

§ 4866. Same—Burden on Proponents to Show.

"The court instructs the jury that the burden of proof is upon the defendants to show that the writing offered as the will of Caroline S— was executed by Caroline S— as and for her will, and that at the time of the execution thereof said Caroline S— was of sound and disposing mind and memory."—Approved: Goodfellow v. Shannon, 197 Mo. 271, 94 S. W. 979.

§ 4867. Sound Mind and Memory Presumed.

(a) "The law presumes, and it is your duty to presume, that every man who has arrived at years of discretion is of sound mind and memory and capable of transacting ordinary business and capable of disposing of his property, by will or otherwise, until the contrary is shown; and it is your duty to hold that Thomas H. W—, at the time he executed the paper offered in evidence, was of sound mind and memory, and to so hold, until you believe, from a preponderance or greater weight of all the evidence, that he was otherwise."—Approved: Wickes v. Walden, 228 Ill. 56, 81 N. E. 798.

(b) "The jury are instructed that every person is presumed to be sane and to have sufficient mental capacity to make a will. This presumption is to be taken into account by the jury in considering, from all the evidence, whether, at the time the will here in question was made, the testator had sufficient mental capacity to make the same, and this presumption is to be taken into account by the jury, with all the other evidence, in determining the validity of the present will. If the jury find, from all the evidence in this case, that at the time the will in question was made the testator had sufficient mental capacity to understand what he was about when he made it, and to remember and appreciate the property he had for disposal and his relations toward the objects of his bounty, so as to judge for himself what he wished to do in the disposal of his property, this is sufficient mental capacity to enable him to make a valid will, whether, at the time, his general health was good or not."—Approved: Shults v. Shults, 229 Ill. 420, 82 N. E. 312.

§ 4868. Mental Soundness Defined.

"Soundness of mind in a testator means sufficient mental capacity to know the natural objects of his bounty, the character and value

of his estate, and to make a rational survey thereof, and dispose of it according to a fixed purpose of his own."—Approved: Murphy's Ex'r v. Hoagland (Ky.), 107 S. W. 303 (not reported in state reports).

§ 4869. Testamentary Capacity—Tests of its Existence.

(a) "If the jury find that Mr. B— had sufficient mental capacity at the time of making his will, or at the time of making either or both of the codicils, to understand the business in which he was engaged, to know and understand the extent and value of his property, and how he wanted to dispose of it, and to keep those facts in his mind long enough to dictate his will without prompting from others, he had sufficient capacity to make a will. If he had sufficient mind to clearly discern the nature and extent of his property, and the objects of his bounty, and the scope and provisions of the will, he was mentally competent to make it."—Approved: Peninsular Trust Co. v. Barker, 116 Mich. 333, 74 N. W. 508.

(b) "A person of sound mind, within the meaning of the law in this case, is one who has full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons he desires shall be the recipients of his bounty, and the capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty; but it is not necessary that he should have sufficient capacity to make contracts, and do business generally, nor to engage in complex and intricate business matters."—Approved: Meeker v. Meeker, 74 Iowa, 352, 37 N. W. 773.

(c) "You are instructed that in order for a will to be valid the person making the same must, at the time of the execution thereof, be of sound mind and memory sufficient to understand, appreciate and be equal, mentally, to the task undertaken. In order to be of such sound mind and memory the person making such will must, at the time he signs it, be capable of knowing what his property is, who are the natural objects of his bounty, and be able to understand the nature, consequence and effect of the act of executing his will. All of these elements must concur, and the absence of any one of them will render such person incompetent to make a valid will, although all the other elements may be present; and if you believe, from the evidence, that the said Frederick S—, at the time of the execution of the said alleged will and codicil, was not capable of knowing who were the natural objects of his bounty, then and in that case you will find against the validity of the said alleged will and codicil; and if you believe, from the evidence, that the said Frederick S—, at the time of the execution of said alleged will and codicil, did not understand the nature or consequence of the execution of his will and codicil, then and in that case you must find against the validity of the alleged will and codicil. You are further instructed upon the subject of soundness of mind, that even where a testator is of sound mind at the time he signs or executes it, yet if he is so far under the dominion of a person in whose favor he

makes the will as to prevent the free exercise of his judgment, such testator is not, in the contemplation of law, of disposing mind and memory. If you believe, from the evidence, that at the time of the execution of the alleged will in this cause Frederick S— was so far under the dominion of any person as to prevent the free exercise of his judgment, said Frederick S— was not, at the time aforesaid, in contemplation of law, of disposing mind and memory, and in that case your verdict must be against the validity of the will and in favor of contestants."—Approved: Dowie v. Sutton, 227 Ill. 183, 81 N. E. 395, 118 Am. St. Rep. 266.

§ 4870. Letters Written by Deceased may be Considered as Evidence.

"The court further instructs you that in arriving at your verdict it is right and proper for you to consider the eleven letters offered in evidence by proponent as the letters of S—, deceased. There has been no attempt on the part of contestant to disprove the evidence that they were the letters of the deceased, and were written and mailed at time detailed in the testimony; and if you believe that they were, respectively, the letters of said deceased, then they are important for you to consider in arriving at your verdict on the following points: First, as to the ability of the deceased to write; second, as to the ability of the deceased to compose; third, as to the ability of the deceased to see; fourth, as to the mental capacity of said S—, deceased; fifth, as to the feelings entertained by the deceased toward his son, —, at the time said letters were written, respectively."—Approved: Stull v. Stull, 1 Neb. (Unoff.) 380 (389), 96 N. W. 196.

§ 4871. Testamentary Capacity—What Required.

"In order to the making and execution of a valid will, it is necessary that the decedent should be of sound mind at the time of the making of the will; that is, that he was capable of comprehending his property interests, and determining what disposition he desired to make of them, and of making such disposition, and by this it is not meant that he should possess the intellectual vigor of youth, or that usually enjoyed by him while in perfect health. It is enough if, as above stated, that he was capable of comprehending his property interests, of which he was possessed, and of determining what disposition he desired to make of such property, and of making such disposition."—Approved: Webber v. Sullivan, 58 Iowa, 260, 12 N. W. 319.

§ 4872. And to do without the Aid of Another.

"In determining the issue of sufficient soundness of mind or testamentary capacity possessed by the testator to make a will, before you can find in favor of the proposed will, you must believe from the preponderance of the evidence that at the time of the signing and execution thereof said testator had sufficient understanding to comprehend the nature of the transaction he was engaged in, the nature and extent of his property, and to whom he desired to and was giving it, without the aid of any other persons, and unless the defendants have shown by such preponderance of evidence that Edward K. H— did

possess all these requisites, you should find the issue in the negative and against the will."—Approved: Holton v. Cochran, 208 Mo. 314, 106 S. W. 1035.

§ 4873. No Greater Capacity Required for Will than Deed.

"That the owner of property who has the capacity to attend to his ordinary business has the lawful right to dispose of it either by a deed or will, as he may choose, and that it requires no greater mental capacity to make a valid will than to make a valid deed, and that if such an owner who is free from improper restraint chooses to disinherit his heir he has a legal right to do so, and such disposition of his property is valid, whether it be reasonable or unreasonable, just or unjust, and that the reasonableness or justice or propriety of the will are not questions for the jury to take into consideration or pass upon."—Approved: Huffman v. Graves, 245 Ill. 440, 92 N. E. 289.

(b) "The law does not undertake to measure a person's intellect and to define the exact quality of mind and memory which he shall possess to authorize him to make a will, yet it does require him to possess mind sufficient to know the extent and value of his property, the number and names of the persons who are the natural objects of his bounty, their deserts with reference to their conduct and treatment toward him, their capacity and necessity, and that he shall have sufficient active memory to retain all these facts in his mind long enough to have his will prepared and executed. If he is not in the possession of mental faculties to this extent, he is of unsound mind or insane within the meaning of the law."—Approved: McReynolds v. Smith, 172 Ind. 336, 86 N. E. 1009.

§ 4874. Testator Must Have Acted Voluntarily.

"You are instructed that the material question for you to determine is whether, at the time the will in controversy was executed, the testator was of sound mind and understood the business he was doing at that time. If the testator was of sound and disposing mind and memory, and acted voluntarily at the time he executed the will in controversy, it is immaterial what the condition of his mind was before and after that time."—Approved: Stull v. Stull, 1 Neb. (Unoff.) 380, 96 N. W. 196.

§ 4875. Weakness Ordinarily Attendant on Old Age does not Incapacitate.

"Testamentary incapacity does not necessarily require that a person shall actually be insane or of an unsound mind. Weakness of intellect, whether it arises from extreme old age, from disease, or great bodily infirmities or suffering, or from all these combined, may render the testator incapable of making a valid will, providing such weakness really disqualifies her from knowing or appreciating the nature, effects, or consequences of the act she is engaged in. Eccentricity, peculiarities, oddities, or the like, or weakness of mind ordinarily attendant upon old age, do not of themselves necessarily establish a lack of testamentary capacity."—Approved: Manatt v. Scott, 106 Iowa, 203, 76 N. W. 717.

§ 4876. Old Age Creates no Presumption Against Testamentary Capacity.

"You are instructed that the mere fact that a person is of great age creates no presumption against the ability of such person to dispose of property by deed or will; and in this case, although you may believe from the evidence that the testatrix, P—, at the time of executing the paper in question, was of about the age of eighty-six years, and suffering to some extent, from weakness or bodily infirmity, yet such circumstances would not render her incapable of disposing of her property by will as she saw fit."—Approved: Pooler v. Cristman, 45 Ill. App. 334, 338, aff'd, 145 Ill. 405, 34 N. E. 57.

§ 4877. Nor does Disorder of Affections, Feeling or Propensities.

"No disorder of the moral affections, feelings, or propensities, unless it is accompanied by insane delusion, will incapacitate a person to make a will, or invalidate a will when made by him."—Approved: Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405.

§ 4878. Senile Dementia Obliterating Memory Incapacitates.

"It is claimed by contestants that the deceased was, at the time of executing the will, afflicted with senile dementia, and that he was so afflicted before and after its execution, and until the date of his death, and much testimony has been introduced on this subject. You are to consider and weigh carefully all this evidence, including the evidence of experts, and if from the evidence you are satisfied that he was afflicted with this disease, and that it so affected his mind at the time of making his will that he did not and could not recollect the property he was about to bequeath, the manner of distributing it, and the objects of his bounty, then you should find against the will on the ground of incapacity. In deciding this question, you may consider all the testimony produced tending to show the condition or state of mind of the deceased."—Approved: Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072.

§ 4879. Less Degree of Mind Required for a Will than a Contract.

"The rule, gentlemen, stated by the weight of authority undoubtedly is that a less degree of mind is required to execute a will than a contract. Although the testator must understand substantially the nature of the act, the extent of his property, his relations to others who may or ought to be the object of his bounty, and the scope and bearing of the provisions of his will, and must have sufficiently active memory to collect in his mind, without prompting, the elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in reference to them, yet he need not have the same perfect and complete understanding and appreciation of any of these matters, in all their bearings, as a person in sound and vigorous health of body and mind would have; nor is he required to know the precise legal effect of every provision contained in his will.

"To use still another form of expression, gentlemen, the will is not valid unless the person making it not only intends of his own free will to make such a disposition, but has capacity to know what he is doing, or understanding to whom he is giving his property, in what proportions, and who he is depriving of it as his heirs or devisees under the will he makes. When a man has mind enough to know and appreciate the natural object of his bounty, and the character and effect of the disposition of the will, then he has a mind sufficiently sound to enable him to make a valid will."—Approved: Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882.

§ 4880. Prostration of Mind from Wasting Illness may Incapacitate.

"The court further instructs the jury that if they find from the evidence that said Caroline S— was at the time of the execution of the writing offered in evidence as her last will, so completely prostrated in body and mind by the wasting effects of fatal illness as to be unable to understand the business in which she was then engaged, then the jury are instructed to find that she was not of sound and disposing mind, even though the jury may believe from the evidence that said Caroline S— previous to said illness was of sound and disposing mind."—Approved: Goodfellow v. Shannon, 197 Mo. 271, 94 S. W. 979.

§ 4881. Not Having Rational Judgment as to Nature of Act is Incapacity.

"Unless proponents have satisfied the jury, by a preponderance of evidence, that Delia D— understood substantially the nature of the act she did in making the will, and the same was her own act, and unless, too, she understood the nature of the act, the extent of her property, her relations to others who might or ought to be the objects of her bounty, and the scope and bearing of the provisions of her will, and had sufficient active memory to collect in her mind, without prompting, the elements of the business to be transacted, and to hold them in her mind a sufficient length of time to perceive at least their obvious relations to each other, and to be able to form some rational judgment in relation to them, then she was mentally incompetent to make a will, and the paper in suit is not her last will and testament; that is, if you shall find that she was incapable of doing all these things at the time of the execution of the will, then, being incompetent to make a will, if you shall so find, you shall declare this paper not to be her last will and testament. The will must have been the free, voluntary act of D—, not that of her sisters; and, if the jury believe the paper offered in evidence is the product of the sisters, Mrs. S—, Mrs. Y—, and Mrs. McE—, then it is not the will of Delia D—, and it should be disallowed by the jury.

"If the paper in suit is the result of the exercise of will upon Delia M. D— in her sickly and dying condition,—that is, provided you shall find she was in that condition,—she could not resist, and did not resist them, this paper is not her will; and if the jury believe this paper is the product of the instructions of the people who surrounded Delia

M. D—, and that she herself gave the man who drew it no instructions in reference thereto, and the jury do not believe, from the evidence, she understood it, or formed any independent idea in reference thereto, then it is not her will. * * * If she expressed her will in any way to anybody, and this paper was made out, and she approved of it, it is not necessary that she should have dictated it to the scrivener of the will; that it was her wish, and not that of the person profiting by it, before it became her will. Unless the jury so find, they should, by their verdict, certify that it was not her will; and if the jury believe that it was the result of importunity or direction, which she, in her state, could not exercise, then this paper is not her will, because unduly influenced."—Approved: McHugh v. Fitzgerald, 103 Mich. 21, 61 N. W. 354.

§ 4882. Illiterate Testator Must be Shown to Have Understood Contents.

"You must further be satisfied that she was fully apprised of the contents of the will; that it was read over to her, and that she understood the same; also that it was her free and voluntary act, free from fraud, or coercion on the part of her husband. You must also find that she was of sound mind and disposing memory at the time of making the will; that she knew her property, her relatives, and those having claims to her bounty; and had mind to intelligently dispose of said property. When a beneficiary under a will is the draftsman of the will, it is a strong circumstance against it, and it devolves upon the plaintiff to show that everything was fair and free from fraud and undue influence. When a party makes his or her mark to a will, it is not enough to show that the will was duly executed, but it must also be shown that the testator was fully cognizant of the contents of the will, and approved it."—Approved: Maxwell v. Hill, 89 Tenn. 584, 15 S. W. 253.

§ 4883. Capacity Requires Knowledge of Property, Objects of Bounty and Nature of a Will.

"You are instructed that in order for a will to be valid the person making the same must, at the time of the execution thereof, be of sound mind and memory sufficient to understand, appreciate and be equal, mentally, to the task undertaken. In order to be of such sound mind and memory the person making such will must, at the time he signs it, be capable of knowing what his property is, who are the natural objects of his bounty, and be able to understand the nature, consequence, and effect of the act of executing his will. All of these elements must concur, and the absence of any one of them will render such person incompetent to make a valid will, although all the other elements may be present; and if you believe, from the evidence, that the said Frederick S—, at the time of the execution of the said alleged will and codicil, was not capable of knowing who were the natural objects of his bounty, then and in that case, you will find against the validity of the said alleged will and codicil; and if you believe, from the evidence, that the said Frederick S —, at the time of the execution

of said alleged will and codicil, did not understand the nature or consequence of the execution of his will and codicil, then, and in that case you must find against the validity of the alleged will and codicil. You are further instructed upon the subject of soundness of mind that even where a testator is of sound mind at the time he signs or executes it, yet if he is so far under the dominion of a person in whose favor he makes the will as to prevent the free exercise of his judgment, such testator is not, in the contemplation of law, of disposing mind and memory. If you believe, from the evidence, that at the time of the execution of the alleged will in this cause Frederick S— was so far under the dominion of any person as to prevent the free exercise of his judgment, said Frederick S— was not, at the time aforesaid, in contemplation of law, of disposing mind and memory, and in that case your verdict must be against the validity of the will and in favor of contestants."—Approved: Dowie v. Sutton, 227 Ill. 183, 81 N. E. 395.

§ 4884. Sanity is Presumed.

"The legal presumption is in favor of sanity, and on the issue of sanity or insanity the burden is upon him who asserts insanity to prove it. Hence, in a doubtful case, unless there appears a preponderance of proof of mental unsoundness, the issue should be found the other way and in favor of the execution of the will."—Approved: Stephenson v. Stephenson, 62 Iowa, 163, 17 N. W. 456.

§ 4885. Delusion Affecting a Will Invalidates It.

(a) "If you believe, from the evidence, that although Frederick S— had sufficient capacity to attend to the ordinary business affairs of life, yet that with regard to subjects connected with the testamentary disposition and distribution of his property and the natural objects of his bounty he was insane, and while laboring under such insanity he signed the alleged will and codicil in question, and that in making and signing it he was so far influenced or controlled by such insanity as to be unable rationally to apprehend the nature and effect of the provisions of said alleged will and codicil, and was thereby led to make the alleged will and codicil as he did, then you must find the alleged will and codicil not to be the will and codicil of the said Frederick S—."—Approved: Dowie v. Sutton, 227 Ill. 183, 81 N. E. 395.

(b) "Although the jury may find from the evidence that Edward K. H— at the time of executing the paper offered as his will, possessed many of the mental requisites in these instructions set out as necessary to qualify him to make a valid will, yet if the jury further find from the evidence that from the time of turning over to his son, Birch, and his daughter, Alice, the stocks of the Ames Company, belonging to them, down to and including the time of the execution of the paper here offered as the will, the said Edward K. H— labored under the insane delusion, as hereinafter defined, that said son and daughter had exacted of him and that he had turned over to them a greater amount of said stocks than they were lawfully entitled to demand and receive from him as their trustee, and that such delusion overcame

and controlled his will and judgment, in the execution of the papers offered as his will, and that without the operation of such delusion upon and controlling his mind and judgment he would have made other provisions in his will for his said son and daughter, or either of them, then you should find that the paper offered is not the will of Edward K. H—."—Approved: Holton v. Cochran, 208 Mo. 314, 106 S. W. 1035.

(c) "A person may be entirely sound mentally on all subjects or as to all individuals save one, and as to that particular subject or individual his mind may be so diseased as to render it impossible to say that he is of sound mind and is capable of reasoning and exercising a sound judgment in regard to the subject of such delusion, or of comprehending the obligations he may owe to the individual who is the subject of the delusion; and the jury are instructed, in considering the question as to the mental soundness of C. M. T— and his capacity to make a will at the date of the paper offered for probate, they should take into consideration all the facts and circumstances adduced at this hearing bearing upon his relations to his daughter and his alleged delusion in regard to the state of her affection for him. And if you find that he entertained an insane delusion in regard to her, which in any way affected the disposition made by him of his property in his will, you will find for the contestant, notwithstanding you believe he was perfectly sane and sound mentally in all other respects, and was so regarded by his friends and business associates."—Approved: Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405.

§ 4886. Monomania or Partial Sanity Creates Insanity as to Whatever It Affects.

(a) "Under our statutes all persons except infants and persons of unsound mind may dispose of their property by will, and the words 'persons of unsound mind' shall be taken to mean any idiot, non-compos, lunatic, monomaniac, or distracted person. And thus the term 'unsound mind' includes every species of unsoundness of mind. A monomaniac is a person who is deranged in a single faculty of his mind, or with regard to a particular subject only. And it is a fact that persons possessed of monomania may, and often do, on all subjects foreign to the subject of mania, act rationally and with ordinary prudence and judgment. While, therefore, monomania is embraced within our statutory definition of what constitutes unsoundness of mind, yet it does not follow that every one possessed of monomania is incompetent to make a valid will. You may find that the testator in this case was afflicted with monomania, or with delusions, or any form of mental unsoundness; but it must further appear by a preponderance of the evidence in this case that such unsoundness of mind entered into and affected the provisions of the will in controversy before you can find that the testator was of unsound mind with reference to the will in controversy. If the monomania or unsoundness of mind does not in any degree influence or affect the provisions of the will, it may be valid; but, if such monomania or unsoundness of mind does influence

or affect any of the provisions of the will, it is invalid."—Approved: Swygart v. Willard, 166 Ind. 25, 76 N. E. 760.

(b) "If you believe from the evidence that although Frederick S— had sufficient capacity to attend to the ordinary business affairs of life, yet that with regard to subjects connected with the testamentary disposition and distribution of his property and the natural objects of his bounty he was insane, and while laboring under such insanity he signed the alleged will and codicil in question, and that in making and signing it he was so influenced or controlled by such insanity as to be unable rationally to apprehend the nature and effect of the provisions of said alleged will and codicil and was thereby led to make the alleged will and codicil as he did, then you must find the alleged will and codicil not to be the will and codicil of the said Frederick S—."—Approved: Dowie v. Sutton, 227 Ill. 183, 81 N. E. 395, 118 Am. St. Rep. 266.

§ 4887. Delusion Defined.

" 'A belief which is founded on any evidence as a basis is not a delusion,' was a concise and correct proposition of law. It was an indispensable test for determining whether a belief of the class under consideration was a delusion, because such a belief is of something in its nature not impossible. It was peculiarly appropriate here, because of the testimony of medical experts on behalf of the appellee defining a delusion as 'a belief, an idea, held by a person against such ordinary average information or experience as would to the ordinary average individual prove sufficient to cause him to give up the idea.' "—Approved: Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405.

§ 4888. Groundless Suspicion is not the same as Insane Delusion.

"You are further instructed that to sustain the allegation that B— was laboring under an insane delusion in regard to the legitimacy of his son, H—, it is not sufficient to show that he had a suspicion to that effect or that his suspicion was not well founded. Although he may have had groundless and unjust distrust of his wife's fidelity, yet such doubt does not establish a condition of lunacy or a lack of testamentary capacity, (unless it appears, from a preponderance of the evidence, that such distrust caused him to execute a will he would not otherwise have made). The right of the testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own, and if there be no defect of testamentary capacity, the law gives effect to his will though its provisions are unreasonable or unjust."—Approved: Petefish v. Becker, 176 Ill. 448, 453, 52 N. E. 71.

§ 4889. General Testamentary Capacity Controlled by a Delusion.

"If you should find from the evidence that the testatrix, at the time of the making of the proposed will, had sufficient capacity to attend to the ordinary affairs of life, yet that with regard to subjects connected with the testamentary disposition and distribution of her property and the natural objects of her bounty she was not of sound mind, and

while laboring under such unsoundness of mind she made the will in question, and that in making it she was so far influenced or controlled by such unsoundness of mind as to be unable rationally to comprehend the nature and effect of the provisions of the said will, and was thereby led to make such proposed will as she did, then you would be justified in finding that it was not the last will and testament of the said Sarah E. W—."—Approved: In re Winslow's Will, 146 Iowa, 67, 122 N. W. 971.

§ 4890. Delusion as to Natural Objects of Bounty.

"The jury are instructed that an insane delusion is a fixed and settled belief in facts not existing, which no rational person would believe. Such delusion may sometimes exist as to one or more subjects. And if the jury believe, from the evidence in this case, that it was laboring under such insane delusions upon subjects connected with the testamentary disposition of his property and the natural objects of his bounty when he made the will in question, and was thereby rendered incompetent to comprehend, rationally, the nature and effect of the act, and that but for such delusions he would not have made the will be did, then the jury should find against the validity of the will."—Approved: American Bible Society v. Price, 115 Ill. 623, 632, 5 N. E. 126.

§ 4891. Outward Rational Appearance not Conclusive of Sanity.

"You are instructed that the fact, if shown, that the testator transacted his own business, and to all outward appearances seemed to be of sane and sound mind to those with whom he comes in contact in a business or social way, while competent to be considered on the question of sanity, does not of itself conclusively establish sanity, and you are instructed that a state of mental unsoundness may exist in such person which would render him incompetent to make a will, notwithstanding his apparent sanity to those with whom he comes in contact and who are not experts on the subject of insanity; and in determining whether or not the testator in this case had testamentary capacity, or was wanting in testamentary capacity at the time of the execution of the instrument, Exhibit A, you should take into consideration and carefully weigh all the evidence introduced and submitted to you bearing on this subject, and therefrom, aided by the instructions herein given you, determine and say in your verdict what the very truth of the matter is. You are instructed that any impairment of the mental faculties which destroys testamentary capacity, as hereinbefore defined, disqualifies a person from making a will, even though it has not reached the state of absolute imbecility."—Approved: Mileham v. Montagne (Iowa), 125 N. W. 664.

§ 4892. The Will in Connections with Prior Declarations of Purpose May be Considered.

"The court instructs the jury that in determining whether the paper in question, offered as the will, is entitled to be so regarded, the paper itself may be considered in connection with all the other evidence in the case. And if the jury believe from the evidence that the deceased

had expressed any fixed purposes and intentions regarding the disposition of his property at variance with the provisions of the alleged will, then the jury should consider whether or not the provisions of the will are inconsistent with his previously expressed and fixed purposes; and if the jury find that they are so, or that deceased was unfriendly to the beneficiaries under the will, then these facts should also be weighed by the jury in determining whether the paper offered is the will of the deceased."—Approved: Flowers v. Flowers, 74 Ark. 212, 216, 85 S. W. 242.

§ 4893. Mental Weakness and Provisions of the Will Considered Together.

"The jury are instructed that while mental weakness of itself may not be sufficient to invalidate a will, it is a circumstance of great importance in determining the effect and influence of other circumstances, and, when connected with other circumstances of impeaching character, will have great weight. And where the provisions of a will are unreasonable and extraordinary, the fact of mental weakness will be considered, particularly if undue influence is actually proved, or the relation of the parties, and other circumstances, are such as reasonably to warrant the presumption of undue influence."—Approved: Bates v. Bates, 27 Iowa, 111, 116.

§ 4894. Insanity Presumed to Continue Until the Contrary Appears.

"It appears that sometime in the month of June, 1900, the said John George M— was adjudged insane by the commissioners of insanity of this county; that he was taken to the state hospital for insane at Clarinda, Iowa, for treatment; that he was subsequenly discharged from said hospital. You are instructed that this is prima facie evidence, but not conclusive, that he had recovered from the condition which caused his incarceration in the hospital, for while it is true that all people are presumed to be sane, yet when it is shown at any time that a contrary condition exists, and that he is in fact insane, this condition is presumed to continue until the contrary appears, and, where one is discharged by the proper authorities after being adjudged insane, the presumption is that he has resumed his natural and normal state of mind, and the burden would rest upon the party alleging insanity at a later period to establish by a preponderance of the evidence the existence of such insanity; but, however, it is proper for you to consider, with all the other evidence in the case, the fact that the party was at one time insane in determining whether or not insanity existed at a later time and at the time of the execution of the instrument purporting to be his last will."—Approved: Mileham v. Montagne (Iowa), 125 N. W. 664.

§ 4895. To Defeat Will, Insanity Must be at the time Will is Executed.

"If the jury believe from a preponderance of the evidence in this case, that at the time of executing the paper in evidence B— was not of sound mind and memory, then the jury should find the paper

in question is not his will."—Approved: Petefish v. Becker, 176 Ill. 448 (453), 52 N. E. 71.

§ 4896. Undue Influence—What Constitutes.

(a) "Any influence obtained over the mind of a testator to such an extent as to destroy his free agency and to constrain him to do against his will what he would otherwise refuse to do is undue influence, and the law condemns as undue such an influence, when exercised over the testamentary act, whether obtained directly or indirectly or at one time or another; but any reasonable influence obtained by acts of kindness or by argument addressed to the understanding is not in law undue influence."—Approved: Murphy's Ex'r v. Hoagland (Ky.), 107 S. W. 303 (not reported in state reports).

(b) "You are instructed, as a matter of law, that undue influence in procuring the execution of a will which will render a will so procured invalid is any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered, and he is induced to do or forbear an act which he would not do, or would do, if left to act freely. And if you believe, from the evidence in this case, that such undue influence was exerted over Frederick S— by any person at the time he executed the alleged will and codicil involved in this suit, then and in that case it is your duty to find against the validity of such alleged will and codicil, and return a verdict that the same is not the will and codicil of said Frederick S—."—Approved: Dowie v. Sutton, 227 Ill. 183, 81 N. E. 395.

(c) "The words 'undue influence,' as used in these instructions, mean such influence as amount to over persuasion, coercion, or force, overpowering and destroying the free agency and will-power of the person upon whom it is used, and no amount of influence or advice or persuasion which comes short of such effect will amount to undue influence. The mere influence of affection or attachment or the desire of gratifying the wishes of one beloved, respected, and trusted by the testator, does not constitute undue influence within the meaning of the law.

"Hence, even if the jury believe from the evidence that co-defendants, William H. H— and Ella M. S—, or either of them, at and prior to the time of the execution of the will in question, exercised an influence over the testatrix whereby she was induced to dispose of her estate in the manner she did in her will, yet if the jury believe from the evidence that such influence was gained over the testatrix by kindness and friendly attention to her, and that it was exercised solely as a persuasive inducement to the making of the said will and the disposition of her property, and not in such a way as to destroy her freedom of will to such extent that she could not exercise it in accordance with her own judgment, and that she was not thereby constrained to make a will and to make such a disposition of her property as was against her actual will, then such influence so exercised is not in contemplation of law undue influence, and is insufficient to validate said will."—Approved: Seibert v. Hatcher, 205 Mo. 83, 102 S. W. 962.

§ 4897. Feebleness of Testator's Mind to be Considered.

"By the term 'undue influence,' as used in these instructions, is meant the exercise of such power and influence by one person over the mind of another as would result in the subjugation of the mind of the one to that of the other, and the complete subjugation of the will of the one for the will of the other in the matter in which they were engaged; and if the jury believe from the evidence in the case that by reason of the weak and feeble mind of said Cecelia A. R—, said Eugene C. R— was enabled to, and did exert such an influence over the mind of said Cecelia A. R— as to substitute his will and wishes for that of Cecelia A. R—, in the disposition of her property by will, and if the signing of said paper by said Cecelia A. R— was induced and brought about by the exercise of the influence, then the jury will find that said paper is not the will of said deceased, Cecelia A. R—, notwithstanding that said Cecelia A. was, at the time said paper was signed and attested, of sound mind and disposing memory."—Approved: Dausman v. Rankin, 189 Mo. 677, 88 S. W. 696.

§ 4898. And the Confidential Relations with Persons Charged with Exercising Undue Influence.

"Undue influence is such influence as suppresses the volition of testator and constrains him to give expression to the will of another, instead. Undue influence need not be proven by direct evidence, but may be inferred from circumstances; and, in determining this question, you should take into account the confidential relations existing between testator and Walter A. B—, who, with others, is charged with having exercised such influence; the opportunities of said B— and others to exercise an influence over the testator; the fact that this will was made without the knowledge of the heirs of the deceased; changes, if any, between the testator's declared intention and the provisions of the will; any unnatural or unjust provisions the will may contain, if there are any; and, in fact, all the circumstances surrounding the testator at the time it is alleged this will was made."—Approved: Sharp v. Merriman, 108 Mich. 454, 66 N. W. 372.

§ 4900. Devise in Favor of Attorney Drawing Will Raises Presumption of Undue Influence.

"Where a person devises his property to one who is acting at the time as his attorney, either in relation to the subject-matter of the making of the will, or generally, during that time, such devise is always carefully examined, and of itself raises a presumption of undue influence. But this is by no means a conclusive presumption, but it is one that may be overcome by evidence; and it is not necessary that that evidence shall in all cases be a positive denial of parties who are personally acquainted with the facts, but it must be such evidence as will lead the jury to believe that no undue influence was exerted. And if such evidence be found from the facts and circumstances surrounding the making of this will as will lead you to believe that the will was made by the testatrix of her own free will, uninfluenced by any other person, then the fact that S— was her attorney would not

in any way invalidate the will. That should simply be taken into consideration, with all the other facts, to determine whether or not the will was, as a matter of fact, the will of the testatrix."—Approved: Donovan v. Bromley, 113 Mich. 53, 71 N. W. 523.

§ 4901. Undue Influence—Declarations of Testator are Evidence.

"In order that contestant may recover in this case, there are two facts that must be proven by her: First, that undue influence was in fact exerted; second, that it was successful in subverting and controlling the will of the testator. Both of these facts must be proven by the contestant by the weight of the evidence in order to defeat the will. Upon the latter question, evidence of the statements of the testator, made either before the will was made or after, and which tend to throw light on the condition of mind, are admissible; but, as to the first question, the evidence of such statements is hearsay and incompetent, and should not be considered by you. Such declarations have been admitted only for the purpose of proving the condition of the testator. They afford no substantive proof of undue influence, and cannot be admitted for such purpose; and, before contestant can recover, it is necessary that she should prove that undue influence was, in fact, and actually, exerted upon the testator, by other evidence than his own declarations."—Approved: In re Townsend's Estate: Townsend v. Townsend, 122 Iowa, 246, 97 N. W. 1108.

§ 4902. Importunity Carried to Undue Length may Constitute Undue Influence.

"Importunity which the testator has not the will or strength to resist, and to which he yields for peace and quiet, if carried to a degree in which the testator's judgment, discretion, or wish is overborne, will constitute undue influence, though no force is used or threatened."—Approved: Lehman v. Lindenmeyer, 48 Colo. 305, 109 Pac. 956.

§ 4903. Undue Influence—Advice of Wife to Testator no Presumption of.

(a) "Evidence has been introduced tending to show that the wife of testator was accustomed to accompany him when he went away from home, and also that she participated to some extent in his business affairs, and was familiar therewith, and was connected with her husband in relation thereto. You are hereby instructed that such facts, if proven, do not raise any presumption of undue influence on her part upon her husband, or that she influenced him to execute said will; and, even though she advised him to make the will as he did, there would be no presumption therefrom that her influence was undue. If the wife, in her faithfulness and good qualities, has secured the respect and esteem of her husband, even to such an extent that her wishes satisfy him, it would not amount to undue influence, should he make a will in accordance with her request. The law will not presume that a wife would exert undue influence upon her husband, nor would it presume that a will made in harmony with her request or preference would be the result of undue influence on her part. No

presumption of undue influence arises from the fact that the wife advised her husband in his business affairs, or even guided him in said matters."—Approved: In re Townsend's Estate: Townsend v. Townsend, 122 Iowa, 246, 97 N. W. 1108.

(b) "It is not every influence exercised over a testator which the law regards as invalidating a will. Such influence to be what is regarded in law as undue or illegal must be such as to destroy or to substantially hinder in its exercise his free agency in the matter of making his will. It must be influence amounting to moral coercion, or importunity which could not be resisted, so that the testator was constrained to do that which was against his actual will, and which influence he was unable to withstand, or too weak to resist. What amounts to such influence in any particular case is to be judged by the facts and circumstances appearing in such case. This test applies to weighing the evidence in the case.

"You are instructed that it is not wrongful for a person by honest advice and persuasion to influence one in the disposition of his property, or to induce a person to make a will in one's own favor by fair speech, argument, and kind conduct, if it does not amount to undue influence, as defined in these instructions.

"Evidence has been introduced with respect to language and conduct of the deceased, both before and after making the will. This has been received for the purpose only to enable you to determine whether the decedent executed the will through undue influence or fraud. What the decedent's state of mind was before the occasion of executing the will or after its execution has nothing to do with its validity, except as it may afford evidence of his state of mind at the time of making it."—Approved: In re Miller's Estate: Miller v. Livingston, 36 Utah, 228, 102 Pac. 996.

§ 4904. Nor Honest Intercession in Behalf of Oneself or Another.

"The court instructs the jury that if they find from the evidence, that the deceased, in making the will in question, was influenced by affection or attachment, or a disposition to gratify the wishes of the defendant, ———, or by her advice or entreaty, that would not be sufficient cause for setting aside the will. The court instructs the jury that testamentary capacity exists where the testator has an understanding of the nature of the business he is engaged in, and the kind and value of the property devised, and of the persons who were the natural object of his bounty, and of the manner in which he desires it to be distributed."—Approved: Nicewander v. Nicewander, 151 Ill. 156, 37 N. E. 698.

§ 4905. Persuasion Leaving Mind Free Insufficient to Invalidate Will.

"It is not unlawful for a man, by honest intercession and persuasion, to procure a will in favor of himself or any other person; neither is it unlawful to induce the testator by fair speeches and kind conduct, for, though persuasion may be employed to induce or influence the disposition in a will, this does not amount to that kind of compulsion or improper conduct, which in a legal sense would render invalid the will;

but to have such effect it must amount to a moral force and coercion, destroying free agency. It must not be the influence of affection and attachment, it must not be the mere free desire of gratifying the wishes of another, but the compulsion in this case, which is essential to render a will invalid, must be of such a degree and character as to prevent the exercise of that discretion which is essential to a disposing mind."—Approved: Dickie v. Carter, 42 Ill. 376, 379.

§ 4906. Undue Influence—Old Age, Impaired Mind and Memory may be Considered.

(a) "You are instructed that, if you find from the evidence that the testator, Duncan R—, was aged and of impaired mind and memory; that although he may not have been legally incompetent to make a will, yet the will of such a person ought not to be sustained, unless it appears that such disposition of his property has been fairly made, to have emanated from a free will without the interposition of others, and to accord to intentions previously expressed or implied from family relations, and in this case if you find from the evidence that the testator was over 90 years of age, with impaired mind and memory, and, although you may find he had sufficient mental capacity to make a will, yet, if from the evidence you believe that a disposition of his property has been made which is unfair to his legal representatives; that such disposition did not emanate from a free will, and is not in accord with the testator's previous intentions, either express or implied from the family relations—you will be justified in finding that it is not the voluntary and free will of the testator, and that such will was obtained by undue influence."—Approved: Ross v. Ross (Iowa), 117 N. W. 1105.

(b) "In considering whether the testator's free volition has been overborne or controlled, the jury must consider his age, his physical and mental condition, and all the circumstances surrounding the testator."—Approved: Lehman v. Lindenmeyer, 48 Colo. 305, 109 Pac. 956.

§ 4907. Same—But These are not Evidence of.

"You are further instructed that, in determining the question submitted to you as to the mental capacity of the testator at the time of the execution of the will in question, and in determining the question of undue influence, neither his age nor the character and extent of his property is to be considered as evidence of incapacity on the testator's part, or of undue influence on the part of the proponents."—Approved: Ross v. Ross (Iowa), 117 N. W. 1105.

§ 4908. Same—Proof of Must be Inconsistent with the Contrary.

"The jury are instructed as a matter of law that it is not sufficient that the circumstances appearing in evidence attending the execution of the instrument in evidence in this case, purporting to be the last will and testament of the said Caroline M—, are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis. Circum-

stances which should avail for the proof of fraud are only such as are inconsistent with a contrary view of the transaction."—Approved: Compher v. Browning, 219 Ill. 429.

§ 4909. Same—Evidence of, May be by Facts and Circumstances.

(a) "The court instructs the jury that it is not necessary that undue influence should be proved by direct and positive testimony, but the same may be proven by facts and circumstances; and, in passing on the question as to whether the signing of the paper in question by Cecelia A. R— was induced by influence on the part of Eugene C. R—, it is proper for the jury to take into consideration the terms of the will itself, the relation of Cecelia A. R— to the plaintiff as shown by the evidence, her age, mental and physical condition as shown by the evidence her relation to and feeling toward the defendants, Charles T. R— and Eugene C. R—, as shown by the evidence, as well as other facts and circumstances disclosed by the evidence in the case; and if from all the facts and circumstances the jury believe that the signing of the paper in controversy by said Cecelia A. R— was induced and brought about by an undue influence on the part of said Eugene C. R—, as undue influence has been defined in these instructions, then it is the duty of the jury to find that the said paper is not the will of the said Cecelia A. R—."—Approved: Dausman v. Rankin, 189 Mo. 677, 88 S. W. 696.

(b) "You are instructed that direct evidence of undue influence in procuring the execution of a will is not required to prove the existence of such undue influence. Proof of undue influence may be made by evidence of facts from which the inference of the existence of such undue influence may naturally and reasonably be drawn, and if you believe, from the evidence, that any fact or facts are proved from which the inference may fairly and reasonably be drawn that the alleged will and codicil of Frederick S— was procured by undue influence operating upon him at the time of the execution of the said alleged will and codicil, then and in that case it is your duty to find that said alleged will and codicil is not the will and codicil of Frederick S—."—Approved: Dowie v. Sutton, 227 Ill. 183, 81 N. E. 395.

§ 4910. Creating False Impressions and Beliefs in the Mind of Testator.

"If a testator is given a false impression concerning persons who are the natural objects of his bounty, so that when he comes to make his will he acts upon unfounded beliefs, and gives or withholds his bounty in a manner entirely different from what his action would have been had it not been based on false beliefs and opinions deliberately instilled into his mind for the purpose of influencing his will, and if in such case the testator is not in position, from any cause, as sickness, age, debility, concealment of the true facts, or other reasons, to judge for himself, and to deliberate or resist the influences, and the will is the result of them, it is invalid from undue influence."—Approved: Coghill v. Kennedy, 119 Ala. 641, 24 South. 459.

§ 4912. Testamentary Capacity—Medical Testimony.

"Medical men have been called as witnesses in this case, and they gave an opinion as to the mental condition of the said Sarah E. W—, founded upon personal knowledge, observation, and treatment of the deceased. The attending physician is presumed to know the state of mind of his patient. This testimony, and the testimony of medical men, if shown by the testimony to be men of experience in cases of this character, when they have testified touching the mental condition of the testatrix at or about the time of the execution of the will, based upon knowledge, observation, or treatment, may be given by you more weight and consideration than the testimony of nonprofessional witnesses, but this is a question for you to determine, and you are to say and determine the value and weight that such opinions are to have with you bearing upon the deceased's mental condition, and give them weight accordingly."—Approved: In re Winslow's Will, 146 Iowa, 67, 122 N. W. 971.

§ 4913. Same—Expressions of Opinion.

"Witnesses have testified before you as to facts concerning the manner, conduct, and conversations of the testator, and have, from the facts testified about by them, given to you their opinion as to the soundness or unsoundness of the mind of the testator; but each opinion should be tested by the facts upon which it is based in order to judge of its probable correctness. It is not the opinion of witnesses alone upon which reliance is to be placed, but from the premises which supplied the conviction in the minds of the several witnesses the jury, aided by these opinions, may form its own independent conviction and decide accordingly."—Approved: McReynolds v. Smith, 172 Ind. 336, 86 N. E. 1009.

§ 4914. Same—Consideration of Provisions of Will.

(a) "You are instructed that where a person of sound mind or memory is not subject to constraint or undue influence he may dispose of his property by will as he sees fit. But where undue influence or want of testamentary capacity is charged, as they are in this case, all of the surrounding facts, including the bequests themselves, their propriety or impropriety, their reasonableness or unreasonableness, in view of the situation, relations, and circumstances of the testator, may be considered in determining whether the testator was, at the time of the execution of the alleged will and codicil, of sound mind and memory, or whether the alleged will and codicil was procured by undue influence."—Approved: Dowie v. Sutton, 227 Ill. 183, 81 N. E. 395.

(b) "The court instructs the jury that an owner of property desiring to dispose of the same by will has the right to distribute it according to his or her own judgment, and may give nothing to children, or may divide it equally among them or other relatives, or leave the same to others not of kin to the deceased, at his or her pleasure, and of this right a property owner cannot be deprived, nor is a will made in execution of such purpose to be lightly set aside, and no will is to be deemed invalid because the jury are of the opinion that a different

disposition ought to have been made, nor is the distribution made by a testator, if otherwise valid, subject to be overruled, or overridden by the jury. The question of the propriety of the will in this case has nothing whatever to do with its validity, with the single exception that the jury may consider, together with all the other evidence, as a circumstance bearing on the question, whether or not the testator had sufficient mental capacity to make a will. The test of the validity of the present will, to be determined from the evidence, is not whether, in the judgment of the jury, it is a just or proper will, but whether, at the time it was made, the testator was of sufficiently sound mind to make a will, as explained in other instructions."—Approved: Shults v. Shults, 229 Ill. 420, 82 N. E. 312.

(c) "You are instructed that in determining the question of whether the testator, John George M—, was, at the time of the making of the instrument in question, a man of sound mind, and had sufficient mental capacity to make a valid will, you may take into consideration the terms and provisions of the will itself, whether the same are just or unjust, reasonable or unreasonable, natural or unnatural, and you may take into consideration the evidence as disclosed to you upon the trial relating to the financial condition of the plaintiff, daughter of said testator, and the financial condition of the other devisees under said will at the time of the execution of said instrument, and also the extent of the estate of the testator as the same existed at the time of the execution of said instrument; but the apparent inequality or inequity in the provisions of the will will not alone warrant the presumption of mental incapacity, but they may and should be considered as circumstances in connection with other facts bearing on the condition of the testator's mind at the time of executing the will."—Approved: Mileham v. Montagne (Iowa), 125 N. W. 664.

§ 4915. Revocation—Tearing with Intent to Revoke.

"The statute of this state provides that a will may be revoked by the testator tearing it with the intention of revoking it. No particular amount of tearing is required, but the intention to revoke the will must exist. Any tearing, if the intent to revoke the will exists, is sufficient to satisfy the requirements of the statute. And, if the jury find by a preponderance of the evidence that Dennis C— tore his will with the intention of revoking it, their verdict should be that the will offered in this case is not his last will.

"In order to find that Dennis C— revoked his will, the jury must find from a preponderance of the evidence that he tore it with the intention at the time to revoke it. If he intended to revoke it at the time of the tearing, it was then and there finally revoked, and no subsequent change of intention on his part to recognize or treat it as his will could have the effect to restore it. And, if the jury find that he intended to revoke it at the time of the tearing, then the verdict must be that it is not his last will, notwithstanding the jury also find that at a later date he regarded or treated it as his last will and supposed that it was his last will. The jury in considering the intention of the

testator concerning the act in question have the right to take into consideration his acts and statements with reference to any of the particular clauses on the page in question, either before the tearing thereof or after, and also have the right, and it is their duty, to consider as bearing on the question of intent the fact, if they so find from the evidence, that the testator saw the will with the torn clauses inserted and pasted in where they originally were, and considered the document as his will and had under consideration the question of revoking one of said torn clauses by a new codicil. But the jury are instructed that such facts are to be considered only as bearing upon the intention of the testator at the time the tearing was done."—Approved: Coghlin v. Coghlin, 79 Ohio St. 71, 85 N. E. 1058.

§ 4916. Unjust or Unnatural Wills Considered as Evidence of Incapacity.

(a) "The court instructs the jury that, in determining the question of mental capacity, a wide range is always permitted. The jury may look at the provisions of the will, may consider the history and relations of testator, his previous conduct and language in relation to those related to, or acquainted with him, and his previous determination as expressed by him as to what disposition he intended to make of his property, as well as the testimony of witnesses who swear to his actual mental condition as witnessed by them at the time of executing the will. If a party makes a will contrary to natural justice, this with other facts may be considered. But the mere fact that a will is not exactly according to what our own conception of justice would be, is not, of itself, sufficient to invalidate a will, for the reason that sane men are known to disagree in this respect. By 'natural justice,' we mean that which is founded in equity, in honesty and right. Natural justice requires that the parent shall care for his children. By bringing them into the world, the parent engages to provide for them. Natural justice requires that the child who has been protected in the weakness of his infancy, should protect and support that parent in the infirmity of his age. There are other relations in the history of every individual out of which obligations grow, but which are so varied and embrace so wide a range that human tribunals cannot and do not attempt to enforce them. And wherever the question is presented as to whether a natural obligation has been created, it can only be by inquiring what honor or conscience dictates. But in determining a case like this, what conscience dictates, we are not to consider alone the fact that this person or that person is a blood relation of the testator. Even under the civil law, where a parent was not allowed to disinherit his child without giving his reasons therefor,—and the law recognized fourteen reasons, either one of which was deemed sufficient to absolve the parent from what, without such reason would be deemed an obligation founded on natural justice; in short, the conduct of the child towards the parent was to be considered in determining the question as to whether natural justice required the parent to confer any portion of his property upon the child. Did the child refuse to aid the father and to give him his services, and did he refuse to reverence his author-

ity, natural justice did not require the father to treat the child in the disposition of his property, any different from strangers."—Approved: McGinnis v. Kempsey, 27 Mich. 363.

(b) "If a party makes a will contrary to natural justice, this, with other facts, may be considered; but the mere fact that a will is not exactly according to what our own conception of justice would be is not of itself sufficient to invalidate a will."—Approved: Lehman v. Lindenmeyer, 48 Colo. 305, 109 Pac. 956.

§ 4917. Revocation—Execution of Subsequent Will.

"The first question for you to determine is: Did A. H. B— make a will, subsequent to the will which has been admitted in evidence in this case and marked as Exhibit A? To aid you in determining this question, you are instructed that any person of full age and sound mind may make a valid will, and you are instructed that the undisputed testimony in this case shows that A. H. B— was of full age and of sound mind; and you are further instructed that under the laws of this state a will is an instrument executed by a person of full age and sound mind, for the purpose of disposing of his property after his death, which instrument must be signed by him in the presence of two witnesses, who must sign the same as such witnesses in his presence and in the presence of each other, and it makes no difference upon what part of such instrument said witnesses may sign, so long as they sign as witnesses as above instructed. Now, if you should find that the contestants have established by a preponderance of the evidence that the said A. H. B—, subsequent to the execution of Exhibit A, executed an instrument in writing substantially as claimed by contestants, disposing in whole or in part of his property, the same being executed in accordance with the laws, as set out in the instruction, for the execution of a will, then you will upon the point find that he executed a valid will subsequent to the execution of Exhibit A. The next question for you to determine is: Did said subsequent will, if any, contain a clause revoking Exhibit A? In this connection you are instructed that if said will, if any, contained a provision substantially as follows: 'Hereby revoking all wills by me at any time herebefore made'—that the same would constitute a sufficient revocation of the will introduced in evidence and marked as Exhibit A, and you are instructed that the burden of proof is upon contestants to establish by a preponderance of the evidence that such a clause, or one of the same or similar import, was contained in said subsequent will, if any, and, if contestants have not done so, then you will find for the proponent, and it will not be necessary for you to consider the case further."—Approved: In re Brown's Will, 143 Iowa, 649, 120 N. W. 667.

§ 4918. Ill-will or Dislike of Child does not Avoid Adverse Will.

"If you find from the evidence in this case that the testator bore some ill-will or dislike towards one or more of his children, you are instructed that, if the testator was influenced thereby to make his will as he did, and at the time was of sound mind, and did so of his own free choice, his will would be valid, and should be recognized by you.

Even if he did it unjustly, or with mistaken opinion as to the matters involved, this would not invalidate the will, but would rather tend to explain why he made his will as he did."—Approved: Ross v. Ross (Iowa), 117 N. W. 1105.

§ 4919. Formalities of Execution.

"The jury are instructed that in this state it is provided by statute that any person of full age and sound mind may execute a will, which, to be valid, must be in writing, witnessed by two competent witnesses, and signed by the testator, or by some person in his presence and by his express direction. But the statute does not require that the subscribing witnesses shall see the testator write his name to the will, but it is sufficient if he did in fact sign the will, provided he afterwards acknowledged it as his will, and requested them to sign as witnesses." —Approved: In re Will of Convey, 52 Iowa, 197, 198.

§ 4920. Proof by Other than Attesting Witnesses.

"The court instructs the jury that while the onus of showing a compliance with the statute as above explained devolves upon the party seeking to establish the will, yet the formal execution may be shown by persons other than the subscribing witnesses, or may be inferred from circumstances, as well as established by the direct and positive testimony of the attesting witnesses, and it is sufficient if the statute was substantially complied with."—Approved: In re Will of Convey, 52 Iowa, 197, 2 N. W. 1084.

§ 4921. Burden of Proof on Proponents.

"The court instructs the jury that it, therefore, devolves upon the proponent (that is, the party seeking to have the will established) to show by the evidence that at the time of the execution of the will or instrument in question the testator, C—, was of sound mind; that he signed said instrument as and for his last will, and that such will was witnessed by two competent witnesses."—Approved: In re Will of Convey, 52 Iowa, 197, 2 N. W. 1084.

CHAPTER CXXXII.

LIMITATIONS OF ACTIONS.

§ 4922. Credit to Revive Debt must be Authorized.
4923. Absence as Stopping the Running of the Statute.
4924. New Promise where Debt is Barred by Statute of Limitations.
4925. Same Under Statute Requiring the Promise to be in Writing.

§ 4922. Credit to Revive Debt must be Authorized.

"Now, if you find that there was no understanding or agreement in regard to the credit of the fifteen dollars, then it does not avail as a payment to take this claim out of the statute of limitations, to prevent its being barred, because the parties must agree upon the payment. The plaintiff cannot, by giving credit upon an account,—upon an outlawed bill, or a bill that may be outlawed,—for the purpose of preventing the running of the statute, make a credit, of his own volition, on that account, and save the running of the statute. He cannot do it unless it is agreed between the parties that there is to be an application upon the account; and that is a question for you to determine, whether or not it was understood between the parties that such a credit was to be made to Mr. E—, and that it was to be credited upon that account, and properly applied upon it. If it was so understood between them, it would be a proper application, and the plaintiff might maintain this action; otherwise it cannot,—and that is the question for you to determine."—Approved: Bay City Iron Co. v. Emery, 128 Iowa, 506, 87 N. W. 652.

§ 4923. Absence as Stopping the Running of the Statute.

"If said C— was an unmarried man, and had no residence in Nebraska except such as he acquired by having his board and lodging at the house of some other party while he was there, then when he went out of the state he would leave no 'place of residence' behind him in said state, and, in this case, all such periods of absence should be deducted in computing the time of the limitation. But if said C—, although an unmarried man, had in the State of Nebraska a permanent residence, that is, a house or rooms which he owned or leased, and which he furnished as and for his home and place of residence, and which he still held as his residence and home while temporarily absent, then, and in such a case as this, a temporary absence from the state for the purposes of prosecuting his business, or recruiting his health, or visiting his friends or relatives, if he still kept such a place of residence publicly in the State of Nebraska, and had an ever-present intention of returning thereto as his home, then such temporary absences from the state, under the circumstances above supposed, are

not such absences as ought to be deducted in computing the statutory period of limitation."—Approved: Thomas v. Brewer, Adm'r, etc., 55 Iowa, 227, 7 N. W. 571.

§ 4924. New Promise where Debt is Barred by Statute of Limitations.

"The court instructs the jury that the instrument, dated June 18, 1866, which has been received in evidence, was barred by the statute of limitations before this suit was brought, and no recovery can be had upon the same, unless the defendant, within six years before the bringing of this suit, made a new promise; and th burden of proof of that rests upon the plaintiff, and not upon the defendant. The plaintiff must recover, if at all, upon the preponderance of testimony. If the plaintiff claims the right to recover upon a new promise alleged to have been made by the defendant, and the testimony upon that point is so conflicting that the jury cannot determine whether such a promise was made or not, they must find for the defendant."—Approved: Parker v. Hawley, 4 Colo. 336.

§ 4925. Same Under Statute Requiring the Promise to be in Writing.

"The jury, in order to take the case out of the statute of limitations and entitle the plaintiff to recover, must find from the testimony that the defendant has, within the last ten years before the commencement of this action, made his promise in writing to pay said note, or that he has actually paid some portion of the principal or interest thereon within the time aforesaid."—Approved: Bridgeton v. Jones, 34 Mo. 472.

CHAPTER CXXXIII.

MISCELLANEOUS INSTRUCTIONS.

§ 4926. Deceit, Action for—Elements of.
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4941. Taxation—Determination of Net Annual Income.
4942. Usages and Customs—Requisite Proof to Establish—Burden.

§ 4926. Deceit, Action for—Elements of.

"Before plaintiff can recover in this action, it must establish by a preponderance of the evidence, as to one or all of its first three claims as explained in the foregoing instruction: First, that the representation or representations as charged in the petition were made by H— to A—; second, that the representations were false; third, that A— believed the representations to be true; fourth, that A—, in making the purchase, relied upon the representations, and was only induced to make the purchase because of the same; and, fifth, that, for the reason the cattle were not as represented, plaintiff has suffered damages. And if you believe from the evidence that plaintiff has made out his case, as herein explained, as to part, but not as to all three, of his said claims for damages, then you will allow him damages accordingly, measured as hereinafter explained, but, if it has not made out its case as to either of said three claims, then you will find for the defendant."—Approved: Hitchcock v. Gothenburg Water Power & Irrigation Co., 4 Neb. Unoff. 620, 95 N. W. 638.

§ 4927. Disqualification for Office by Illegal Ante-Election Promises.

"Promises to the people by candidates for public office, that, if elected, they will practice a rigid economy in the expenditures of their several departments or offices, are unobjectionable, and if the successful candidate fulfills his pledges in that behalf he is entitled to praise and commendation. In such a case the candidate only promises to perform a legal and moral duty. But the proposition contained in the resolution in question has an entirely different aspect. It contains something more than a promise of rigid economy. It contains a distinct proposition to the electors that if they will elect the particular candidate he will donate all fees received from the office, in excess of a certain sum, to the taxpayers of the county by paying the same into the county treasury. Such a proposition introduced into elections would be a mischievous element very nearly allied to bribery, and if the incumbent (Mr. R—) indorsed the resolution and pledged himself publicly and privately that, if elected to the office, he would carry out the proposition, then as I have before explained he is, under the law, disqualified from holding the office; and this is so without regard to whether there were few or many votes changed thereby."—Approved: Carrothers v. Russell, 53 Iowa, 346, 5 N. W. 499.

§ 4928. Divorce—Degree of Proof of Adultery Required.

"It is the law of this state that, if the wife shall commit adultery, the husband is entitled to a divorce, and in a suit brought by the husband against the wife, if it is shown from the evidence, whether circumstantial or otherwise—that is, shown from the evidence—strong, convincing, and conclusive, that the wife has committed an act of adultery, this entitles the husband to a divorce."—Approved: Kinney v. Kinney, 149 N. C. 321, 63 S. E. 97.

§ 4929. Domicil—Absence with Intent to Return.

"The jury is instructed, under the law of the state, that the place shall be considered and held to be the residence of a person in which his habitation is fixed, without any present intention of removing therefrom, and to which, whenever he is absent, he has an intention of returning. A person shall not be considered and held to have acquired a legal residence in any county in this state into which he shall have come for temporary purposes, merely, without the intention of making it his residence."—Approved: State ex rel. Vale v. School Dist. of City of Superior, 55 Neb. 317, 75 N. W. 855.

§ 4930. Estoppel—Action in Reliance upon Representations.

"If you believe from the evidence in this case that this plaintiff, as the agent of his father, or part owner of the premises in question, made certain statements, whether true or false, to this defendant, Joseph N—, and whereby he induced him to purchase the premises in good faith, and for a valuable consideration, and that the said N— acted upon them, believing them to be true, the plaintiff is now precluded from asserting the contrary, and you must find for the defendant; for it is a rule of law that where one, by his words or conduct, wilfully causes another to believe in a certain state of things, and induces him

to act on that belief, so as to alter his own previous conditions, the former is concluded from averring against the latter a different state of things."—Approved: Wise v. Newatney, 26 Neb. 88, 42 N. W. 339.

§ 4931. Estoppel Arising Out of Silence When there is Obligation to Speak.

"If you find from the evidence in this case that the amount of the indebtedness of the Lansing, St. Johns & St. Louis Railway Company was discussed and talked over by the stockholders of said company, in the presence of Mr. D—, at its meeting held March 3, 1904, when it passed a resolution to sell and transfer its property to the Lansing & Suburban Traction Company, and that the amount and items of said indebtedness was stated as that represented by the bonds amounting to the sum of $500,000, and the indebtedness of the company under its contract of construction with M—, P—, and N—, and Mr. D— made no claim for services at that time, but remained silent, without stating to the said stockholders that he had a claim for services as secretary of the company, he cannot now recover in this case, for the reason that the silence misled the stockholders and incorporators of the Lansing & Suburban Traction Company, who were about to take said property subject to the indebtedness of the Lansing, St. Johns & St. Louis Railway Company, and he would now be estopped from asserting such a claim."—Approved: Dodge v. Lansing & Suburban Traction Co., 152 Mich. 100, 115 N. W. 1004.

§ 4932. Executors and Administrators—Due Presentation of Claim Against an Estate.

"I charge you further that, before the plaintiff in this case can recover, he must prove by a fair preponderance of the evidence that prior to the bringing of this suit the checks sued upon in this action were presented to the defendant, Charlotte C—, and that the same were accompanied at that time by the affidavit of the plaintiff in this case to the effect that the amount claimed was justly due the plaintiff, and that no payments had been made thereon, and that there were no offsets to the same, to the knowledge of the plaintiff. You are further instructed that if you find the only presentation of the claims sued upon by the plaintiff to defendant, prior to the commencement of this action, was a copy of the checks sued upon, accompanied with a copy of the affidavit of the plaintiff to the effect that the amount sued upon was justly due, and that no payments had been made thereon, and that there were no offsets to the same to his knowledge, and at the same time that the copies referred to were presented and left with the administratrix, that the original claims were not presented or submitted to said administratrix, then you should find that there was no presentation of the claims sued upon by the plaintiff to the defendant prior to the commencement of this action, and your verdict should be for the defendant."—Approved: Ash v. Clark, 32 Wash. 390, 73 Pac. 351.

§ 4933. Explosives—Labeling Packages so as to Give Warning.

"That by the common law, itself, the unwritten law of this land, it is essential that a manufacturer who puts up an article which is liable

to cause injury to the ignorant must of necessity put upon his package proper information of the danger which is to be apprehended by the party who uses the article, and if you find in this case, gentlemen of the jury, that the article in question was liable, when mixed with air, to explode or to ignite under circumstances which would become a menace to those ignorant of its properties, then I charge you, gentlemen of the jury, that it was the duty of the manufacturer of the article to put a proper and sufficient warning as to its contents upon the can. Now, there are some of us, gentlemen of the jury, I think, on opening of that can, would have been aware of its contents. Those who have used naphtha for any purpose, doubtless, have recognized the odor of naphtha, or known that it was one of the lighter constituents of crude petroleum, and perhaps, gentlemen, we might not have used the article in such a manner as to produce an injury; but unless you find in this case, gentlemen of the jury, that the plaintiff had, or ought to have had, that knowledge, then unquestionably, if she was injured in the innocent use of the article, in the manner in which the counsel has claimed in this case, under those circumstances, gentlemen, she would be entitled to recover such damages as would compensate her for the injuries which she has sustained. Now I do not mean to say, from what I have said, that the accident occurred in the manner in which she has detailed, because, I think, I would be intruding upon your province, if I did. It is possible that you should find in this case, gentlemen of the jury, that the explosion may have come from a leakage in the can itself, and that that was the proximate cause of the injury. It is possible, gentlemen of the jury, that you may disbelieve the testimony of the plaintiff as to the method of the injury, and so, gentlemen of the jury, find that the defendant is not responsible in any way for the damage which occurred; but I think it belongs to you, from the evidence which has been adduced before you, to say, if in your judgment you see fit, that she was injured by reason of the fact that no warning was given of the nature of the contents of the package—that is, of the dangerous nature—I may say, if you find it to be dangerous, of the contents of the package, and you may find that, without negligence on her part, she was injured in the manner in which she has detailed. * * * If the defendant be liable for negligence, and it occurs either from friction, or, as I say—you have heard the testimony that it could not occur in that way—or from the striking of a match, or from the gas which still remained lit upon the stove, then I say to you, no matter if it occurred in those ways, if you find that the sale of the article without proper warning was the proximate cause of the injury, and she did not contribute thereto, whether it occurred in any of these ways, still the defendant would be liable."—Approved: Clement v. Crosby & Co., 157 Mich. 643, 122 N. W. 263.

§ 4934. Infant—Civil Liability for Tort.

"You are instructed, gentlemen, that, so far as this case is concerned, the infancy of the defendant does not affect the liability. The rule that one who hires property of this kind for one purpose, and uses it for another or different purpose from that contemplated by the parties in the contract of hiring, is liable for any harm that may happen it while

he is so using it, applies to minors as well as to adults."—Approved: Churchill v. White, 58 Neb. 22, 78 N. W. 369.

§ 4935. Insane Person — Incompetency Justifying Appointment of Guardian.

"If you believe from the testimony that Mrs. S— is possessed of ordinary sagacity and insight into affairs, so that she knows how to care for her house, and table and clothing, to deal and transact ordinary affairs, and is not so insane, nor so foolish or imbecile, as to have no mind or intelligence regarding ordinary matters and affairs which she is accustomed to know of, then you are not to find her incompetent."—Approved: In re Guardianship over Storick, 64 Mich. 685, 31 N. W. 582.

§ 4936. Judgment, Assignment of—Right of Defendant to Question Consideration.

"Now, gentlemen, it is of no importance in this case what consideration plaintiff paid for the assignment of this judgment to him. The plaintiff's rights are precisely the same, whether he paid one cent or the full amount of the judgment, with interest. And there is no evidence in this case that the assignment in question did not cost the plaintiff as much or more than the face of the judgment, with interest. And, as I have said, it would make no difference if in fact the judgment only cost the plaintiff a dollar. It is of no importance, either, whether the assignor, C. McC. R—, was, at the time of the assignment, solvent or insolvent And if it was not agreed, as the defendant says it was, between the parties, that the services in question should be accepted in full satisfaction of the judgment, it is of no importance whether the defendant in this case was solvent or insolvent when the assignment was made or at any time since that time."—Approved: Dalby v. Lauritzen, 98 Minn. 75, 107 N. W. 826.

§ 4937. Rape—Civil Action—No Outcry and Subsequent Friendliness.

"If the jury believe from the evidence that at the time the alleged assault on plaintiff is alleged to have been committed, or within a reasonable time thereafter, the plaintiff had an opportunity to make an outcry, and that she did not do so, and did not as soon as an opportunity offered, or at any time prior to the time her baby was born, complain of the alleged assault to any person, and that she continued on friendly relations with the defendant after the date of said alleged assault, then the jury should take these circumstances into the case in determining whether the defendant did, in fact, have carnal knowledge of the plaintiff by force and against her will; and if you believe from all these circumstances and all the evidence in the case that the defendant did not have sexual intercourse with the plaintiff, or even if you believe that he did have sexual intercourse with her by her consent, then the defendant is not liable in this case and your verdict must be for defendant."—Approved: Champagne v. Hamey, 189 Mo. 709, 88 S. W. 92.

§ 4938. Sheriffs and Constables—Refusal to Levy Without Indemnifying Bond.

"The jury are instructed that an officer, called upon to levy an execution, or to make a sale under a levy already made, cannot arbitrarily

demand an indemnifying bond; and, if you find from the evidence in this case that the property levied on was the property of the defendant in the execution, and was not exempt under the exemption laws of this state, and that no other person was claiming the same, nor setting up any title thereto, but that the defendant in the execution, C. B. W—, was then present and admitting the property to be his own, and that the only reason that the defendant L— had for demanding an indemnifying bond was that he had heard that the defendant in the execution was contemplating filing a petition in bankruptcy, and that he thought that some of the property might belong to the defendant's wife, although he had never heard any one say so, and that she was not claiming the same, then, under the law, said L— had no right to demand of plaintiff an indemnifying bond."—Approved: Mayfield Woolen Mills v. Lewis, 89 Ark. 488, 117 S. W. 558.

§ 4939. Sheriffs and Constables—Negligence in Caring for Property Levied on.

"If the jury should believe and find from the evidence that defendant had charge of the steamboat Laynesville under a writ from the United States court, by himself or deputy, and should further believe and find from the evidence that the defendant or his deputy, or those whom he or his deputy put in charge of said boat, negligently failed to use ordinary care in watching, looking after, and keeping said boat, and that by reason of the failure to use such care the said boat was partially or wholly destroyed and burned by fire, they will find for the plaintiff the damages they thereby sustained, not exceeding $2,000; but if the jury should believe and find that the defendant, by his deputy and those he had in charge of the boat, used ordinary care in watching, looking after, and keeping said boat, they will find for the defendant."—Approved: Sharp v. Layne (Ky.), 117 S. W. 292.

§ 4940. Taxation—Domicile of Person Assessed.

"That the domicile of a person, when once fixed by his living at a place with the fixed intention of making it his home, is not changed by his removal to another place or location under comforts and surroundings of a home, until he has a fixed intention of abandoning his former domicile and home, and of acquiring or fixing a domicile at the place to which he has removed."—State ex rel. Kelly v. Shepherd, 218 Mo. 656, 117 S. W. 1169.

§ 4941. Taxation—Determination of Net Annual Income.

"You are instructed that in ascertaining the net income, if any, of the Nevada Central Railroad, for the year 1901, or the net loss, if any, you should add any taxes actually paid by the company for that year to the other necessary expenditures of the road, and deduct the same from the receipts of the road for that year; and in order to determine whether there will be any net income whatsoever, or to determine the loss from operation of the road, if a loss is shown, you must consider and deduct from the receipts of the road for 1901 such an amount for the taxes for 1901 as you agree ought to be paid by the railroad company upon the property described in the complaint, which, in brief, con-

sists of ninety-three miles of main railroad track and two miles of side track."—Approved: State v. Nevada Cent. R. Co., 28 Nev. 186, 81 Pac. 99.

§ 4942. **Usages and Customs—Requisite Proof to Establish—Burden.**

"You are instructed that the defendant claims that there was and is a custom and usage existing among live stock commission men and banks, which deal in cattle paper, where cattle paper secured by mortgages upon cattle is discounted or sold to banks, that it becomes the duty of the commission man to look after the chattel security, and see to and look after the sale and disposition of the same, directing the manner and place of sale, etc., and to see that the proceeds arising from the sale of the cattle so mortgaged are applied to the satisfaction of the mortgage debt, which custom defendant claims existed between the Denver National Bank and the Sigel-Campion Live Stock Commission Company, and that such general custom was well known to said bank and to the said live stock commission company; that by reason of such custom the said live stock commission company had the authority and the right to consent that F—, the mortgagor of the cattle in question, might sell and dispose of the cattle described in said mortgage, and that the said commission company did in fact so consent that the said F— might sell and dispose of the mortgaged cattle, collect the proceeds, and account for the same to the said commission company, and have the proceeds applied to the satisfaction of the mortgage debt.

"I instruct you, therefore, that the burden of proof rests upon the defendant to prove the existence of the general custom above referred to, and that such custom or usage was well known and understood by both the Denver National Bank and the Sigel-Campion Live Stock Commission Company, and that when said commission company sold and transferred the note and mortgage in question to the said Denver National Bank, that it was presumed to have contracted with reference to such custom or usage.

"That the burden is also upon the defendant to prove that the commission company, under and by reason of such authority, did consent, in writing, that the mortgagor of the cattle in question, H. H. F—, might sell and dispose of the cattle mentioned and described in the said chattel mortgage, including the cattle in controversy, and collect and account to the said commission company for the proceeds thereof.

"And I instruct you, further, that if you find from the evidence such usage and custom did exist, and that the said bank and live stock company had knowledge of same, and contracted and dealt with each other with reference thereto, and that in pursuance thereof the said live stock commission company did consent to and authorize, in writing, a sale of the said cattle to the said F—, and that F— sold same pursuant to such consent, all as alleged and claimed by the defendant, all of which are questions of fact for you to determine from all the evidence in the case, then, if you so find, your verdict should be for the defendant.

"The court instructs you that a usage and custom of trade or business, in order to be binding upon the parties, must be generally known and established among those who are engaged in the business where the

usage and custom are claimed to exist, and so well settled and so uniformly acted upon as to raise a fair presumption that it was known to both the contracting parties, and that they contracted in reference to it, and in conformity to it.

"While a usage or custom of trade and business cannot be set up to contravene an established rule of law, or to vary the terms of an express contract, yet all contracts made in the ordinary course of business, without particular stipulation to the contrary, are presumed to be made in reference to the usages and customs of such business, if any such exists."—Approved: Standley v. Clay, Robinson & Co., 68 Neb. 332, 94 N. W. 140.

CRIMINAL LAW INSTRUCTIONS.

CHAPTER CXXXIV.

ACCESSORY.

A. Alibi.
B. Accomplice.
C. Accessory.

A. Alibi.

§ 4943. Presence and Participation with Guilty Intent.
4944. Constructive Presence in a General Felonious Plan.
4945. Liability as Principal.
4946. Mere Presence Without Aiding or Abetting.

§ 4943. Presence and Participation with Guilty Intent.

"The court instructs the jury that every person who is present at the commission of a felony, aiding, abetting, assisting or encouraging the same by words, gestures, looks or signs, is, in law, deemed to be an aider and abettor, and is liable as a principal. But, on the other hand, mere presence at the commission of a felony or other wrongful act does not render a person liable as a participator therein; if he is only a spectator, innocent of any unlawful intent, and does not aid, abet, assist or encourage those who are actors, he is not liable, as principal or otherwise. Therefore, if from the evidence you believe and find, beyond reasonable doubt, that any of the defendants actually assaulted the prosecuting witness, John D—, and by force and violence, or by putting him in fear of some immediate injury to his person, took from him or from his person, against his will, the property described in the indictment, with the intent at the time to steal, take and carry away such property, and that any of the other defendants were then and there present aiding, abetting and encouraging in any way, or by any means, the same, you should convict such other defendant of the offense of robbery in the first degree; otherwise you should acquit such other defendant."—Approved: State v. Cantlin, 118 Mo. 100, 23 S. W. 1091.

§ 4944. Constructive Presence in a General Felonious Plan.

"Any participation in a general felonious plan, provided such participation be concocted, and there be actual or constructive presence, is enough to make a man a principal as to any crime committed in the execution of such concocted plan."—Approved: Baldwin v. State, 46 Fla. 115, 35 South. 220.

§ 4945. Liability as Principal.

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed."—Approved: People v. Warren, 130 Cal. 683, 63 Pac. 86.

§ 4946. Mere Presence Without Aiding or Abetting.

"The mere presence of the defendant at the time and during the act of killing would not, of itself, be sufficient to constitute him an aider and abettor in the commission of the act, but it is not essential in order to constitute him such, that he should himself have fired the fatal shot. It is sufficient if at the time of the killing he was there present, consenting to and encouraging the act, and ready, if needed, to give assistance to him who did the act."—Approved: Kelly v. State, 44 Fla. 441, 33 South. 235.

B. Accomplice.

§ 4947. Defined.
4948. Competent as Witness with or without Corroboration.
4949. Sufficiency of Testimony Standing Alone.
4950. Caution as to Uncorroborated Testimony.
4951. Extent of Needed Corroboration.
4952. Degree of Caution to be Exercised by Jury.
4953. Corroboration Needed as to Material Facts—Texas Rule.
4954. As also That of Kentucky.
4955. Instruction as to Female Accomplice in Incest.
4956. Or by Other Evidence Direct or Circumstantial.
4957. Corroboration Insufficient Which Merely Shows a Crime.
4958. Where One is Compelled to Aid He is Not an Accomplice.

§ 4947. Defined.

(a) "An accomplice, in the meaning of the law, is one of severally equally concerned in the commission of a crime, either as principal or one who aids or abets in the commission of the crime."—Approved: Best v. Commonwealth (Ky.), 92 S. W. 555 (not reported in state reports).

(b) "An 'accomplice,' as the word is here used, means any one connected with the crime committed, either as principal offender, as an accomplice, as an accessory, or otherwise. It includes all persons who are connected with the crime by unlawful act or omission on their part, transpiring either about, at the time, or after the commission of the offense, and whether or not he was present and participated in the commission of the crime."—Approved: Davis v. State, 55 Tex. Cr. R. 495, 117 S. W. 159.

§ 4948. Competent as Witness With or Without Corroboration.

"The court instructs the jury that the testimony of an accomplice in crime, that is, a person who actually commits or participates in crime, is

admissible in evidence, but such evidence, unless corroborated by some other witness or witnesses not implicated in the crime as to the facts material to the issues, that is, facts connecting the defendant with the commission of the crime, as charged against him, should be received and considered by you with great caution. But, if you are fully satisfied that the testimony of an accomplice is true, and that the facts and circumstances testified to by him are sufficient to establish the guilt of the defendant of the crime as charged under the instructions of the court, then you are at liberty to find the defendant guilty upon such testimony alone."—Approved: State v. Bobbitt, 215 Mo. 10, 114 S. W. 511.

§ 4949. Sufficiency of Testimony Standing Alone.

(a) "The testimony of an accomplice is competent evidence, and the credibility of such accomplice is for the jury to pass upon as they do upon any other witness; and, while the testimony of an accomplice will sustain a verdict when uncorroborated, yet the testimony of an accomplice must be received with great caution; but if the testimony carries conviction, and the jury are convinced of its truth, they should give to it the same effect as would be allowed to a witness who is in no respect implicated in the offense."—Approved: Shiver v. State, 41 Fla. 630, 27 South. 36.

(b) "The court instructs the jury that under the law of this state the defendant may be convicted upon the uncorroborated testimony of an accomplice; and if the jury believe, from the evidence in this case, the testimony given by the witness W. J. L— is true, then they can act upon the same as true. The testimony of an accomplice, like all the other evidence in the case, is for the jury to pass upon."—Approved: People v. Frankenburg, 236 Ill. 408, 86 N. E. 128.

(c) "Gentlemen of the jury, the court instructs you that the testimony of an accomplice in the crime—that is, a person who actually commits or participates in the crime—when not corroborated by some person or persons not implicated in the crime, as to matters material to the issues—that is, matters connecting the defendant with the commission of the crime as charged against him—ought to be received with great caution by the jury, and the jury ought to be fully satisfied of its truth before they should convict defendant on such testimony. The court further instructs the jury that you are at liberty to convict the defendant, Frank S—, on the uncorroborated testimony of an accomplice alone if you believe the statements as given by such accomplice in his testimony to be true, if you further believe that the state of facts sworn to by such witness, if any, will establish the guilt of the defendant."—Approved: State v. Shelton, 223 Mo. 118, 122 S. W. 732.

§ 4950. Caution as to Uncorroborated Testimony.

"If you find and believe from the evidence that any witnesses who have testified on the part of the State in this case were concerned in and participated in the commission of the same offense (if you believe and find from the evidence the offense was committed), which by the indictment is charged against this defendant Julius L—, and the other

defendants named in said indictment and hereinbefore named in these instructions, then such witnesses are to be considered as accomplices.

"The court instructs you that you are at liberty to convict the defendant on the uncorroborated testimony of an accomplice alone, if you believe the statements given by said accomplice in his testimony are true in fact and sufficient in proof to establish the guilt of the defendant; but you are instructed that the testimony of an accomplice in crime, when not corroborated by some person or persons not implicated in the crime as to material matters to the issues, that is, matters connecting the defendant with the commission of the crime charged against him and identifying this defendant as the perpetrator thereof, ought to be received by you with great caution, and you ought to be fully satisfied of its truth before you should convict the defendant on such testimony."—Approved: State v. Lehman, 182 Mo. 424, 81 S. W. 1118.

§ 4951. Extent of Needed Corroboration.

"The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury; but great caution should be used in weighing such testimony, and the jury should not convict upon the testimony of any accomplice alone, unless his testimony is corroborated by other evidence in some material point in issue, but such corroboration need not be as to everything to which the accomplice testified."—State v. Greenburg, 59 Kan. 404, 53 Pac. 61.

§ 4952. Degree of Caution to be Exercised by Jury.

"The court instructs the jury that the testimony of an accomplice in a crime, that is, a person who actually commits or participates in the crime, is admissible in evidence; yet the evidence of an accomplice in a crime, when not corroborated by some person or persons not implicated in the crime, as to matters material to the issues, that is, matters connecting the defendant with the commission of the crime as charged against him, ought to be received with great caution by the jury before they should convict the defendant on such testimony."—Approved: State v. Daly, 210 Mo. 664, 109 S. W. 53.

§ 4953. Corroboration Needed as to Material Facts—Texas Rule.

"You are further charged as a part of the law of this case, at the request of the defendant, that, before you would be authorized to find the defendant guilty, you must not only believe the testimony of the witness Tennie S— to be true, but you must further find from the evidence that said Tennie S— has been corroborated by other testimony showing both the commission of the offense charged as well as connecting defendant therewith. The corroborating testimony necessary under the law must be upon material facts connecting the defendant with the commission of the offense charged."—Approved: Jackson v. State, 51 Tex. Cr. R. 220, 101 S. W. 807. See also Close v. State, 55 Tex. Cr. R. 380, 117 S. W. 137.

§ 4954. As also That of Kentucky.

"If the jury shall believe from the evidence that the witness Thomas R— was an accomplice in the burning of the barn of H—, then a conviction cannot be had upon his testimony, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof; and the question as to whether said Richardson was an accomplice is one for the jury to determine under the evidence."—Approved: Best v. Commonwealth (Ky.), 92 S. W. 555 (not reported in state reports).

§ 4955. Instruction as to Female Accomplice in Incest.

"A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed, and the corroboration is not sufficient, if it merely shows the commission of the offense; and in this case, in determining whether or not the witness Emma L— is an accomplice, if, in fact, there was any such act of incestuous intercourse committed between her and the defendant as charged, the proper inquiry would be, Did she knowingly, voluntarily, and with the same intent which actuated the defendant, unite with him in the commission of the crime charged against him, if, in fact, such crime was committed by him, and if, in fact, such incestuous intercourse between said witness and said defendant did occur? If she did, she was an accomplice."—Approved: Jordan v. State (Tex. Cr. R.), 137 S. W. 114.

§ 4956. Or by Other Evidence Direct or Circumstantial.

"The defendant cannot be convicted on the uncorroborated testimony of R—, M—, and T—, but their testimony must be corroborated by other evidence, direct or circumstantial, tending to connect defendant with the commission of the offense charged. If there is such corroboration, and you are satisfied beyond a reasonable doubt that defendant is guilty, you will convict; otherwise you should acquit. It is not necessary that the corroborating evidence shall be sufficient of itself, without the testimony of T—, M—, and R—, to convict the defendant. It is sufficient if there be such evidence independent of theirs, either direct or circumstantial, tending to connect defendant with the commission of the offense, and that that evidence, together with the testimony of T—, R—, and M—, convince your minds beyond a reasonable doubt that defendant is guilty. The corroborating evidence must tend to connect defendant with the commission of the offense. Evidence only that the offense was committed by somebody, and the circumstances thereof, without tending to connect defendant with the commission of the offense, is not sufficient."—Approved: Celender v. State, 86 Ark. 23, 109 S. W. 1024.

§ 4957. Corroboration Insufficient Which Merely Shows a Crime.

"No conviction can be had in any criminal case upon the testimony of an accomplice unless the same be corroborated by other testimony, which has a tendency to connect the defendant with the commission of

the alleged offense; and such corroboration is not sufficient if it merely shows the commission of the alleged offense, or the circumstances. An accomplice is one who voluntarily participates in the commission of a crime; and the uncorroborated evidence of one who so participates is not sufficient to convict a defendant of an alleged crime. This is an imperative rule of the law, and must be obeyed, regardless of the opinion of the jury as to the truthfulness of the evidence given by the accomplice. If you believe from the evidence in this case and from the circumstances disclosed by such evidence that said Stena A. H— was an accomplice as herein defined, then no conviction of defendant can be had upon either testimony unless it has been corroborated as hereinbefore stated by evidence tending to connect him with the alleged crime. Upon this point you are instructed that you have the right to consider as corroborating evidence in this case testimony by parties other than said Stena A. H—, if you find that there is any such testimony, which shows indecent or improper familiarities on the part of said defendant with said Stena A. H—, provided you believe that such conduct shows an adulterous disposition or desire on his part towards said Stena A. H—. But in considering this evidence, if any, and all the evidence in this case, you should remember that every presumption of law is in favor of the innocence of defendant, and if any alleged conduct of defendant is consistent with his claim of innocence, or if you have any reasonable doubt of the consistency of any such alleged acts with the defendant's guilt, you should give the defendant the benefit of such doubt, and give to such alleged acts an innocent construction."—Approved: State v. Henderson, 84 Iowa, 161, 50 N. W. 758.

§ 4958. Where One is Compelled to Aid He is Not an Accomplice.

"The court further says to the jury, if they believe from the evidence that the witnesses J. L. W—, Clarence D—, W. B. S—, and Will I— did willfully, unlawfully, and feloniously conspire or confederate with the defendants, Jake E—, Will McC—, Henry T—, or any one of them, or with other person, or persons, to the grand jury unknown, for the purpose of intimidating, alarming, or disturbing the said Mose T—, then they are such one or ones of them as did so unlawfully, willfully, and feloniously conspire or confederate for said purpose of alarming, intimidating, or disturbing the said T—, is an accomplice, or accomplices, in the crime charged in the indictment, and the jury cannot convict the defendant upon the testimony alone of such accomplice, or accomplices, unless same be corroborated by other evidence in this case tending to connect the defendant Jake E— with the crime charged in the indictment, and such corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. But the court further says to the jury that, if they believe from the evidence beyond a reasonable doubt that the witnesses J. L. W—, Clarence D—, W. B. S—, and Will I—, or any of them, did not willfully or voluntarily conspire or confederate with the defendants, Jake E—, Will McC—, or Henry T—, or with any other person or persons to the grand jury unknown, but shall further believe from the evidence beyond a reasonable doubt that they, or any of them, were present at

the time and place of such unlawful, willful, and felonious confederation or conspiracy for the purpose of alarming, intimidating, or disturbing said T—, and shall further believe from the evidence beyond a reasonable doubt that said witnesses, or any of them, did not willfully and voluntarily go forth for the purpose of alarming, intimidating, or disturbing the said T—, with said defendants, or any one or more of them, nor with said unknown person, or persons, or any one or more of them, but were forced and compelled against their will to so conspire and to go forth for the purpose named above, then they or such of them as were so forced or compelled against their will to conspire or confederate with the parties named above, or any of them, would not be accomplices, and their testimony should be received and considered as the testimony of other witnesses."—Approved: Commonwealth v. Ellis, 133 Ky. 625, 118 S. W. 973.

C. Accessory.

§ 4959. Defendant in Different Place When Crime was Committed.
4960. To be Established by Preponderance of Evidence.
4961. Not Required to be Shown Beyond a Reasonable Doubt.
4962. If it Raises a Reasonable Doubt it is Sufficient.
4963. Evidence of to be Considered with all the Other Evidence.
4964. Presence Must be Shown Beyond a Reasonable Doubt.
4965. Reasonable Doubt as to Presence Must be Substantial Doubt.

§ 4959. Defendant at Different Place When Crime Was Committed.

"Gentlemen of the jury, the defendant in this case has introduced evidence that at the time the deceased was shot, if he was shot, he (the defendant) was not at the place where the shooting occurred. This in law is termed an 'alibi,' which is defined thus: When a person charged with a crime proves that he was, at the time alleged, in a different place from that in which it was committed. Therefore you are instructed that if you entertain from the evidence in this case a reasonable doubt of the presence of the defendant at the place where deceased was killed at the time of the killing, and if from the evidence you entertain a reasonable doubt that at that time he may not have been elsewhere, he is entitled to the benefit of such doubt, and you will acquit him."—Approved: Tinsley v. State, 52 Tex. Cr. R. 91, 106 S. W. 347. See also Crowell v. State, 56 Tex. Cr. R. 480, 120 S. W. 897.

§ 4960. To be Established by Preponderance of Evidence.

"The burden of establishing an alibi is cast upon the defendant, and the evidence introduced to sustain it should outweigh the proof introduced by the state tending to show that the defendant participated in the burglary. But he is not bound to establish such a defense beyond a reasonable doubt; and if, upon the whole case, the testimony raises in your mind a reasonable doubt that the defendant was at the place of the burglary, and you find that said offense was not committed by the counsel, advice, or direction of the defendant, then you should find the defendant not guilty."—Approved: State of Iowa v. Krewsen, 57 Iowa, 588, 11 N. W. 7.

§ 4961. Not Required to be Shown Beyond a Reasonable Doubt.

"As regards the defense of an alibi, the jury are instructed that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged."—Approved: McLain v. State, 18 Neb. 154, 24 N. W. 720.

§ 4962. If it Raises a Reasonable Doubt it is Sufficient.

(a) "If the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the time and place when and where said property was fraudulently taken from the possession of Mrs. M. L—, if you find that the same was taken, then you will find the defendant not guilty."—Approved: McCoy v. State, 56 Tex. Cr. R. 551, 120 S. W. 858.

(b) "Evidence introduced in the trial of this case suggests what is known and called, in legal phraseology, as an alibi; that is, if the offense was committed as alleged, then the defendant was, at the time of the commission thereof, at another and different place from that at which said offense was committed (if committed), and therefore was not and could not have been the person who committed the same (if committed). Now, if the evidence raises in your mind a reasonable doubt as to the presence of the defendant in the Blue Front Saloon on the 30th day of January, 1907, at the time of the alleged sale to W. S. C— (if any), then you will acquit defendant, and say by your verdict not guilty."—Approved: Fox v. State, 53 Tex. Cr. R. 150, 109 S. W. 370.

(c) "The defense of an alibi has been offered, which means that the defendant was not there when the house was set fire to, and consequently did not do it. If from the evidence in the case you have a reasonable doubt as to the truth of the alibi, that is to say, whether the defendant was there or not, then you should give him the benefit of such reasonable doubt and acquit him."—Approved: Knight v. State (Fla.), 53 South. 541.

§ 4963. Evidence of to be Considered with all the Other Evidence.

(a) "There is evidence in this case tending to show an alibi; that is, at the time the crime with which the defendant stands charged was being committed the defendant was at such a distant and different place that he could not have participated in its commission. You will carefully consider the testimony on the subject of an alibi with all the other evidence in the case, and from that, if you are not satisfied beyond a reasonable doubt of the defendant's presence at the commission of the crime charged against him, then you should acquit him; but, after a full and careful consideration of all the evidence in the case, you are satisfied of the guilt of the defendant then you should find him guilty."—Approved: Nightingale v. State, 62 Neb. 371, 87 N. W. 158.

(b) "The defendant has offered evidence tending to show that at the time of the alleged assault he was absent some considerable dis-

tance from where the transaction occurred. On this subject you are instructed that if you believe, from a preponderance of evidence, that defendant was at the house of Michael McL— at the time the alleged crime was committed, your verdict should be for the defendant. The defendant is not required to prove an alibi beyond a reasonable doubt, but it is sufficient if you are satisfied, by a preponderance of evidence, that defendant was at the house of said McL— at the time said crime, if any, was committed.

"By a preponderance of evidence, as herein mentioned, is meant not a greater number of witnesses, but the greater weight of the testimony. If the circumstances in evidence, taken together, in your judgment, outweigh the testimony of any number of witnesses, then you will be authorized to award the preponderance to the circumstances, and render your verdict accordingly. But you will remember that if, from all the evidence, there is a reasonable doubt of defendant's guilt, he must be acquitted, whether that doubt arises from a defect in the evidence on the part of the state, or from evidence introduced by defendant."—Approved: State of Iowa v. Kline, 54 Iowa, 183, 6 N. W. 184.

(c) "There is evidence in this case tending to show an alibi; that is, that at the time the crime with which defendant stands charged was committed, the defendant was at such a distant and different place that he could not have participated in its commission. You will carefully consider the testimony on the subject of an alibi with all of the other evidence in the case, and from that, if you are not satisfied beyond a reasonable doubt of the defendant's presence at the commission of the crime charged herein, then you should find the defendant not guilty."—Approved: Johnson v. State (Neb.), 130 N. W. 282.

§ 4964. Presence Must be Shown Beyond a Reasonable Doubt.

(a) "Unless you find and believe from all the facts and circumstances given in evidence the presence of the defendant at the place of the alleged murder, and his guilt beyond a reasonable doubt, you should acquit him."—Approved: State v. Shelton, 223 Mo. 118, 122 S. W. 732.

(b) "Among other defenses set up by the defendant is what is known in legal phraseology as an 'alibi'; that is, that if the offense was committed as alleged, and the defendant was at another and different place from that which the same was committed at the time of the commission thereof, and therefore was not, and could not have been, the person who committed the crime. Now, if the evidence raises in your mind a reasonable doubt as to the presence of the defendant at the place where the offense was committed, if any such was committed, at the time of the commission thereof, you will give the defendant the benefit of such doubt and acquit him."—Approved: O'Hara v. State, 57 Tex. Cr. R. 577, 124 S. W. 95.

§ 4965. Reasonable Doubt as to Presence Must be Substantial Doubt.

"You are further instructed that one of the defenses interposed by the defendant is what is known as an alibi, by which is meant a claim on his part that he was at another and different place than that at which the alleged crime was committed, at the time when it was in

fact committed. And in that connection, you are instructed that, if you have reasonable doubt of the presence of the defendant at the time and place where said crime was committed, you will acquit him; but you are instructed that a reasonable doubt by you of the defendant having been present at the time and place where said crime was committed, to authorize you to acquit him on the ground of your having such reasonable doubt should be a substantial doubt by you of the defendant having been present at the time and place where such crime was committed and not a mere possibility that he may have been at another and different place than that at which said crime was committed at the time it was committed."—Approved: State v. Barton, 214 Mo. 316, 113 S. W. 1111.

CHAPTER CXXXV.

EVIDENCE—PARTICULAR OFFENSES.

A. Burden of Proof.
B. Circumstantial Evidence.
C. Flight.
D. Confessions.

A. Burden of Proof.

§ 4966. Presumption of Innocence—Burden on State to Overcome.
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4969. His Explanation of Criminative Testimony Need Only be by Preponderance of Evidence.
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4972. Of two Reasonable Views of Evidence that Which Follows the Presumption of Innocence is to be Preferred.
4973. Homicide Shown—Burden on Accused to Justify or Mitigate.

§ 4966. Presumption of Innocence—Burden on State to Overcome.

(a) "The court instructs you that the defendant, in law, is presumed to be innocent, and that it devolves upon the state to prove, by evidence, to the satisfaction of the jury, beyond a reasonable doubt, that the defendant committed the crime, as charged in the indictment and explained in these instructions, and if, upon a view of the whole case, you have a reasonable doubt of defendant's guilt, you will give him the benefit thereof, and acquit him.

"But a reasonable doubt, to authorize an acquittal on that ground, must be a substantial doubt of defendant's guilt, formed on the careful consideration of all the facts and circumstances proven in the case, and not a mere possibility of the defendant's innocence."—Approved: State v. Duestrow, 137 Mo. 44, 38 S. W. 554; 39 S. W. 266.

(b) "The burden of proof is upon the people in this case to show the guilt of the defendant, and all the presumptions of the law, independent of the evidence, are in favor of his innocence. The law presumes every defendant who has been indicted and charged with crime, to be innocent until he has been proven guilty, beyond all reasonable doubt. And in this case, the court instructs you that if, after you have considered all the evidence in the case, you then have a reasonable

doubt as to the guilt of the defendant, then the defendant is entitled to the benefit of that doubt, and you should acquit him."—Approved: Parsons v. People, 218 Ill. 386, 75 N. E. 993.

§ 4967. The Burden of Proof Never Shifts to Defendant.

"The burden of proof never shifts from the state to the defendant, but is upon the state throughout to first establish every constituent element of the offense."—Approved: Horn v. State, 30 Tex. App. 541, 17 S. W. 1094.

§ 4968. And He is not Bound to Overcome or Explain Evidence Against Him.

"In the absence of evidence to the contrary, the law presumes every one innocent; and this legal presumption of innocence is a matter of evidence, to the benefit of which the party is entitled. The burden of proof is on the state to satisfy the jury of his guilt. Even if he introduces no evidence at all to overcome or explain that against him, the jury should acquit him, unless the evidence introduced by the state satisfies you, beyond a reasonable doubt, that he is guilty, as charged in the indictment."—Approved: Long v. State, 23 Neb. 33, 36 N. W. 310.

§ 4969. His Explanation of Criminative Testimony Need Only be by Preponderance of Evidence.

"If the evidence offered and introduced on the part of the State, taken above, is sufficient to establish the defendant's guilt beyond a reasonable doubt, then it is incumbent on the defense to explain the facts so proved by the state, or establish his defense, and this may be done by a preponderance of the evidence; that is, if the circumstances so proved by the defense be established by a preponderance of the evidence, it necessarily leaves the material facts in dispute reasonably doubtful. If the evidence of the state fails to show the defendant guilty, he is entitled to an acquittal, unless the evidence introduced on the part of the defendant, which you deem credible and of any weight, so strengthens the proofs offered by the state as to leave no reasonable doubt of his guilt. If, upon the whole proof, and under all the evidence, there is reasonable doubt of defendant's guilt, he is entitled to an acquittal."—Approved: State v. Hemrick, 62 Iowa, 414, 17 N. W. 594.

§ 4970. State Must Prove Beyond Reasonable Doubt that Offense is Not Barred.

"You are instructed that one of the issues in this case is that the offense, if any, occurred within one year prior to the filing of the indictment herein, which is September 28, 1906, and if from the evidence, if any, or from the lack of evidence, upon this issue, you have a reasonable doubt thereon, you will acquit defendant."—Approved: Battles v. State, 53 Tex. Cr. R. 202, 109 S. W. 195.

§ 4971. Presumption of Innocence is Substantial Law not to be Disregarded.

"The jury are instructed further that the presumption of innocence is not a mere form, to be disregarded by the jury at pleasure, but it is an essential and substantial part of the law of the land, and binding on the jury in this case; and it is the duty of the jury to give the defendant in this case the full benefit of the presumption, and to acquit the defendant unless they feel compelled to find him guilty, as charged, by the law of the land and the evidence in this case, convincing them of his guilt, as charged, beyond all reasonable doubt."—Approved: State v. Lowry, 42 W. Va. 205, 24 S. E. 561.

§ 4972. Of Two Reasonable Views of Evidence that which Follows the Presumption of Innocence is to be Preferred.

"As a matter of law, if you believe from an examination of the evidence in certain of its aspects that the defendant is guilty, and if you further believe from an examination of other aspects of the evidence, that the defendant is not guilty, then you should adopt that view of the evidence which will lead to the acquittal of the defendant rather than that view which leads to his conviction, if that view of the evidence leading to his acquittal is as reasonable as that which leads to his conviction."—Approved: Parsons v. People, 218 Ill. 386, 75 N. E. 993.

§ 4973. Homicide Shown, Burden on Accused to Justify or Mitigate.

"When the killing is proved to be the act of the defendant, the presumption of innocence with which he enters upon the trial is removed from him, and the burden is then upon him to justify or mitigate the homicide; but, as before charged, the evidence to do this may be found in the evidence offered by the state to prove the killing, as well as by the evidence offered by the defendant."—Approved: Mann v. State, 124 Ga. 760, 53 S. E. 324.

B. Circumstantial Evidence.

§ 4974. Defined and Distinguished from Direct Evidence.
4975. Legal and Competent Evidence.
4976. Circumstances Must be Consistent with Each Other and with the Main Fact to be Proved.
4977. Each Circumstance Necessary to a Conclusion Must be Fully and Fairly Proven.
4978. The Facts Must be Proved by a Preponderance of Evidence and That They are Incapable of Explanation With any Reasonable Hypothesis of Innocence.
4979. Circumstances Must Exclude, to all Moral Certainty, Innocence.
4980. Must Point to Guilt and be Inconsistent with Innocence.
4981. Each Necessary Link to be Proven Beyond Reasonable Doubt.
4982. Other View is that Testimony as a Whole Must Convince Beyond a Reasonable Doubt.

4983. Must Not on any Reasonable Theory be True and Accused Innocent.
4984. If They May Apply as Well to Some Other Person Facts are Inconclusive.
4985. Jury Should Neither Enlarge nor Belittle Such Evidence.

§ 4974. Defined and Distinguished from Direct Evidence.

"Evidence is either direct and positive, or presumptive and circumstantial. Evidence is direct and positive, and the very facts in dispute are communicated by those who have had actual knowledge of them by means of their senses, and where, therefore, the jury may be supposed to perceive the fact through the organs of the witnesses. It is presumptive or circumstantial where the evidence is not direct, but where, on the contrary, a fact which is not directly and positively known is presumed or inferred from one or more other facts or circumstances which are known. The state claims that it has connected the defendant with the crime alleged in the second count of the information, not by direct and positive evidence, but by what has been herein defined as presumptive and circumstantial evidence; that is, the state has offered no evidence of a witness or witnesses who saw the act that is alleged in the second count of the information, which it is claimed resulted in the death of the said Ida G—, but the state has offered the testimony of witnesses tending to prove a catalogue of facts and circumstances which the state claims presumably and circumstantially connects the defendant with the commission of the alleged crime in said second count, and establishes his guilt of the crime charged beyond a reasonable doubt."—Approved: Morgan v. State, 51 Neb. 672, 71 N. W. 788.

§ 4975. Legal and Competent Evidence.

"The evidence in this case is what is known as 'circumstantial'; that is, no person who has testified was an eyewitness of the alleged crime, and the state seeks to connect the defendant with the crime by showing a chain of circumstances leading up to it, and connected with it and the defendant; and this is circumstantial evidence. And I will say to you that the evidence which has been received in this case is legal and competent, and if it is, in your mind, of such a character as to exclude every reasonable theory or hypotheses other than that of the defendant's guilt, beyond a reasonable doubt, then and in that event it should be given the same weight by you as would direct evidence of the fact alleged. Circumstantial evidence, when competent and when complete and satisfying to your minds, as has been charged, is entitled to the same weight that direct evidence is."—Approved: State v. Coleman, 17 S. D. 594, 98 N. W. 175.

§ 4976. Circumstances Must be Consistent With Each Other and With the Main Fact to be Proved.

(a) "All the evidence produced by the state is circumstantial. There is no direct or positive evidence that the defendant committed the crime charged. And to warrant a conviction on circumstantial evidence each fact necessary to the conclusion sought to be established

must be proven by competent evidence beyond a reasonable doubt, and all the facts necessary to such conclusion must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no other person, committed the offense charged. The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to generate and justify full belief according to the standard rule of certainty. It is not sufficient that they coincide with and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis. No other conclusion but that the guilt of the accused must fairly and reasonably grow out of the evidence, but the facts must be absolutely incompatible with innocence, and incapable of explanation upon any other reasonable hypothesis than that of guilt."—Approved: Colbert v. State, 125 Wis. 423, 104 N. W. 61.

(b) "Gentlemen of the jury, the state in this case seeks to some extent to convict the defendant of the crime charged on circumstantial evidence; that is, there is no evidence by any witness that saw the fatal blow struck. Evidence is of two kinds—direct and circumstantial. Circumstantial evidence is proof of certain facts and circumstances in a certain case in which the jury may infer other and connected facts which usually and reasonably follow according to the common experience of mankind. Crime may be proven by circumstantial evidence as well as by direct testimony of eyewitnesses, but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of defendant's innocence."—Approved: State v. Shelton, 223 Mo. 118, 122 S. W. 732.

§ 4977. Each Circumstance Necessary to a Conclusion Must be Fully and Fairly Proven.

"Where the conviction of a crime is sought on circumstantial evidence, each circumstance necessary to reach a conclusion of guilt, must be fully and fairly proven, and, if in considering any such necessary circumstances you have a reasonable doubt in your mind as to the evidence being sufficient to fully prove such circumstance, such doubt should be solved in favor of the defendant, and you should return a verdict of not guilty."—Approved: State v. Harmann, 135 Iowa, 167, 112 N. W. 632.

§ 4978. Facts Proven by Preponderance of Evidence and that they are Incapable of Explanation with Any Reasonable Hypotheses of Innocence.

"The jury are instructed as a matter of law that when a conviction for a criminal offense is sought upon circumstantial evidence alone, the prosecution must not only show, by a preponderance of evidence, that the alleged facts and circumstances are true, but they must show by such facts and circumstances as are absolutely incompatible, upon any

reasonable hypothesis, with the innocence of the defendant, and incapable of explanation, upon any reasonable hypothesis, other than that of the guilt of the defendant."—Approved: Benton v. State, 78 Ark. 284, 94 S. W. 688.

§ 4979. Circumstances Must Exclude, to All Moral Certainty, Innocence.

"The jury are further instructed that in order to convict the defendant upon circumstantial evidence, it is necessary not only that all the circumstances concur to show that he committed the crime charged, but that those circumstances are inconsistent with any other reasonable conclusion than that of his guilt. It is not sufficient to entitle the prosecution to a conviction that the circumstances coincide with account for, and render probable, the hypothesis of guilt sought to be established by the prosecution, but those circumstances must exclude, to all moral certainty, every other hypothesis but the single one of the guilt of the defendant, or the jury must find the defendant not guilty."—Approved: Parsons v. People, 218 Ill. 386, 75 N. E. 993.

§ 4980. Must Point to Guilt and be Inconsistent with Innocence.

"The court instructs the jury that in this case the evidence of facts and circumstances must be such as to exclude, to a moral certainty, every hypothesis but that of guilt of the offense imputed, or, in other words, the facts and circumstances must not only all be consistent with and point to the guilt of the accused, but they must be inconsistent with his innocence. And unless the facts and circumstances in evidence are sufficient to satisfy your minds and consciences beyond a reasonable doubt that the defendant is guilty, you should acquit."—Approved: State v. Sharpless, 212 Mo. 176, 111 S. W. 69.

§ 4981. Each Necessary Link to be Proven Beyond a Reasonable Doubt.

"The prosecution claim that the evidence in this case is made up of a chain of circumstances and facts, or links, so connected together that they lead up with all reasonable certainty to the defendant's guilt. Gentlemen, I charge you that, in order to convict the defendant upon this class of evidence, you must be satisfied beyond a reasonable doubt that each material fact, or necessary link, in the chain, has been proven, and, if you have any reasonable doubt about any one of the material facts, or links, constituting the chain of circumstances, then you should acquit the defendant. To illustrate, the first material fact or link is death. That is not disputed. Second, death by violence by the hands of some person. That is disputed. Third, death by violence by the hand of the defendant. That is denied by the defendant. If you have any doubt of whether or not the defendant inflicted any blow on the deceased, then it is your duty to acquit him. If you have any doubt that the blow claimed to have been inflicted by the defendant was the sole cause of the death of the deceased, it is still your duty to acquit him."—Approved: People v. McArron, 121 Mich. 1, 79 N. W. 944.

§ 4982. Other View is That Testimony as a Whole Must Convince Beyond a Reasonable Doubt.

"The law requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish guilt. It is sufficient if, taking the testimony altogether, you are satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged in the second count of the information. But if you have a reasonable doubt of the defendant's guilt, because of the weakness of one link of the chain of circumstances relied upon by the state to establish the defendant's guilt, when taken and weighed by you with all the evidence in the case, it may fairly be said that a reasonable doubt exists in your minds, and you should acquit the defendant of the crime charged in the second count of the information."—Approved: Morgan v. State, 51 Neb. 672, 71 N. W. 788.

§ 4983. Must Not on Any Reasonable Theory be True and Accused Innocent.

"The court instructs the jury that it is an invariable rule of law that to warrant a conviction for a criminal offense, upon circumstantial evidence alone, such a state of facts and circumstances must be shown as that they are all consistent with the guilt of the party charged, and such that they cannot, upon any reasonable theory, be true and the party charged be innocent."—Approved: Marion v. State, 15 Neb. 676, 20 N. W. 289.

§ 4984. If they May Apply as well to Some Other Person, the Facts are Inconclusive.

"Where circumstances alone are relied upon for conviction, the rule of law is, to warrant a conviction such a state of facts and circumstances must be shown that they are all consistent with the guilt of the defendant, and such as cannot, upon any reasonable theory and hypothesis, be true, and the defendant be innocent; and in this case this rule should be applied by the jury to that portion of the evidence offered by the state wholly of a circumstantial nature, and if the jury find from the evidence that all the incriminating circumstances upon which the prosecution relies for a conviction will as well apply to some other person or persons as to the defendant, or if such facts and circumstances are reconcilable with any reasonable theory or hypothesis other than the guilt of the defendant, or if such facts and circumstances, together with the direct evidence offered in this case, do not satisfy the minds of the jury beyond any reasonable doubt, of the guilt of the defendant, then you should, by your verdict, acquit him."—Approved: Davis v. State, 51 Neb. 301, 70 N. W. 984.

§ 4985. Jury Should Neither Enlarge or Belittle Such Evidence.

"Circumstantial evidence is to be regarded by the jury in all cases. It is many times quite as conclusive in its convincing power as direct and positive evidence of eyewitnesses. When it is strong and satisfac-

tory, the jury should so consider it, neither enlarging or belittling its force. It should have its just and fair weight with the jury; and if, when it is all taken as a whole, and fairly and candidly weighed, it convinces the guarded judgment, the jury should act on such conviction. You are not to fancy situations and circumstances which do not appear in evidence, but you are to make those just and reasonable inferences from circumstances proven which the guarded judgment of a reasonable man would ordinarily make under like circumstances."—Approved: Smith v. State, 61 Neb. 296, 85 N. W. 49.

C. Flight.

§ 4986. Circumstance Prima Facie Indicative of Guilt.
4987. Fact of More or Less Weight to Show Consciousness of Guilt.
4987a. Flight Circumstance to be Considered with All the Other Evidence.
4988. Presumption of Guilt to be Taken into Consideration.
4989. Corroborative Evidence Tending to Connect Defendant With the Crime Alleged.
4990. Attempt to Escape Unexplained Raises Presumption of Guilt.
4991. Attempted Escape a Circumstance to be Taken into Consideration.

§ 4986. Circumstance Prima Facie Indicative of Guilt.

"If you find from the evidence that the defendant, upon being informed that he was suspected of taking the life of said George P. F—, fled to avoid arrest, and remained away, going under an assumed name, such fact is a circumstance which prima facie is indicative of guilt."—State v. Seymore, 94 Iowa, 699, 63 N. W. 661.

§ 4987. Fact of More or Less Weight to Show Consciousness of Guilt.

"The flight of a person suspected of a crime is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, and is entitled to more or less weight according to the circumstances of the particular case."—Approved: People v. Easton, 148. Cal. 50, 82 Pac. 840.

§ 4987a. Flight Circumstance to be Considered with All the other Evidence.

"Evidence has been offered tending to show flight by the defendant from the state of Kansas to the state of Washington, at or about the time the complaint was filed charging him with the crime alleged against him in the information. If you find from the evidence that the defendant did, at or about the time the charge contained in the information was first preferred against him, flee to a distant section of the country, and that such flight was induced by such charge, this is a circumstance to be considered by you in connection with all the other evidence to aid you in determining the question of his guilt or innocence."—Approved: State v. Thomas, 58 Kan. 805, 808.

§ 4988. Presumption of Guilt to be Taken into Consideration.

"Flight raises the presumption of guilt, and, if the jury believe and find from the evidence that, after the commission of the offense alleged in the information, the defendant fled from the state, and tried to avoid arrest and trial for said offense, then the jury may take this fact into consideration in determining his guilt or innocence."—Approved: State v. Hottman, 196 Mo. 110, 94 S. W. 237.

§ 4989. Corroborative Evidence Tending to Connect Defendant with the Crime Charged.

"If the offense was committed, and prosecutrix charged him therewith, and defendant knew that she so accused him, and, while so knowing thereupon fled from the vicinity for the purpose of avoiding or retarding prosecution in the case, then such flight is admitted in law as a circumstance against him, and it is to be received as evidence tending to connect him with the commission of the crime charged. In such case this is corroborative evidence within the meaning of the law tending to connect the defendant with the commission of the crime charged. The credibility, weight, and sufficiency of it as such corroborative evidence is a question solely for your determination in the light of all the evidence in the case."—Approved: State v. Hetland, 141 Iowa, 524, 119 N. W. 961.

§ 4990. Attempt to Escape Unexplained Raises Presumption of Guilt.

"The court instructs the jury that where there is evidence introduced as to an attempted escape by the defendant, who has been charged with an offense, to avoid his arrest by the officers of the law and trial, such attempt to escape, in the absence of qualifying circumstances, raises a presumption of guilt; and if you find from the evidence in this case that the defendant did attempt to escape to avoid arrest and trial, this is a circumstance to be considered by you, in connection with all the other evidence, to aid you in determining the question of the guilt or innocence of defendant."—Approved: State v. Hunt, 141 Mo. 626, 43 S. W. 389.

§ 4991. Attempted Escape a Circumstance to be Taken Into Consideration.

If the jury find and believe from the evidence in this case that the defendant while confined in the county jail of Clinton county, Missouri, by the use of a saw, attempted to escape therefrom, with the intent of avoiding trial for the charge herein, they may take that fact into consideration in determinig the guilt or innocence of the defendant."—Approved: State v. Cushenberry, 157 Mo. 168, 56 S. W. 737.

D. Confessions.

§ 4992. Jury Must be Satisfied Statements Were Substantially as Testified to.
4993. Received with Caution Because of Danger of Misapprehension.
4994. When Voluntarily and Deliberately Made Evidence of Highest Character.

4995. To be Wholly Disregarded Unless Believed to Have Been Freely Made.
4996. Not Voluntary if Induced by Any Threat or Promise.
4997. If Accused Led to Believe to His Interest to Make, Should be Rejected.
4998. Regarded Precisely as Other Testimony in the Case.
4999. Jury May Believe a Part and Reject the Balance.
5000. If Defendant Did Not Know What He was Saying, Confession Discarded.
5001. What Defendant Said Against Himself Presumed to be True.
5002. Distinction Between Admissions and Confessions.
5003. Admissions Made in Civil Trial Competent in Criminal Prosecution.

§ 4992. Jury Must be Satisfied Statements Were Substantially as Testified to.

"Before you can regard this alleged confession as evidence against the defendant you must be satisfied that the statements were made by him substantially as given by the witnesses and contained in the paper prepared by the sheriff and signed by the defendant; that such confession and all the statements contained therein were freely and voluntarily made by the defendant. * * *

"So that this confession is not evidence to be considered by you unless you find that there was no fear produced by threats and no promise made by the district attorney, or on behalf of the district attorney, not to prosecute him on this charge. * * * If there was no threat and no promise that he should not be prosecuted, and if the statements were made voluntarily, as they are contained in the written paper, and were testified to by these three witnesses, then you may consider such statement as some evidence in support of the charge here made against him. The confession is not sufficient to warrant the conviction of the defendant—that is, it, alone, is not sufficient; there must be additional proof that the crime charged against the defendant has been committed."—Approved: People v. Rogers, 192 N. Y. 331, 85 N. E. 135.

§ 4993. Received with Caution Because of Danger of Misapprehension.

(a) "Some evidence has been offered of statements made by defendant at the time of his arrest, and I charge you in relation thereto that such statements at the time of the arrest are to be received with great caution; for besides the danger of misapprehension of witness, or the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is often oppressed by the calamity of his situation, and that he is often influenced by motive of hope or fear to make statements."—Approved: People v. McArron, 121 Mich. 1, 79 N. W. 944.

(b) The jury are instructed that evidence of confession or admission should be carefully scrutinized by the jury and received with great caution, though a witness is perfectly honest, it is impossible for him in most cases to give exact words in which any admission was made; and sometimes by the transposition of the words a party may find a mean-

ing entirely different from that which was intended to be conveyed by the witness."—Approved: State v. Fleming, 17 Idaho, 471, 106 Pac. 305.

§ 4994. When Voluntarily and Deliberately Made Evidence of Highest Character.

"Should you find from the evidence that the defendant voluntarily and deliberately confessed his guilt of the theft of the harness alleged to have been stolen in the information, such confession, if made under the circumstances I have indicated, furnishes evidence of the highest character against him; but it is for you to say, as a question of fact, whether or not the defendant voluntarily and deliberately confessed the taking of said harness, and, if you should find from the evidence that the defendant made such confession, you may properly consider the time, place, and circumstances under which such confession was made, and all the attending circumstances, for the purpose of determining what weight you should give to such confession, in case you find a confession was in fact made, as indicated in this instruction."—Approved: State v. Wortman, 78 Kan. 847, 98 Pac. 217.

§ 4995. To be Wholly Disregarded Unless Believed to Have Been Freely Made.

"The court charges you to wholly disregard the alleged confession of defendant, unless you believe from the evidence that the same, if any, was freely and voluntarily made. If you believe from the evidence that the confession, if any, was made on compulsion or promise on the part of the officer or officers in question you will wholly disregard said alleged confession. The only way in which you can consider the confession, if any, in evidence, is for you to believe from the evidence that the same, if any, was freely and voluntarily made."—Approved: Griffin v. State, 49 Tex. Cr. R. 440, 93 S. W. 732.

§ 4996. Not Voluntary if Induced by Any Threat or Promise.

"No confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat, or promise proceeding from a person in authority, and having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly, and if such inducement, threat, or promise gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. The prosecutor, officers of justice having the prisoner in custody, or magistrate are persons in authority. It is time for the jury to determine for themselves whether the alleged confession of the defendant was made freely and voluntarily, without any influence of hope or fear. If so, they may consider it. If not, it is no evidence. Any—the slightest—menace or threat, or any hope engendered or encouraged that the prisoner's case will be lightened or more favorably dealt with if he will confess, is enough to exclude the confession thereby superinduced; and any words spoken in the hearing of the prisoner which may, in their nature, engender such fear or hope, render it necessary that a confession made within a reasonable

time afterwards shall be excluded, unless it is shown by clear and full proof that the confession was voluntarily made after all trace of hope or fear had been fully withdrawn or explained away."—Approved: People v. Clarke, 105 Mich. 169, 62 N. W. 1117.

§ 4997. If Accused Led to Believe to His Interest to Make, Should be Rejected.

"Testimony has been given before you in this case of certain alleged confessions and admissions claimed to have been made by the respondents. It was the duty of the court to determine, in the first place, whether such alleged confessions were so far voluntary as to admit them in evidence for you consideration. The court did not, however, thereby determine them to be voluntary, and whether they were voluntary or not is a matter to be determined by you alone, without reference to their admission. If you find them to have been made voluntarily, you will consider them with all the other evidence in the case; but if you find that they were not voluntary, or if you find that they were made because of hopes held out to them, or because of fear, or because of inducements made to them to confess, you will reject them. Under such circumstances no reliance could be placed upon admissions of guilt, for the obvious reason that it could not be said that they were made because they were true, but because, whether true or false, the accused was led to believe it for his best interest to make them. And what I say upon this branch of the case I mean to apply also to the alleged written statements. I further say to you that the confessions of a prisoner out of court are a doubtful species of evidence, and should be acted upon with great caution, and unless they are supported by some other evidence tending to show that the prisoners committed the crime they are rarely sufficient to warrant a conviction. The credit and weight to be given to confessions depend very much upon what the confessions are. If the crime itself as charged is proved by other testimony, and it is also proved that the defendants were so situated that they had an opportunity to commit the crime, and their confessions are consistent with such proof and corroborative of it, and the witness who swears to the confession is apparently truthful, honest, and intelligent, then confessions so made might be entitled to weight. And you are also instructed that in criminal prosecutions the admissions of prisoners are received in evidence upon the same principle that admissions in civil suits are received; that is, upon the presumption that a prisoner will not voluntarily make an untrue statement against his own interest. I further charge you that where the verbal admissions of a person charged with crime are offered in evidence, the whole of the admission must be taken together, as well that part which makes for him as that which may make against him, and if the part of the statement which is in favor of the respondent is not disproved, and is not apparently improbable or untrue, when considered with all the other evidence in the case, then such part of the statement is entitled to as much consideration from the jury as any other part of the statement. Alleged confessions and statements of these respondents were received simply and only as af-

fecting the particular one alleged to have made them, and cannot be considered by you against the other."—Approved: People v. Barker, 60 Mich. 277, 27 N. W. 539.

§ 4998. Regarded Precisely the same as Other Testimony in the Case.

"If the jury believe from the evidence beyond a reasonable doubt that the defendant, John B—, made the confession as alleged, and which has been admitted in evidence in this case, the jury should treat such alleged confession precisely as they would any other testimony in the case. You are not bound to believe as true the statements contained in such alleged confession, but may give to them such weight as you think proper in view of all the other facts and circumstances appearing on the trial, and in determining the weight to be given to such alleged confession you may take into consideration all the circumstances under which the same was made, including the age, mental condition, intelligence, lack of intelligence, character, situation, disposition, and experience of the defendant, the fact that he was under arrest at the time the same is alleged to have been made, the statements, threats, or promises, if any, made to him at the time, and all the other attending circumstances. The jury are at liberty to judge of it like any other evidence, in view of all the circumstances of the case as disclosed by the evidence, for your power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence."—Approved: State v. Berberick, 38 Mont. 423, 100 Pac. 209.

§ 4999. Jury May Believe a Part and Reject the Balance.

"If the jury believes from the evidence that the defendant made the confession as alleged and attempted to be proved in the case, the jury should treat and consider such confession precisely as they would any other testimony. Hence, if you believe the whole confession to be true, you should act upon the whole as true. But you may believe part of the testimony and reject the balance if you see sufficient grounds in the evidence for so doing. You are at liberty to act on it like other evidence in view of all the circumstances of the case as disclosed by the evidence."—Approved: State v. Barker, 56 Wash. 510, 106 Pac. 133.

§ 5000. If Defendant Did Not Know What He was Saying, Confession Discarded.

"The court further instructs the jury that, if they believe and find from the evidence that the defendant made any statement or statements in relation to the homicide, after said homicide is alleged to have been committed, the jury must consider such statement or statements altogether.

"The defendant is entitled to the benefit of what he said for himself, if true, and the state is entitled to the benefit of anything he said against himself in any statement or statements proven by the state; what the defendant said against himself the law presumes to be true, because said against himself; what the defendant said for himself, the jury are not bound to believe, because it was said in a statement or statements proven by the state; but the jury may believe, or disbelieve

it, as it is shown to be true or false by the evidence in this cause. It is for the jury to consider, under all the circumstances, how much of the whole statement or statements of the defendant, proved by the state, the jury, from the evidence in this cause, deem worthy of belief.

"If you find and believe, however, from the evidence, that the defendant, at the time he made any statement concerning the crime charged, and his connection therewith, was insane, and not of sufficient mind and memory to understand or comprehend what he was saying, then such statement or statements made by defendant, while in such condition, you will not consider."—Approved: State v. Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

§ 5001. What Defendant Said Against Himself Presumed to be True.

"If verbal or written statements of the defendant have been proven in this case, you may take them into consideration, with all the other facts and circumstances proven. What the proof may show you, if anything, that the defendant has said against himself, is presumed to be true, because against himself; but anything you may believe from the evidence the defendant said in his own behalf, you are not obliged to believe, but you may treat the same as true or false, just as you believe it true or false, when considered with a view to all the other facts and circumstances in the case."—Approved: State v. Hottman, 196 Mo. 110, 94 S. W. 237.

§ 5002. Distinction Between Admissions and Confessions.

"The testimony of some witnesses has been offered by the state to show certain oral statements made by the defendant now on trial, after the death of Oliver S—. In criminal law a statement voluntarily made by a person of a fact only, which is as consistent with his innocence as with his guilt, and is made exculpatory, or in explanation of any suspicious incriminating circumstances, is an admission; but when the statement carries with it a suggestion of guilt, either as to the character of his intent, or the quality of his act, and the statement is made inculpatory, such statement is in the nature of a confession."—Approved: State v. Caseday (Or.), 115 Pac. 287.

§ 5003. Admissions Made in Civil Trial Competent in Criminal Prosecution.

"The court instructs the jury that the fact that the defendant testified in an insolvency proceeding in obedience to a citation did not deprive him of his right to refuse to answer questions tending to criminate him, if he did answer any such questions; and an admission made by him in such proceeding is voluntary and competent evidence in a criminal prosecution subsequently inaugurated, where he was not in custody or charged with a criminal offense when he made such admission, if he did make any such."—Approved: State v. Burrell, 27 Mont. 282, 70 Pac. 982.

CHAPTER CXXXVI.

DEFENDANT AS WITNESS.

A. Defendant as Witness.
B. Good Character of Accused.

A. Defendant as Witness.

§ 5004. His Testimony to be Tested the Same as that of Other Witnesses.
5005. It must be Weighed and not Arbitrarily Rejected.
5006. Jury may Take Into Consideration his Interest in the Result.
5007. And Also his Demeanor and Conduct on the Stand.
5008. And the fact that he has been Contradicted by Other Witnesses.
5009. Such Interest Creates no Presumption of Falsity.
5010. May Take Into Consideration the Enormity of the Crime Charged.
5011. His Manner and the Probability of his Statements to be Considered.
5012. His Temptation to Testify Falsely may be Considered.
5013. Failure to Testify not to be Taken Against him or Discussed.
5014. No Presumption of Guilt from Failure to Testify.
5015. Failure to Testify Should not be Permitted to Prejudice Defendant.
5016. Evidence of Another Charge Merely to Aid in Determining Credibility.

§ 5004. His Testimony to be Tested the Same as that of Other Witnesses.

(a) "The defendant, under our statute, is allowed to testify under oath in his own behalf, and it is the duty of the jurors, where he has done so, to give his testimony such weight as, in view of all the facts and circumstances shown, it shall appear to them to be entitled to. His testimony is to be tested the same as that of other witnesses. If rational, natural, and consistent, it may outweigh the testimony of all other witnesses."—Approved: People v. McArron, 121 Mich. 1, 79 N. W. 944.

(b) "In the beneficence of our modern statutes, in this state, one on trial for a crime is allowed to testify under oath in his own behalf. His interest in the result of the trial, that would formerly preclude his so testifying, now has not that effect, and it is the duty of jurors, where this is done, to give his testimony such weight as, in view of

all the facts and circumstances shown, it shall appear to them to be entitled to. His interest is to be considered only so far as it affects his credit. His testimony is to be scanned and tested the same as that of other witnesses. If rational, natural, and consistent, it may outweigh the testimony of other witnesses. If inconsistent with established facts, or with his prior statements, you will treat it the same as you would that of any other witness whose testimony is thus defective."—Approved: People v. Willett, 105 Mich. 110, 62 N. W. 1115.

§ 5005. It Must be Weighed and not Arbitrarily Rejected.

(a) "In considering the weight and effect to be given to the evidence of the defendant, while you may consider his manner, and the probability of his statements, taken in connection with all the evidence in the case, and, if convincing and carrying with it a belief in its truth, act upon it; if not, you have the right to reject. But this does not mean that you have a right to arbitrarily reject it. And, in judging of the defendant who has testified before you, you are in duty bound to presume that he has spoken the truth; and, unless that presumption has been legally repelled, his evidence is entitled to full credit."—Approved: People v. Hill, 1 Cal. App. 414, 82 Pac. 398.

(b) "The court instructs the jury, as a matter of law, that in this state one accused and on trial charged with the commission of a crime may testify in his own behalf, or not, as he pleases. You are instructed that when a defendant does testify in his own behalf, then you have no right to disregard his testimony merely because he is accused of crime; that when he does so testify he at once becomes the same as any other witness, and his credibility is to be tested by and subjected to the same tests as are legally applied to any other witness; and in determining the degree of credibility that shall be accorded to his testimony the jury have a right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct upon the witness stand; and the jury may also take into consideration the fact, if such is the fact, that he has been corroborated or contradicted by credible evidence or by facts or circumstances in evidence. And the court further instructs the jury that if, after considering all the evidence in this case, they find that any witness testifying on behalf of either side has wilfully and corruptly testified falsely to any fact material to the issue in this case, then they have the right to disregard the testimony of such witness, except in so far as corroborated by other credible evidence or facts and circumstances in evidence. The question of the weight and credit to be given to each and every witness, on either side, is entirely for the jury."—Approved: People v. Scarbak, 245 Ill. 435, 92 N. E. 286.

§ 5006. Jury May Take Into Consideration his Interest in the Result.

(a) "The court instructs the jury that the defendant is a competent witness in his own behalf, and you may consider his testimony; but in determining what weight and credit you will give his testimony, you may take into consideration the fact that he is the defendant on trial,

and interested in the result of the trial."—Approved: State v. Brown, 216 Mo. 351, 115 S. W. 967. See, also, Henry v. People, 198 Ill. 162, 65 N. E. 120; Holmes v. State, 85 Neb. 506, 123 N. W. 1043.

(b) "You are instructed that you have no right to disregard the testimony of the defendant on the ground alone that he is defendant and stands charged with the commission of a crime, nor are you required to receive the testimony of the defendant as true, but you are to fully and fairly consider whether it is true, and for this purpose you have a right to consider the interest of the defendant in this prosecution. The law presumes the defendant to be innocent until he is proven guilty by the evidence beyond a reasonable doubt, and the law allows him to testify in his own behalf, and you should fairly and impartially consider his testimony together with all the other evidence in the case."—Approved: Johnson v. State (Neb.), 130 N. W. 282.

§ 5007. And also his Demeanor and Conduct on the Stand.

"The defendant is a competent witness in his own behalf, and when he testified as a witness in this case he became as any other witness, and his credibility is to be tested by, and is subject to, the same tests as are legally applied to any other witness; and, in determining the degree of credibility that should be accorded to the testimony of the defendant, the jury have a right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct on the witness stand."—Approved: Territory v. Taylor, 11 N. M. 588, 71 Pac. 489.

§ 5008. And the Fact that he has been Contradicted by Other Witnesses.

"The jury are instructed that, when the defendant testified in this case, he became as any other witness, and his credibility is to be tested by, and subjected to, the same tests as are legally applied to any other witness; and, in determining the degree of credibility that shall be accorded to his testimony, the jury have a right to take into consideration the fact that he is interested in the result of this prosecution, as well as his demeanor upon the stand, and the fact that he has been contradicted by other witnesses."—Approved: Philamalee v. State, 58 Neb. 320, 78 N. W. 625.

§ 5009. Such Interest Creates no Presumption of Falsity.

"Under the law of this state, the defendants are competent witnesses in their own behalf. They have given their testimony and it is before you to consider with the other evidence in the case. They are directly interested in the result of this trial. In determining the weight to be given to their testimony it is proper for you to take such interest into consideration. You are to give their testimony such weight as, under all circumstances, you think it entitled to. If other witnesses have any such interest, disclosed by the evidence, it is your duty to consider it in determining the degree of credit that should be given their testimony. You are cautioned, however, that interest in the result of the trial creates no presumption that such witnesses

will swear falsely."—Approved: Emery v. State, 101 Wis. 627, 78 N. W. 145.

§ 5010. May Take Into Consideration the Enormity of the Crime Charged.

"A defendant in a criminal case may be sworn and may testify in his own behalf. In such a case the jury, in judging of the credibility and weight to be given his testimony, must take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he is accused. You are instructed that you have no right to disregard the testimony of the defendant on the ground alone that he is the defendant, and stands charged with the commission of a crime. The law presumes the defendant to be innocent until he is proved guilty by the evidence beyond a reasonable doubt, and the law allows him to testify in his own behalf; and the jury should fairly and impartially consider his testimony, under the instructions above given, together with all the other evidence in the case, and if, from all the evidence, the jury have a reasonable doubt as to the guilt of the defendant, it is your duty to acquit him."—Approved: State v. Dotson, 26 Mont. 305, 67 Pac. 938.

§ 5011. His Manner and the Probability of his Statements to be Considered.

"The defendant has offered himself as a witness on his own behalf in this trial, and in considering the weight and effect to be given his evidence, in addition to noticing his manner and the probability of his statements, taken in connection with the evidence with (in) the cause, you may consider his relation and situation under which he gave his testimony, the consequences to him relating as a result from this trial, and all of the inducements and temptations which would ordinarily influence a person in his situation. You should carefully determine the amount of credibility to which the witness is entitled. If convincing and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it."—Approved: Younger v. State, 12 Wyo. 24, 73 Pac. 551.

§ 5012. His Temptation to Testify Falsely May be Considered.

"Under the law, the defendant is a competent witness in his own behalf. He has given his testimony, and you are the judges of the weight which ought to be attached to it. He is directly interested in the result of the trial. In determining the weight to be given to his testimony, it is proper for you to take such interest into consideration. You are to give his testimony such weight as, under all the circumstances, you think it is entitled to. You have the right to consider his situation, his interest in the result of the trial, the temptation that exists under the circumstances to testify falsely, and everything appearing in the case bearing upon his credibility, and to give to his testimony just such weight as you think it entitled to, no more, no less. His testimony is to be considered with all the other evidence in the case."—Approved: Anderson v. State, 133 Wis. 601, 114 N. W. 112.

§ 5013. Failure to Testify not to be Taken Against him or Discussed.

"Defendant in a criminal case is permitted by law to testify in his own behalf, but his failure to do so cannot be taken as a circumstance against him, and the jury must not discuss the question of his failure to testify when considering of your verdict."—Approved: Tankersley v. State, 51 Tex. Cr. R. 224, 101 S. W. 997. It has been held error for the court to allude to such failure, as the defendant is "entitled to absolute silence on his failure to testify in his own behalf." Tines v. Commonwealth, 25 Ky. L. R. 1233, 77 S. W. 363.

§ 5014. No Presumption of Guilt for Failure to Testify.

"You are further charged that it is not incumbent on a defendant in a criminal case to testify in his own behalf, and a failure to do so is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part. Such failure on the part of the defendant to testify cannot be considered for any purpose by you."—Approved: Anderson v. State, 53 Tex. Cr. R. 341, 110 S. W. 54.

§ 5015. Failure to Testify Should not be Permitted to Prejudice Defendant.

"The defendant in this case had a right to go upon the witness stand and testify in his own behalf, if he chose to do so. The law, however, expressly provides that no presumption adverse to him is to arise from the mere fact that he does not place himself upon the witness stand. So, in this case, the mere fact that this defendant has not availed himself of the privilege which the law gives him should not be permitted by you to prejudice him in any way. It should not be considered as evidence either of his guilt or innocence. The failure of the defendant to testify is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part."—Approved: People v. Provost, 144 Mich. 17, 107 N. W. 716.

§ 5016. Evidence of Another Charge is Merely to Aid in Determining Credibility.

"If you believe that there is testimony showing or tending to show that defendant has been legally charged with some other crime or crimes than the one on trial, then you could consider such evidence only for the purpose of aiding you to determine the weight and credibility of defendant's testimony, and for no other purpose whatever."—Approved: Leftrick v. State, 55 Tex. Cr. R. 204, 116 S. W. 817.

B. Good Character of Accused.

§ 5017. Evidence as Tending to Establish a Defense.
5018. May be Sufficient to Turn the Scale in Defendant's Favor.
5019. Especially in Cases of Circumstantial Evidence.
5020. Law Presumes Less Probability of Guilt.
5021. Of Itself it May Create a Reasonable Doubt.
5022. If Guilt is Shown Beyond Reasonable Doubt, Good Character Avails Nothing.
5023. Reputation for Peace and Quietude Competent in Homicide.

§ 5017. Evidence as Tending to Establish a Defense.

"Upon the question of the good character of the defendant for being a peaceable and law-abiding citizen, the court instructs the jury that this evidence should be considered by the jury as tending to establish a defense. If, however, the jury should be satisfied of the guilt of the defendant beyond a reasonable doubt, after a full consideration of all the evidence in the case, including the evidence in regard to the character of the defendant for being a peaceable and law-abiding citizen, then, though the jury might believe the defendant had a good character for being a peaceable, law-abiding citizen before the charge for which he is now being tried, such evidence of good character would not avail the defendant as a defense and entitle him to an acquittal."—Approved: State v. Stentz, 33 Wash. 444, 74 Pac. 588.

§ 5018. May be Sufficient to Turn the Scale in Defendant's Favor.

"It is competent for a person accused of crime to prove, as a circumstance in his defense, that his previous character as to the trait involved in the charge was good. Previous good character is not of itself a defense, but is a circumstance which should be considered by the jury in connection with all the other evidence, and it may be sufficient to turn the scale in his favor, but its value as defensive evidence in any given case is to be determined by the jury."—Approved: State of Iowa v. Donovan, 61 Iowa, 278, 16 N. W. 130.

§ 5019. Especially in Cases of Circumstantial Evidence.

"You are instructed that evidence of good character is always receivable in a court of law, where a person is charged with the commission of a crime, and sometimes it proves a very important part of the testimony, as, for instance, in a case that depends entirely upon circumstantial evidence, or where the testimony as to the commission of the crime or offense is very contradictory. In such cases the testimony might be very important. Sometimes in such a case the testimony of good character would turn the scale in favor of the defendant. But, in a case where the testimony is direct and positive as to the commission of the offense, it is not of so much weight—not of so much value. Still it is to be considered by the jury, and to be given by them all the weight they believe it entitled to receive. It should be considered in connection with all of the other testimony and circumstances surrounding the alleged commission of the offense."—Approved: Grabowski v. State, 126 Wis. 44, 105 N. W. 806.

§ 5020. Law Presumes Less Probability of Guilt.

"The previous good character of the defendant, if proved to your reasonable satisfaction, is a fact in the case which you ought to consider in passing upon the question of his guilt or innocence of this charge, for the law presumes that a man whose character is good is less likely to commit a crime than one whose character is not good. But if all of the evidence in the case, including that which has been given touching the previous good character of the defendant, shows him to be guilty of the charge, then his previous good character cannot justify or excuse the commission of the offense."—Approved: State v. Gordon, 196 Mo. 185, 95 S. W. 420.

§ 5021. Of Itself it May Create a Reasonable Doubt.

"In this case the defendant has offered direct evidence that he has a good character. * * * It is the law that evidence of good character may of itself create a reasonable doubt when without it none would exist. It is for you as jurors to say what weight the evidence relating to the character of the defendant should be given in determining the question of his guilt of the crime charged, or of any lesser degree or of any lesser crime. No matter how conclusive the testimony may be, the law is that the character of the accused may be such as to create a doubt in view of the improbability that a person of such character would be guilty of the offense charged and that the other evidence that is being urged against him is false or the witnesses who stated those facts are mistaken. It is for you to say, in view of what the seven witnesses from Olean have said about the defendant's character, whether that evidence as to his character leads you to a reasonable doubt as to the truth of the testimony that is claimed to have established that the defendant is guilty beyond a reasonable doubt. If you are satisfied beyond a reasonable doubt of the defendant's guilt, evidence of the defendant's good character is of no importance whatever. Evidence of good character is not a defense for a guilty man. It is only to be considered by the jurors in reaching a conclusion as to his guilt. After you have reached a conclusion beyond a reasonable doubt as to the guilt of a person, the question of character cannot be of any importance, but in investigating the case, analyzing the evidence, resolving doubts as to the various facts and circumstances that have been established, putting the items of evidence and the facts that are claimed to exist in their proper place, you are bound as jurors to consider the character of the accused and give it such weight as you as jurors deem proper under the law as I have given it to you, and in disposing of all questions which are required to be proved by the people to your satisfaction beyond a reasonable doubt."—Approved: People v. Gilbert, 199 N. Y. 10, 92 N. E. 85.

§ 5022. If Guilt is Shown Beyond a Reasonable Doubt, Good Character Avails Nothing.

"Evidence as to the good reputation of the defendant for honesty and integrity was received, and you should consider such evidence, together with all the other evidence in the case, in arriving at your

verdict. But if, from all the evidence in the case, you are satisfied of his guilt beyond a reasonable doubt, then it is immaterial what his reputation has heretofore been as to honesty and integrity."—Approved: State v. Dunn, 125 Wis. 181, 102 N. W. 935.

§ 5023. Reputation for Peace and Quietude Competent in Homicide.

"You are instructed that the defendant is entitled to have the evidence touching the question of his reputation for peace and quietude considered by the jury in determining the question of his guilt, and especially in determining the question as to who was the aggressor in the affray in which K— lost his life. In such cases, proof of good reputation for peace and quietude on the part of the defendant is proper evidence to be considered by the jury in connection with all the other evidence. In determining the guilt or innocence of the accused, the weight to be attached to the fact of good character or reputation, like that to be attached to every other fact of the case, is for the jury alone to determine."—Approved: State v. Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883.

CHAPTER CXXXVII.

INDICTMENT AND INFORMATION.

A. Indictment and Information.
B. Former Jeopardy.

A. Indictment and Information.

§ 5024. Defendant Tried Only on the Specific Charge Therein.
5025. It is Not Evidence and Jury Should Not be Biased by it.
5026. And Presumption of Innocence is in no Way Disturbed by it.
5027. No Variance for Failing to Prove Exact Day of Offense.

§ 5024. Defendant Tried Only on the Specific Charge Therein.

(a) "The defendant must be tried by you only on the specific charge specified in the indictment. He must be convicted of no other crime nor upon any other charge. You must confine your deliberations upon the whole evidence to the particular crime charged in the indictment, and if that crime has not been proven beyond a reasonable doubt, you must acquit the defendant."—Approved: State v, Coss, 53 Or. 462, 101 Pac. 193.

(b) "As has been stated to you, the defendant is on trial for the crime charged in the information, and for no other crime. The law in its wisdom does not undertake to regulate the moral conduct of its subjects, and even if you find that the defendant's conduct has been very reprehensible morally, still if you are not convinced of his guilt beyond a reasonable doubt of the crime charged in the information, you should find the defendant not guilty, no matter what your opinion may be of his conduct otherwise."—Approved: People v. Chadwick, 143 Cal. 116, 76 Pac. 884.

(c) "You are instructed that the information in this case, or the fact that an information has been filed against the defendant, is not to be taken or considered by you as evidence against him. Such information contains simply the charge or allegations made necessary under the law as a basis upon which an accused is to be tried."—Approved: Kastner v. State, 58 Neb. 767, 79 N. W. 713.

§ 5025. It is not Evidence and Jury Should not be Biased by it.

"The information is a mere formal charge against the defendant and is no evidence of his guilt of the charge therein contained, and no juror should permit himself to be in any way biased or prejudiced against the defendant on account of the filing of the information against him."—Approved: State v. Gordan, 196 Mo. 185, 95 S. W. 420.

§ 5026. And Presumption of Innocence is in no way Disturbed by It.

"The information in this case, filed on the —— day of ————, 1905, charges the defendant with the crime of murder in the first degree. To this charge defendant pleads not guilty. In making up your verdict in this case, the jury will be governed by the instructions given by the court, as follows: The information in this case is a mere formal accusation against the defendant. It is no evidence of his guilt, and no juror should permit himself to be influenced against the defendant because or on account of said information. The law presumes the defendant to be innocent, and this presumption of innocence attends him throughout the trial until his guilt is established by the evidence beyond a reasonable doubt. If, therefore, upon a consideration of all the evidence, you have a reasonable doubt of the guilt of the defendant, you should acquit him, but a doubt to authorize an acquittal on that ground should be a substantial doubt touching the guilt of defendant, and not a mere possibility of his innocence."—Approved: State v. Darling, 199 Mo. 168, 97 S. W. 592.

§ 5027. No Variance for Failing to Prove Exact Day of Offense.

"It is not necessary, in order to establish the offense charged, that the state should prove the charge or crime to have been committed on the exact day alleged in the information. It would be sufficient to show that the crime was committed at any time within two years prior to the 14th day of September, 1904, which was the day this prosecution was begun."—Approved: State v. Lackey, 72 Kan. 95, 82 Pac. 527.

B. Former Jeopardy.

§ 5028. Must Prove Bar by Preponderance of Evidence.
5029. If Property Alleged to be Stolen is Same Jury Must Acquit.
5030. If Offenses in Both Trials Substantially the Same, the Defense is Valid.
5031. If Former Prosecution is Collusive, Defense Rejected.
5032. If Prosecution Invited to Evade Prosecution for Higher Offense, Defense Rejected.

§ 5028. Must Prove Bar by Preponderance of Evidence.

"The defendant has pleaded specially that he has heretofore been tried and legally convicted upon the accusation as herein charged in a court of competent jurisdiction, to-wit, in the county court of Grayson Co., Tex., and evidence has been introduced before you in regard to said plea. You are charged that in order to sustain said plea you must be satisfied from the evidence that the offense for which the defendant was so formerly convicted grew out of the identical transaction involved in this case—that is, that the transaction growing out of which the defendant was prosecuted and convicted in said former case is the identical transaction upon which this prosecution is based; and the burden of proof is on the defendant to show by a preponderance of the evidence, by which is meant the greater weight and degree of credible testimony, that said transactions were one and the same. If you are

so satisfied, and so believe from the evidence, then the form of your verdict will be, 'We, the jury, find that the matters alleged in the defendant's plea of former conviction are true,' and you need not inquire any further into nor render or return any further verdict in this case." —Approved: Benton v. State, 52 Tex. Cr. R. 422, 107 S. W. 837.

§ 5029. If Property Alleged to be Stolen is Same Jury Must Acquit.

"Defendant has not only entered a plea of not guilty, but has also entered in this case a plea of former conviction, viz., the conviction at the former October term of this court, 1901, for the larceny of a brown gelding, the property of this prosecuting witness, Charles R—. If the gelding for the larceny of which he is prosecuted in this case is the same animal for the larceny of which he was prosecuted in the former case, then the conviction in this former case is a bar to a prosecution in this case, and if you so find then your verdict should be for the defendant upon this issue. But if you find that the prosecution in this case is for the larceny of a different gelding that the one for the larceny of which he was convicted in the former case, then your verdict on the issue of former conviction should be for the state on that issue."—Approved: State v. Deal, 43 Or. 17, 70 Pac. 534.

§ 5030. If Offenses in Both Trials Substantially the Same the Defense is Valid.

"If you find from the evidence that in the trial of the former case the main defense was that the road obstructed by the defendant was not a public highway, then you will find that the judgment of acquittal in the former case was a final judicial decision in defendant's favor on this question; and if you further find that the roads mentioned in the two indictments, and the obstructions complained of, are the same, and that in this present case the same question as to the existence of a public highway is involved, and that in order to convict in this case the same question will have to be retried and decided the other way, you will find that the offenses in the two cases are substantially the same. And this you will do notwithstanding the claim of the state that the offense under the present indictment is a continuance of the obstruction mentioned in the former indictment after the said acquittal. If you find the offenses described in the two indictments to be the same, your verdict will be, 'For the defendant;' otherwise, 'For the state.' "—Approved: State v. Waterman, 87 Iowa, 255, 54 N. W. 359.

§ 5031. If Former Prosecution is Collusive Defense Rejected.

"If you believe from the evidence that the defendant was in good faith lodged in jail in default of bail in this prosecution, and that the county judge of Larue county obtained a copy of the record in this case from the clerk of the court and thereafter entered an order dismissing this prosecution, then you should find for the defendant. If, however, you believe from the evidence, to the exclusion of a reasonable doubt, that defendant, if lodged in jail procured himself to be so lodged in jail for the purpose of avoiding a trial of this prosecution in this court, you should find for the commonwealth as to the plea of for-

mer acquittal."—Approved: McDermott v. Commonwealth (Ky.), 100 S. W. 830 (not reported in state reports).

§ 5032. If Prosecution Invited to Evade Prosecution for Higher Offense, Defense Rejected.

"Although the jury should believe from the evidence that the defendant, in this county and in less than one year before the finding of the indictment herein, assaulted and beat Pearl Y— with a stick, yet if the jury should further believe from the evidence that afterwards the defendant in good faith went before B. B. E—, who was at that time a duly qualified and acting justice of the peace of Logan county, and surrendered himself, and that he was in good faith tried and convicted before said justice of the peace on the charge of breach of the peace, and that in said trial of the defendant on said charge the same facts in substance were proved that have been given in evidence on this trial, and that the defendant was convicted of said charge and a judgment to that effect duly rendered against him, then and in that event the jury should find the defendant not guilty. But the court instructs the jury that, if they should believe from the evidence that the defendant surrendered himself to the said B. B. E— with the design of evading a subsequent prosecution for some greater or other offense than breach of the peace, then and in that event such conviction before said justice of the peace is no bar to the present indictment."—Approved: Commonwealth v. Gill (Ky.), 90 S. W. 605 (not reported in state reports).

CHAPTER CXXXVIII.

INFANT CAPACITY TO COMMIT CRIME.

A. Infant—Capacity to Commit Crime.
B. Insanity.

A. Infant—Capacity to Commit Crime.

§ 5033. Under Fourteen—Burden on State to Show Capacity.
5034. This may Appear by Conduct and Appearance of Accused.

§ 5033. Under Fourteen—Burden on State to Show Capacity.

(a) "In this case the defendant has introduced testimony tending to show that, at the time of the alleged theft, defendant was between the ages of 9 and 13. Now, if you believe from the evidence that defendant at the time involved herein was between the ages of 9 and 13 years, then it devolves upon the state to establish by competent evidence that at the time in question the defendant has discretion to understand the nature and illegality of the act constituting the alleged offense. Proof that defendant knew good from evil, or right from wrong, or that he was possessed of the intelligence of ordinary boys of his age, does not fill the requirements of the statute. This can be shown by circumstances, education, habits of life, general character, moral and religious instructions; but the proof must show beyond a reasonable doubt that he had the discretion above referred to."—Approved: Binkley v. State, 51 Tex. Cr. R. 54, 100 S. W. 780.

(b) "The law presumes that persons between the ages of seven and fourteen years are incapable of committing any crime, and it is incumbent on the state to prove by evidence that the defendant had sufficient capacity to know that he was committing a crime. If you find that one was committed and that the defendant was under fourteen years old at the time of its alleged commission, and if the State has failed so to do, you should acquit."—Approved: State of Iowa v. Fowler, 52 Iowa, 103, 2 N. W. 983.

§ 5034. This may Appear by Conduct and Appearance of Accused.

"To establish capacity to commit crime in a person over seven and under fourteen years, it is not necessary that any witness shall state that he has such capacity, but the same may be shown to exist by the appearance and general conduct of the accused, and by his testimony as a witness before the jury."—Approved: State v. Williams, 40 W. Va. 268, 21 S. E. 721.

B. Insanity.

§ 5035. Presumption of Sanity and Burden of Proof.
5036. Physical Disease in the Brain Deranging Mental or Moral Faculties.
5037. Not Know Nature of Act, or if he did, that he was doing Wrong.
5038. That which Dethrones Reason and Incapacitates from Distinguishing between Right and Wrong.
5039. Capacity as to the Particular Act Charged.
5040. Partial and Total Insanity Distinguished.
5041. Knew Act When Committed was Wrong and Able to Choose.
5042. Act Committed During a Lucid Interval.
5043. Weak Intellect or Blunted or Ill Developed Moral Perceptions Responsible.
5044. Mental Aberration or Sickness of Mind Produced by any Cause.
5045. Settled Insanity from Long Continued Intoxication.
5046. Immaterial that Derangement Arises from Excessive Drink.
5047. Voluntary Drunkenness Producing Temporary Insanity.
5048. Temporary Insanity from Voluntary Drunkenness Taken in Mitigation.
5049. Consciousness of Wrong Where Governing Power of Mind is Lost.
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5051. Emotional Insanity Defined.
5052. Impulse or Passion Temporarily Dethroning Reason.
5053. To be an Excuse Irresistible Impulse must Arise from Disease.
5054. Insanity Proven by a Preponderance of Evidence.
5055. Proven Either Directly or by Facts and Circumstances.
5056. Insanity Once Established is Presumed to Continue.
5057. Except it be a Transient Derangement of the Mind.
5058. Subsequent Insanity no Defense if Sane When Act was Committed.
5059. Self Defense and Insanity are Not Inconsistent Defenses.
5060. Letters Showing Wife's Unfaithfulness Competent Evidence Bearing on Sanity.

§ 5035. Presumption of Sanity and Burden of Proof.

"The law presumes every man is sane unless the contrary is established by the evidence to the satisfaction to the jury, and, when insanity in any form is set up as a defense, it is a fact which may be proven like any other fact. The burden of proving such insanity is on the defendant, and he is not entitled to the benefit of a mere doubt whether he was or was not insane."—Approved: State v. Paulsgrove, 203 Mo. 193, 101 S. W. 27.

§ 5036. Physical Disease in the Brain Deranging Mental or Moral Faculties.

"Insanity is a physical disease, located in the brain, which disease so perverts and deranges one of the mental or moral faculties as to render the person suffering therefrom incapable of distinguishing right from wrong in reference to the particular act charged against him, and incapable of understanding that the particular act in question was a violation of the laws of God and society.

"Therefore, if the jury find and believe from the evidence that, at the time defendant did the killing charged in the indictment, he was so perverted and deranged in one or more of his mental or moral faculties as to be incapable of understanding, at the moment he killed his father, that such killing was wrong, and that defendant at that time was incapable of understanding that the act of killing was a violation of the laws of God and society, they will find him not guilty." —Approved: State v. Porter, 213 Mo. 43, 111 S. W. 529.

§ 5037. Not Know Nature of Act, or, if he did, that he was Doing Wrong.

"Among other defenses made in this case is that of insanity. You are charged that only a person with sound memory and discretion can be punishable for crime, and that no act done in a state of insanity can be held punishable as an offense. Every man is presumed to be sane until the contrary appears to the jury trying him. He is presumed to entertain, until this appears, a sufficient degree of reason to be responsible for his acts; and to establish a defense on the ground of insanity it must be clearly proved that at the time of committing the act the party accused was laboring under such defects of reason from disease of mind as not to know the nature or quality of the act he was doing, or, if he did know, that he did not know he was doing wrong—that is, that he did not know the difference between the right and the wrong as to the particular act charged against him. The insanity must have existed at the very time of the commission of the offense, and the mind must have been so dethroned of reason as to deprive the person accused of the knowledge of right and wrong as to the particular act done."—Approved: Thomas v. State, 55 Tex. Cr. R. 293, 116 S. W. 600.

§ 5038. That Which Dethrones Reason and Incapacitates from Distinguishing Between Right and Wrong.

"The insanity which the law recognizes as an excuse for crime must be such as dethrones reason and incapacitates an individual from distinguishing between right and wrong as to the consequences of his conduct. If you find from the testimony submitted on the trial of this case, to a reasonable certainty, that the defendant at the time of the homicide was afflicted with insanity to that extent as to dethrone reason and to incapacitate him from distinguishing between right and wrong as to the consequences of his act or conduct, you should acquit the defendant of the offense charged. If you find from the testimony that the defendant at the time of the homicide had sufficient mind and

understanding to distinguish between right and wrong as to the consequences of his own act and conduct, he is responsible for his act."—Approved: Carter v. State, 2 Ga. App. 254, 58 S. E. 532.

§ 5039. Capacity as to the Particular Act Charged.

(a) "The court further instructs you that you must determine from all the facts and circumstances proven in the case, whether or not the defendant was sane or insane at the time of the killing of his wife.

"If you find, from all the evidence, that the defendant, at the time of the killing, had the capacity to distinguish between right and wrong, as to the particular act with which he stands charged; that he knew his act was criminal and wrong, and would deserve punishment, then in law he had a criminal intent, and is not so far insane as to be exempt from responsibilities.

"On the other hand, if you find that at the time of the killing of his wife the defendant was insane or of unsound mind, from any disease or disorder of mind, and by reason thereof was not conscious of what he was doing when he fired the pistol at his wife; that he did not know the nature of the act he was about to commit, when he fired the pistol; that he did not know the act was criminal, and would subject him to punishment; that he had no capacity to distinguish right from wrong, as to the act with which he is charged, or that he was impelled by an insane impulse, and his powers were so impaired by disease, that he could not restrain from doing the act, then the defendant is not responsible in law, and you should find him not guilty."—Approved: State v. Duestrow, 137 Mo. 44, 38 S. W. 554; 39 S. W. 266.

(b) "Homicide committed by one who has not sufficient knowledge and understanding to understand right from wrong, and to comprehend and understand the consequences of his act, is excusable for any act in reference to which his mind is in such weakened condition. But it is not every derangement of the mind that will excuse one for the commission of crime. If one has sufficient mind and understanding to know right from wrong regarding the particular act, and is able to comprehend and understand the consequences of such act, the law recognizes him as sane, and holds him responsible for such acts; and, in this connection, if you should find beyond a reasonable doubt that the defendant took the life of Ella Q—, as charged in the indictment, and that at the time of such homicide he knew and understood that it was wrong to take her life, and was able to comprehend and understood the consequences of such act, then and in that event it will be your duty to find the defendant guilty of murder, as charged in the indictment. But on the other hand, if you should find that he was not able to know that the act of taking her life was wrongful, and was not able to comprehend and understand the consequences of such act, then you should find the defendant not guilty."—Approved: Queenan v. Territory, 11 Okl. 261, 71 Pac. 218.

§ 5040. Partial and Total Insanity Distinguished.

"Insanity is either partial or general. Total insanity always excuses. Partial insanity does not excuse. One may be partially in-

sane, and yet be responsible for his criminal acts. The law does not excuse unless the derangement is so great that it actually renders the person incapable at the time of its commission of distinguishing between right and wrong, in reference to the particular act charged and proven against him."—Approved: State v. Paulsgrove, 203 Mo. 193, 101 S. W. 27.

§ 5041. Knew Act when Committed was Wrong and Able to Choose.

"You are instructed that if, from all the evidence in the case, you believe beyond a reasonable doubt that the defendant committed the crime of which he is accused in manner and form as charged in the information, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable of choosing either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty, under the law, to find him guilty, even though you should believe from the evidence that at the time of the commission of the crime he was not entirely and perfectly sane."—Approved: State v. McGowan, 36 Mont. 422, 93 Pac. 552.

§ 5042. Act Committed During a Lucid Interval.

"One of the defenses relied on in this case is that of insanity, and upon this issue you are instructed as follows: The law does not hold a man responsible for an act committed by him when insane, and it is not necessary that the insanity should be permanent or that the person should have been a raving maniac at the time of the commission of the act in order to absolve the party from the punishment prescribed by law. It is sufficient to absolve such person if it is shown that he was insane at the time of the commission of the act, though it may be shown that such person was at other times sane. On the other hand the fact that a person may at times have been insane, or may have had an impaired mind, is not sufficient to absolve such person from the punishment prescribed by law for the commission of an act, if it was committed by him during a lucid interval. Again, the law does not require, as the condition on which criminal responsibility shall follow the commission of crime, the possession of one's faculties in full vigor or a mind unimpaired by disease or infirmity. The mind may be weakened or impaired, and yet the person be criminally responsible for his acts. He can discharge himself from responsibility only by proving that his intellect was so disordered that at the time he committed the act he did not know the nature and quality of the act he was doing and that it was an act which he ought not to do. On the other hand, if at the time of the commission of the act he had sufficient intelligence to know what he was doing and the will power to do or not to do same, in contemplation of law he is responsible for the act he has committed. In other words, to free a person from criminal responsibility for an act committed by him on the ground of insanity, his mind at the time of the commission of the act must be in such an impaired and unsound state as to create an uncontrollable impulse to do the act by overriding the reason and judgment and obliter-

ating the sense of right and wrong, and depriving such person of the powers of choosing between right and wrong as to the particular act done. A man may be laboring under partial insanity, but, if he still understands the nature and character of his act and its consequences, if he has a knowldge that it is wrong and criminal, and mind sufficient to apply that knowledge to his own case, and know that if he does the act he will do wrong and will receive punishment, such partial insanity is not sufficient to exempt him from responsibility for his criminal act."—Approved: Sartin v. State, 51 Tex. Cr. R. 571, 103 S. W. 875.

§ 5043. Weak Intellect or Blunted or Ill Developed Moral Perceptions Responsible.

"If the defendant, Charles W. A—, shot and killed the said Timothy R— at the time and place and with a revolver as charged in the information, and if at the time he did so he was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know that what he was doing was wrong, then the law does not hold him responsible for his act. On the other hand, if he was capable of understanding what he was doing, and had the power to know that his act was wrong, then the law will hold him criminally responsible for it. If this power of discrimination existed, he was sane, or, in other words, a person of sound memory and discretion will not be exempt from punishment because he might have been a person of weak intellect or one whose moral perceptions were blunted or ill developed, or because his mind may have been depressed or distracted from brooding over misfortunes or disappointments, or because he may have been wrought up to the most intense mental excitement from sentiments of disappointment, revenge, or anger. The law recognizes no form of insanity, although the mental faculties may be disordered or deranged, which will furnish one immunity from punishment for an act declared by law to be criminal, so long as the person committing the act had the capacity to know what he was doing and the power to know that his act was wrong."—Approved: State v. Arnold, 79 Kan. 533, 100 Pac. 64.

§ 5044. Mental Aberration or Sickness of Mind Produced by Any Cause.

"If you find from the evidence that at the time of the alleged commission of the offense the defendant was suffering from mental aberration or sickness of mind produced by any cause, and by reason thereof his judgment, memory, and reason were so perverted that he did not realize the nature and quality of the act he was doing, or that he did not realize that it was wrong, you must find that he was insane, and for that reason not guilty."—Approved: Schissler v. State, 122 Wis. 365, 99 N. W. 593.

§ 5045. Settled Insanity from Long Continued Intoxication.

"Settled insanity produced by a long-continued intoxication affects responsibility in the same way as insanity produced by any other

cause. But it must be settled insanity, and not merely a temporary mental condition, produced by recent use of intoxicating liquor. When temporary or spasmodic insanity is proved to have existed prior to the commission of a criminal act, there is no presumption of its continuance down to the specific time of the criminal act. To establish the basis of a presumption that insanity, once shown to have existed, continues to exist, it must appear to have been of such duration and character as to indicate the probability of its continuance, and not simply the possibility or even probability of its recurrence."—Approved: People v. Findley, 132 Cal. 301, 64 Pac. 472.

§ 5046. Immaterial that Derangement Arises from Excessive Drink.

"If you believe and find from the evidence, at the time the defendant shot his wife, his mental faculties had become, and were, so perverted and deranged as to render him incapable of distinguishing between right and wrong, and of knowing the right from wrong of that particular act, then it is immaterial what caused such condition of his mind, whether the same was brought on by hereditary disease, or was the result of the excessive use of alcoholic beverages and stimulants, or of any disease or other cause, or combination of causes.

"And though you should believe from the evidence that such perverted and deranged mental faculties of the defendant were the result of continued drunkenness, or the excessive or continued use of intoxicants, such deranged and perverted condition of mind is entitled to the same consideration as a diseased and unsound condition of mind from any other cause, and entitles the defendant to an acquittal at your hands, if shown and proven to your reasonable satisfaction."—Approved: State v. Duestrow, 137 Mo. 44, 38 S. W. 554; 39 S. W. 266.

§ 5047. Voluntary Drunkenness Producing Temporary Insanity.

"If you believe and find from the evidence, that the defendant, from any cause whatsoever, had become insane and irresponsible in law, as explained in the foregoing instructions, and that he was so insane and irresponsible at the time of the killing, by reason of any mental disease or disorder arising from any cause whatsoever, then you will find the defendant not guilty, although you may believe that the defendant killed his wife while he was intoxicated or drunk.

"Drunkenness is a species of insanity and is attended with a temporary loss of reason and power of self-control; drunkenness, however, is voluntary, brought on by the act of the party, while insanity proper is an affliction of Providence, for which the party affected is not responsible.

"Such insanity is a full and complete defense to a criminal charge, drunkenness is none; therefore, if you believe from the evidence that the defendant, Arthur D—, voluntarily made himself intoxicated, and while so intoxicated, killed his wife in a fit of drunkenness or temporary insanity, which was the result of that intoxication, then he is responsible in law for such killing and you should so find."—Approved: State v. Duestrow, 137 Mo. 44, 38 S. W. 554; 39 S. W. 266.

§ 5048. Temporary Insanity from Voluntary Drunkenness taken in Mitigation.

"Now, if you believe from the evidence in this case that the defendant, at the time of the commission of the offense for which he is on trial, if you find him guilty of such offense, was laboring under temporary insanity as above defined, produced by the voluntary recent use of ardent spirits, you will take such temporary insanity into consideration in determining the grade of the offense, if any, that the defendant may be found guilty of, and in mitigation of the penalty attaching to the offense, if any."—Approved: Campos v. State, 50 Tex. Cr. R. 289, 97 S. W. 100.

§ 5049. Consciousness of Wrong where Governing Power of Mind is Lost.

"Insanity means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or not conscious at the time of the nature of the act which he is committing; and where, though conscious of it, and able to distinguish between right and wrong, and knowing that the act is wrong, yet his will—by which is meant the governing power of his mind—has been, otherwise than voluntarily, so completely destroyed that his actions are not subject to it, but are beyond his control."—Approved: Lowe v. State, 118 Wis. 641, 96 N. W. 417.

§ 5050. Moral or Emotional Insanity from Excitement or Anger.

"Moral or emotional insanity does not exempt a person from criminal responsibility. Mere moral insanity, or temporary frenzy or passion, arising from excitement or anger, and not from any mental disease, is not an excuse for crime."—Approved: Lowe v. State, 118 Wis. 641, 96 N. W. 417.

§ 5051. Emotional Insanity Defined.

"Emotional insanity depends upon the mere emotions of the crime, rising from some defective or perverted moral sense, which begins on the eve of the criminal act and ends when it is finished."—Approved: Genz v. State, 58 N. J. L. 482, 34 Atl. 816.

§ 5052. Impulse or Passion Temporarily Dethroning Reason.

"Should you first find that the defendant fired the fatal shot then the court instructs you, gentlemen, that the true test and standard of accountability is: Had the defendant sufficient mental capacity to appreciate the character and quality of his acts? Did he know and understand that it was in violation of the rights of another and in itself wrong? Did he know that it was prohibited by the laws of the state and that its commission would entail punishment and penalty upon himself? If he had the capacity thus to appreciate the character and comprehend the possible or probable consequences of his acts, he is responsible to the law for the acts thus committed and is to be adjudged accordingly. A person in the possession of a sound mind who

commits a criminal act under the impulse of passion or revenge, which may temporarily dethrone reason, or for the time being control his will, cannot be shielded from the consequences of his act."—Approved: State v. Fleming, 17 Idaho, 471, 106 Pac. 305.

§ 5053. To be an Excuse Irresistible Impulse Must Arise from Disease.

"If the defendant did shoot A. B—, but at the time he did so the defendant had mental capacity sufficient to enable him to know right from wrong, and if at the time he had will power sufficient to enable him to choose between shooting and refraining from shooting said A. B—, the defendant was of sound mind; and if the defendant did shoot A. B—, but at the time he did so the defendant had mental capacity sufficient to enable him to know right from wrong, and if his mind was free from disease, then no impulse to shoot said A. B—, no matter how violent, and no matter how completely it dominated the will of the defendant, was unsoundness of mind."—Approved: McCarty v. Commonwealth, 24 Ky. Law Rep. 1427, 71 S. W. 656.

§ 5054. Insanity Proven by a Preponderance of Evidence.

(a) "Among other defenses made in this case is insanity created and produced by a diseased condition of the mind. Every man is presumed to be sane until the contrary appears to the satisfaction of the jury trying him. He is presumed to entertain, until this appears, a sufficient degree of reason to be responsible for his acts, and to establish a defense on the ground of insanity it must be proven by a preponderance of the evidence that at the time of committing the burglary (if you have found he did) the defendant was laboring under such defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing, or, if he did not know that, he did not know that he was doing wrong; that is, that he did not know the difference between the right and wrong as to the particular act charged against him.

"You are to determine from the evidence in this case the matter of insanity, it being a question of fact controlled, so far as the law is concerned, by the instructions herein given you.

"Now, if the defendant has shown by a preponderance of the evidence that at the time of the alleged burglary the defendant was laboring under such defect of reason, from disease of the mind, as not to know the nature or quality of the act of burglary as herein defined, or, if he did know that, he did not know that he was doing wrong—that is, that he did not know the difference between the right and wrong as to the particular act charged against him—you will acquit the defendant upon the defense of insanity."—Approved: Smith v. State, 55 Tex. Cr. R. 563, 117 S. W. 966.

(b) "You are instructed that, when the insanity of defendant in a criminal case is interposed as a defense, the burden of proving such insanity is upon the defendant to the satisfaction of the jury by a preponderance of the evidence."—Approved: Fults v. State, 50 Tex. Cr. R. 502, 98 S. W. 1057.

(c) "To establish insanity as a defense, positive or direct testimony

is not required, nor is it necessary to establish this defense beyond a reasonable doubt. It is sufficient if the jury is reasonably satisfied by the weight or preponderance of the testimony that the accused was, at the time he committed the act, incapable of distinguishing between right and wrong."—Approved: State v. Porter, 213 Mo. 43, 111 S. W. 529.

(d) "You are instructed that every person is presumed to be sane and rational, unless the fact is proven otherwise by a preponderance of the evidence, and you are to treat the acts of the defendant at and subsequent to the fire, as shown by the evidence, as the acts of a sane and rational man, unless the evidence shows, not only a possibility that his mental condition was otherwise, but further shows, by a fair preponderance of the evidence in the case, that the defendant was then in fact irrational or suffering from mental aberration of the mind. You are not required to find that the defendant was irrational or insane at such time, unless the evidence clearly establishes such fact, and should only find him insane or irrational at the time of the fire and subsequent thereto, upon evidence of a reliable character, which convinces you that such fact is proven by a fair preponderance of all the evidence in the case bearing thereon."—Approved: State v. Novak, 109 Iowa, 717, 79 N. W. 465.

§ 5055. Proven Either Directly or by Facts and Circumstances.

"In order to establish insanity, it is not necessary that the proofs shall be direct and positive, but it may be shown by such facts and circumstances as convince the mind of its existence, the same as any other fact. But when the claim set up as a defense is unusual, unnatural, and out of the ordinary course of affairs, you are not required to take the same for granted upon slight evidence, nor should you so find, except upon evidence of a reliable character, and which satisfies you that the defense has been made out."—Approved: State v. Hockett, 70 Iowa, 442, 30 N. W. 742.

§ 5056. Insanity once Established is Presumed to Continue.

"The jury are charged that when a man becomes chronically of unsound mind he is presumed to continue in such condition until the contrary is proven; that when one is adjudged to be of unsound mind, then he is presumed to continue in that condition until the contrary is proved."—Approved: Kaack v. Stanton, 51 Tex. Civ. App. 495, 112 S. W. 702.

§ 5057. Except it be a Transient Derangement of the Mind.

"Insanity of a permanent nature, when once shown to exist, is presumed to continue until the contrary appears; but where delirium tremens is set up as a defense, the delirium must exist at the time the act was committed, as there is no presumption of its existence from antecedent fits from which the party has recovered, for this is a mere transient derangement of the mind, and there is no presumption of its recurrence or continuance."—Approved: Wagner v. State, 116 Ind. 181, 18 N. E. 833.

§ 5058. Subsequently Insanity no Defense if Sane When Act was Committed.

"If you find that the defendant was insane, and irresponsible from any disease or disorder of the mind, as explained in these instructions, when he committed the homicide, then you will find him not guilty; but if you find at the time of the shooting, he was not insane, but responsible for his acts, as explained in these instructions, and that he committed the crime as charged, then you will find him guilty, even though you may believe and find from the evidence that he has become insane since the homicide and that he is now insane."—Approved: State v. Crane, 202 Mo. 54, 100 S. W. 422.

§ 5059. Self Defense and Insanity are not Inconsistent Defenses.

"The court instructs the jury that the law of self-defense is applicable alike to the insane as to the sane, that both defenses are consistent and, if you find on one or both such defenses in favor of the defendant, you will return your verdict of not guilty."—Approved: State v. Porter, 213 Mo. 43, 111 S. W. 529.

§ 5060. Letters Showing Wife's Unfaithfulness Competent Evidence Bearing on Sanity.

"The court instructs the jury that the letters which have been introduced in evidence in this case do not furnish any lawful excuse or justification for the killing of the deceased. Nor would the fact, if it is a fact, that Lulu C— had been unfaithful to the defendant, be any lawful excuse or justification for such killing. The letters are admitted in evidence as a circumstance bearing upon the issue as to the sanity of the defendant at the time of such killing."—Approved: People v. Casey, 231 Ill. 261, 83 N. E. 278.

CHAPTER CXXXIX.

INTENT.

A. Intent.
B. Motive.
C. Intoxication.

A. Intent.

§ 5061. Presumed from Result Following an Act Intentionally Done.
5062. Death from Assault with Dangerous Weapon Presumes Intent to Kill.
5063. Inferred from Surrounding Facts and Circumstances.
5064. Or from Willfully and Knowingly Committing an Illegal Act.
5065. Natural, Usual and Probable Consequences Presumed to be Intended.
5066. Appropriating Proceeds of a Transaction as Showing Fraudulent Intent.
5067. Prior Similar Transactions as Showing Intent.
5068. While Intoxication is not Defense Evidence Competent on Question of Intent.
5069. Where in Crime Intent is Necessary Ingredient it must be Proved Beyond Reasonable Doubt.
5070. One Endeavoring to Obtain Money on Forged Paper Presumed to have Fraudulent Intent.
5071. Claiming Land under Forged Deed Raises Strong Presumption of Guilty Intent.

§ 5061. Presumed from Result Following an Act Intentionally Done. "The intent with which an action is done is an act or emotion of the mind, seldom if ever capable of direct and positive proof, but is to be arrived at by such just and reasonable deduction or inferences, from the acts and facts proved, as the guarded judgment of a candid and cautious man would draw ordinarily therefrom. The law warrants the presumption or inference that a person intends the results or consequences to follow an act which he intentionally commits which ordinarily do follow such acts. If a person makes an assault on another and inflicts on him an injury of a more serious character than an ordinary battery, the presumption is warranted that he intends to inflict a great bodily injury, if there is no evidence tending to show that he intended a less injury. If you find that defendant committed the assault charged, you will determine his intent in so doing by the surrounding circumstances, and all the evidence in the case before you

which tends to show this intent."—Approved: State of Iowa v. Gillett, 56 Iowa, 459, 9 N. W. 362.

§ 5062. Death from Assault with Dangerous Weapon Presumes Intent to Kill.

"A person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable, and usual consequences of his own acts. Therefore, when one person assails another violently with a dangerous weapon, likely to kill, and which does in fact destroy the life of the party assailed, the natural presumption is that such assailant intended death, or other great bodily harm, and, in the absence of evidence to the contrary, this presumption must prevail. The willful use of a deadly weapon without excuse or provocation, in such a manner as to imperil life, generally indicates a felonious intent."—Approved: People v. Besold, 154 Cal. 363, 97 Pac. 871.

§ 5063. Inferred from Surrounding Facts and Circumstances.

(a) "The intent with which an act is done may be proved by direct and positive testimony, or the intent may be inferred from all the facts and circumstances surrounding and attending the act as shown by the evidence in the case, and the intent in this case must be determined from the evidence given in this case."—Approved: State v. Merkel, 189 Mo. 315, 87 S. W. 1186.

(b) "The intent with which an act is committed being but a mental state of the party accused, direct proof of it is not required. Nor, indeed, can it ordinarily be so shown; but it is generally derived from and established by all the facts and circumstances attending the doing of the act complained of, as disclosed by the evidence; and in this case the intent with which the defendant entered the dwelling-house of G—, if he did enter it, must be determined by you from all the evidence in the case."—Approved: State v. Maxwell, 42 Iowa, 208.

§ 5064. Or From Willfully and Knowingly Committing an Illegal Act.

"The rule of law in regard to intent is that intent to defraud is to be inferred from willfully and knowingly doing that which is illegal, and which, in its necessary consequences and results, must injure another. The intent may be presumed from the doing of the wrongful and fraudulent or illegal act, and in this case, if you find that the defendant placed that which was worthless or of little value among the assets of the bank at a greatly exaggerated value and had that exaggerated value placed to his own personal account upon the books of the bank, from such finding of fact you must necessarily infer that the intent with which he did that act was to injure or defraud the bank; but this inference or presumption is not necessarily conclusive. There may be other evidence which may satisfy the jury that there was no such intent, but such an inference or presumption throws the burden of proof upon the defendant; and the evidence upon him in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy you, beyond a reasonable doubt, that there

was no such guilty intent in such transaction."—Approved: Agnew v. United States, 165 U. S. 36, 17 S. Ct. 235.

§ 5065. Natural, Usual and Probable Consequences Presumed to be Intended.

"Upon the question of intent, the court instructs the jury that the law presumes a person intends all the natural, probable, and usual consequences of his act; and this presumption of law will always prevail, unless from a consideration of all the evidence bearing upon the point the jury entertain a reasonable doubt whether such intention did exist."—Approved: Wells v. Territory, 14 Okl. 436, 78 Pac. 124.

§ 5066. Appropriating Proceeds of a Transaction as Showing Fraudulent Intent.

"Evidence to the effect that the defendant took the notes from Y—, payable to himself, and to the effect that he cashed and appropriated the money for said notes, may be considered by you in passing upon whether or not the defendant, at the time he disposed of the horse described in the indictment, entertained the fraudulent intent to appropriate the said horse to his own use and deprive the owner of the value of the said horse, and for no other purpose."—Approved: Smith v. State, 52 Tex. Cr. R. 527, 107 S. W. 844.

§ 5067. Prior Similar Transactions as Showing Intent.

(a) "The fact, if you should find it to be a fact, that the defendant committed a like crime to the one with which he is charged in the indictment against Mrs. S—, * * * prior to the time the acts in question were committed, is admitted in evidence for the purpose of aiding you in determining the question as to the defendant's intent in doing the acts complained of, and you should only consider it for that purpose."—Approved: State v. Jamison, 74 Iowa, 613, 38 N. W. 509.

(b) "You may and should, therefore, consider all evidence, if any there is, which tends to show that defendant had obtained other warrants from Wapello county by falsely representing that he had transported other paupers, to aid you in determining whether or not he falsely represented in this case that he had transported a woman calling herself Eliza Y—, and her children, to Chillicothe, Mo., and whether or not such representations, if made by him, were fraudulently and falsely made, with the intent to obtain a warrant in this case."—Approved: State v. Brady, 100 Iowa, 191, 69 N. W. 290.

§ 5068. While Intoxication is not Defense, Evidence Competent on Question of Intent.

(a) "Intoxication is no defense or excuse for crime; but in certain cases, where a specific intent is an element in the offense, the fact of intoxication, if shown, is to be considered. If it appears from the evidence that the prisoner was intoxicated at the time, and if you find that his state of intoxication was such that he had so far lost his intelligence, and his reason and faculties, that you have a reasonable doubt whether he was able to form and have a purpose to kill,

or to know what he was doing, then you should find him not guilty of intent to kill."—Approved: State v. Fiske, 63 Conn. 388, 28 Atl. 572.

(b) "If you find from the evidence beyond a reasonable doubt that the defendant committed the offense as charged, then, in passing upon the question of intent, you may, in mitigation of the penalty affixed to the offense, take into consideration the question of the drunkenness of the defendant. If you believe from the evidence that at the time the defendant took the money, if you should so find, he was so drunk as to be temporarily insane, then you may take this into consideration in assessing the penalty you may fix."—Approved: Stoudenmire v. State (Tex. Cr. R.), 125 S. W. 399.

(c) "On this point you are instructed that drunkenness in itself is no defense, but, if the defendant was so completely intoxicated, and was in such a besotted condition, that he was incapable at the time of forming an intent, then he cannot be found guilty."—Approved: State v. Yates, 132 Iowa, 475, 109 N. W. 1005.

§ 5069. Where in Crime Intent is Necessary Ingredient it must be Proved Beyond Reasonable Doubt.

"In order to convict the prisoner at the bar, in manner and form as he stands indicted, it is necessary for the state to satisfy you, beyond a reasonable doubt, that the assault was committed by the prisoner, that it was committed with an intent to murder the person assaulted, and that if the person assaulted had died from the effects of the injuries received thereby, the prisoner would have been guilty of murder, either of the first or second degree. The intent to commit murder is an essential ingredient of the charge, and it must be proved to your satisfaction, just as any other material fact in the case. It may be proved, however, by direct evidence, such as the declarations of the prisoner made at the time of the shooting, or by circumstantial evidence. It is your duty therefore to consider all the facts proved in the case in order to determine whether such an intent to commit murder existed or not; and in determining whether there was such intent, you should consider the words or threats which may have been made by the prisoner at the time of the shooting, the character of the assault, the kind of weapons used, the danger of producing death, and the means used to avoid or cause death, and all the acts and conduct of the prisoner with the circumstances attending them, as shown by the evidence."—Approved: State v. Brown, 5 Pen. (Del.), 440, 63 Atl. 328.

§ 5070. One Endeavoring to Obtain Money on Forged Paper Presumed to have Fraudulent Intent.

"Defendant is indicted for forgery. Bill contains two counts. In order to convict under either count the state must satisfy you from the evidence beyond a reasonable doubt of defendant's guilt. Now, what does it take to constitute the crime of forgery or the uttering and publishing of such? (Here the court reads the statutes.) You will observe that in either case—that of forgery or that of uttering or

publishing the instrument—the guilty intent to injure or defraud must appear. It is not necessary, in order to constitute the crime, that the person committing the forgery should be the gainer thereby, but it is sufficient if there is a fraudulent intent to deceive by a forged paper; and the fact that no one is defrauded is immaterial, the other elements of the crime being established. That where one is found in possession of a forged instrument, and is endeavoring to obtain money or advances upon it, this raises a presumption that the defendant either forged or consented to forging such instrument, and, nothing else appearing, the person would be presumed to be guilty. Therefore, if you are satisfied beyond a reasonable doubt that the paper (in this case the note) was a forgery, and that defendant had it in his possession, and tried to obtain money from C— or S— or the bank upon it, then this raises a presumption of guilt, and, unless he has rebutted it, you will return a verdict of guilty. If, upon the whole evidence, any reasonable doubt remains as to the innocence of defendant, you will give him the benefit of it, and return a verdict of not guilty."—Approved: State v. Peterson, 129 N. C. 556, 40 S. E. 9, 85 Am. St. 756.

§ 5071. Claiming Land Under Forged Deed Raises Strong Presumption of Guilty Intent.

"The court instructs the jury that if you find and believe from the evidence that the deed read in evidence and described in the information, or any part thereof (not including the acknowledgment of the same), was falsely made and forged, with intent to cheat and defraud, as defined in other instructions, and the defendant had had possession of the same in Saline county, Missouri, and that he made claim to the land described therein, or any part thereof, by virtue of and under said deed in said county of Saline, then such facts raise the presumption that he forged or caused the same to be forged in Saline county, state of Missouri, and that, unless such possession by the defendant of said deed and his claim thereunder are satisfactorily explained to the jury by the evidence in the case in a manner consistent with the innocence of the defendant, then such presumption of guilt becomes conclusive." Approved: State v. Pyscher, 179 Mo. 140, 77 S. W. 836.

B. Motive.

§ 5072. Motive Not Indispensable to be Shown.
5074. Its Presence or Absence Merely a Circumstance for Consideration.
5075. Failure to Show Motive a Circumstance in Defendant's Favor.
5076. Where Reconciliation in Good Faith, Prior Troubles no Evidence of Motive.

§ 5072. Motive Not Indispensable to be Shown.

(a) "You are further instructed that it is not indispensable that a motive be shown for the commission of a crime, but the existence or non-existence of such motive is a question of fact, which must be determined by the jury from a consideration of all of the evidence in

the case, and as a circumstance tending to show the guilt or innocence of the accused."—Approved: Lillie v. State, 72 Neb. 228, 100 N. W. 316.

(b) "Proof of a motive to commit the crime is not indispensable nor essential to conviction. While a motive may be shown as a circumstance to aid in fixing the crime on the defendant, yet the state is not required to prove a motive on the part of the defendant in order to convict; and the jury would be justified in inferring a motive from the commission of the crime itself, if the commission of the crime by the defendant is proved beyond every reasonable doubt, as required by law, and you find that the defendant, at the time of the commission of said act, was sane, and there were no extenuating circumstances."—Approved: Wheeler v. State, 158 Ind. 687, 63 N. E. 975.

§ 5074. Its Presence or Absence Merely a Circumstance for Consideration.

"The presence or absence of a motive for the alleged commission of an alleged crime is always an important ingredient for the consideration of the jury in determining the guilt or the innocence of the person charged, yet when the accused is shown beyond a reasonable doubt, even if only by circumstantial evidence, to be the perpetrator of the alleged crime, it is not necessary that there be proof of motive, there is no occasion for explaining the reason of his acts. Every man of sane mind is presumed to intend the reasonable and natural consequences of his own acts."—Approved: State v. Dull, 67 Kan. 793, 74 Pac. 235.

§ 5075. Failure to Show Motive a Circumstance in Defendant's Favor.

(a) "The court instructs the jury that, when the evidence fails to show any motive to make an assault or commit a crime, this is a circumstance in favor of the innocence of the party accused. And in this case, if the jury find, upon a careful examination of all evidence, that it fails to show any motive, cause, or reason on the part of Louise S— to assault and murder the defendant, then you should consider this fact in determining the truth or falsity of the claim made by the defendant that his wife first shot him and then killed herself."—Approved: Smith v. State, 61 Neb. 296, 85 N. W. 49.

(b) "The court instructs the jury that, when evidence fails to show any motive to commit the crime charged on the part of the defendant, this is a circumstance in favor of his innocence; and in this case, if the jury finds, upon a careful examination of all the evidence, that it fails to show any motive on the part of the defendants to commit the crime charged against them, then this is a circumstance which the jury ought to consider, in connection with all the evidence in the case, in making up their verdict. And, in order to ascertain a motive, the jury will take into consideration all the evidence in relation with the association, relations and deportment toward each other and the deceased, together with all the other evidence in the case."—Approved: State v. Hendricks, 172 Mo. 654, 73 S. W. 194.

§ 5076. Where Reconciliation in Good Faith Prior Troubles no Evidence of Motive.

"If you find from the evidence that on the day after Thanksgiving, 1899, a reconciliation and adjustment of all matters of differences and trouble was effected between the defendant and her husband, X—; and you further find from the evidence that such reconciliation was in good faith entered into on behalf of the parties thereto, and was thereafter, including the night on which X— was assaulted, if he was assaulted, in like good faith lived up to and observed by the parties, and that after such reconciliation and adjustment there was no further trouble or quarrels between them, including the night on which the said X— is alleged to have been assaulted,—then whatever trouble, differences, or quarrels you may find from the evidence, if any, had existed or occurred prior to such good-faith reconciliation and adjustment, if any, would not, alone, be sufficient to show malice."—Approved: State v. Hossack, 116 Iowa, 194, 89 N. W. 1077.

C. Intoxication.

§ 5077. Voluntary Drunkenness, Though by One Addicted to Drink, is no Excuse or Mitigation for Crime.
5079. Jury Should Disregard All Evidence Showing Voluntary Drunkenness.
5080. If Irresponsibility is Temporary from Liquor it is Not to be Considered.
5081. Drunkenness as Affecting Degree of Guilt if Caused by Another.
5082. If Drunken Man Knows Right from Wrong, Drunkenness no Defense.
5083. Where Drunkenness is by Artifice or Fraud and Destroys Reason Temporarily.
5084. Mere Drunkenness does not Disprove Intent.
5085. If Defendant Drinks at Request of Deceased—Intoxication voluntary.

§ 5077. Voluntary Drunkenness, Though by One Addicted to Drink, is no Excuse or Mitigation for Crime.

"Voluntary drunkenness is neither an excuse for crime, nor a mitigation of crime.

"If you find and believe, from the evidence, that the defendant, at the time of the homicide, had not become insane and irresponsible, as explained in these instructions, either from the continued excessive use of intoxicating drinks, or from any other cause or causes, but that the defendant has been voluntarily addicted to the use of intoxicants for a long period prior to the homicide, and that shortly, or immediately, before the homicide the defendant voluntarily drank large quantities of intoxicating stimulants or beverages, and that being under the influence of such intoxicants he shot and killed his wife, while laboring under temporary frenzy or madness, and while being unconscious of the nature of the act, and that such temporary frenzy and madness, and such unconsciousness, was then and there the immediate result of alcoholic

liquor or liquors, voluntarily drunk by the defendant, then such temporary frenzy or madness, and such unconsciousness, affords neither justification, mitigation, or excuse for the shooting of his wife by defendant, nor can you consider it in determining whether the defendant acted willfully, deliberately, and premeditatedly, and he is equally guilty under the law as if he had been sober or sane at the time of the shooting; and in case, as in the case of a sober and sane man, the intent to kill and malice may be presumed from the intentional use of a deadly weapon upon a vital part of the body, in a manner likely to produce death, and premeditation and deliberation may be inferred from the facts and circumstances of the killing, where there was sufficient time to consider, and in the absence of justification or just provocation, and need not be shown by direct and positive proof.

"Therefore, if you believe and find from the evidence, that the defendant, under the circumstances, and while being in the condition aforesaid, and by the means and in the manner charged in the indictment, and explained by instructions numbers 1, 2, and 3 herein, shot and killed his wife, Albertine D—, then you will find the defendant guilty of murder in the first degree, and so state in your verdict."—State v. Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

§ 5079. Jury Should Disregard All Evidence Showing Voluntary Drunkenness.

"The court instructs the jury that drunkenness, in any degree, cannot justify, excuse, nor mitigate the commission of a crime; and if the jury believe from the evidence that the defendant did, with one Eli J. S—, stop, detain, and arrest the progress of the Lexington branch train on the Missouri Pacific railroad as described and defined in instruction number one on behalf of the state, with intent to commit robbery thereon, they should find the defendant, James L. W—, guilty; and the fact that defendant may have been drunk to any degree at the time cannot be taken into consideration by the jury in making up their verdict.

"The court instructs the jury that in making up their verdict, they will entirely disregard all the testimony with reference to the defendant being drunk, and that drunkenness cannot be pleaded in excuse, mitigation, or defense of any crime."—Approved: State v. West, 157 Mo. 309, 57 S. W. 1071.

§ 5080. If Irresponsibility is Temporary from Liquor it is Not to be Considered.

"As between the two offenses of murder in the first degree and second degree and voluntary manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry, and if the killing was voluntary, and committed under the influence of liquor either to a great or less degree, but so as to becloud and render oblivious the slayer's mind, and so as to preclude deliberation, premeditation, or murder in the first degree, necessarily it would be murder in the second degree; and if there was a provocation that was sufficient and adequate, and made by the deceased, such as a blow, it might be manslaughter. Manslaughter is

defined as the unlawful killing of another without malice, express or implied. Now, if you should believe that the defendant, at the time of the slaying of the deceased, was of unsound mind, incapable of knowing the right and incapable of knowing the wrong, and an irresponsible person, then you should acquit the defendant. But, if his irresponsibility grew out of and was traceable to strong drink and intoxication at the time, then and in that event his plea of insanity will not avail him. If he knew right from wrong prior to and just before the killing, but reason was dethroned by liquor at the time of the slaying, and this proof leads you to attribute his incapacity to judge of the right and understand wrong of his deeds by reason of intoxication only, the defendant could not avail himself of his plea of insanity."—Approved: Atkins v. State, 119 Tenn. 458, 105 S. W. 353.

§ 5081. Drunkenness as Affecting Degree of Guilt if Caused by Another.

"While drunkenness is no excuse for any crime or misdemeanor, unless occasioned by the fraud, contrivance or force of some other person, for the purpose of causing the perpetration of an offense, yet if be a fact appearing in the evidence, it is to be considered by the jury in connection with all other facts in determining the degree of guilt. The fact that the prisoner was drunk, if proven, does not render his act any the less criminal, and in this sense it is not available as an excuse, but upon the question whether the act was deliberate or premeditated it is proper to be considered, and only for this purpose. It neither excuses the offense, nor avoids the punishment which the law inflicts when the character of the offense is ascertained."—Approved: May v. People, 8 Colo. 210, 220.

§ 5082. If Drunken Man Knows Right from Wrong, Drunkenness no Defense.

"If the liquor which he claims to have drunk had merely inflamed his passion and caused him to be quarrelsome and abusive, while, at the same time, he was able to distinguish right from wrong, and knew at the time he was doing wrong, if he did assault B—, then drunkenness would be no defense."—Approved: State v. Yates, 132 Iowa, 475, 109 N. W. 1005.

§ 5083. Where Drunkenness is by Artifice or Fraud and Destroys Reason Temporarily.

"You are instructed that if you find that the defendant, at the time of the alleged shooting, was intoxicated, but that his intoxication had been procured by the artifice or fraud of the deceased or other persons, then, and in such event, it would not be a voluntary intoxication in the eye of the law; and in such event, if you so find, if the intoxication was to such an extent as to absolutely destroy the reason for the time being, so far as his knowledge of his acts is concerned,—that is, place the defendant in such a mental condition that he had no knowledge of the nature or character of his acts, or whether right or wrong,—then, and in such event, you are instructed that you should acquit the defendant."—Approved: State v. Wright, 112 Iowa, 436, 84 N. W. 541.

§ 5084. Mere Drunkenness Does not Disprove Intent.

"You are instructed that under our law voluntary drunkenness is no excuse for the perpetration of crime, and that where, without intoxication, the law would impute a criminal intent, mere proof of drunkenness will not avail to disprove such intent, and that it is only in cases where the constant and excessive use of alcoholic stimulants have produced actual insanity, resulting in derangement of the mental and moral faculties to such extent as to render the person so afflicted incapable of distinguishing right from wrong, that crime may be excused thereby."—Approved: Hill v. State, 42 Neb. 503, 522, 60 N. W. 916.

§ 5085. If Defendant Drinks at Request of Deceased, Intoxication Voluntary.

"If you find that defendant became intoxicated, in whole or in part, upon liquor furnished him by or at the request or solicitation of the deceased, this would not prevent the intoxication from being voluntary within the meaning of the law."—Approved: State v. Sopher, Jr., 70 Iowa, 494, 30 N. W. 917.

CHAPTER CXL.

REASONABLE DOUBT.

§ 5086. Absolute and Moral Certainty Distinguished.
5087. Doubt Based on Reason Preventing an Abiding Conviction of Guilt.
5088. Must be Substantial Doubt not Excluding Mere Possibility of Innocence.
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5107. But Each Fact Necessary to a Conclusion of Guilt Must Be.
5108. Each Necessary Allegation in Indictment Must be Proved Beyond a Reasonable Doubt.
5109. Presumption of Innocence Overcome only by Proof Beyond a Reasonable Doubt.
5110. And Jury Must Give Defendant Full Benefit of Such Presumption.
5111. This Presumption is Matter of Evidence.
5112. And Continues with Defendant Until Every Material Allegation is Sufficiently Proven.
5113. Presumption of Innocence a Humane Provision of the Law.

§ 5086. Absolute and Moral Certainty Distinguished.

"The meaning of the phrases 'reasonable doubt' and 'moral certainty' are difficult to put in words. It will be observed that in order to sustain a conviction it is not necessary to establish the guilt of a defendant to an absolute certainty, but only to a moral certainty. Absolute certainty is seldom obtainable in any case where there is a conflict of proof. Nor is it necessary that the guilt of the defendant be established beyond all doubt, but only beyond all reasonable doubt, for it is seldom, in matters of serious controversy, that a question can be decided beyond every kind of doubt. Nor will the fact itself, if such be the fact, that the question of guilt or innocence submitted to you is difficult of solution, constitute a reasonable doubt, if by a careful consideration and deliberation that solution may, in fact, be established according to law. But if, after a careful scrutiny of the whole case, including a careful weighing of the testimony of the witnesses according to the rules given you in these instructions and a conscientious consideration of the law there arises in your mind, spontaneously and naturally, without being sought after, an uncertainty concerning the guilt or innocence of the defendant, which uncertainty is of the weight and quality that if interposed in any of the graver transactions of life it would check your final judgment, causing you to pause and hesitate, then such uncertainty amounts to a reasonable doubt. In other words, unless you have an abiding conviction of the guilt of the defendant, you must acquit him. But, on the other hand, if you believe the defendant has been proven guilty under the law and the evidence, beyond a reasonable doubt, you must convict him, even though doubts remain in your minds which do not amount to reasonable doubts. So, also, you must convict him if his guilt be established to a moral certainty, but though it be not established to an absolute certainty."—Approved: People v. Buettner, 233 Ill. 272, 84 N. E. 218.

§ 5087. Doubt Based on Reason Preventing an Abiding Conviction of Guilt.

(a) "A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such a conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt."—Approved: State v. Nerzinger, 220 Mo. 36, 119 S. W. 379.

(b) "By the term 'reasonable doubt,' as used in these instructions, is meant that state of the case which, after a full consideration of all the evidence, leaves your minds in that condition that you cannot say that you feel an abiding conviction of the guilt of the defendant. You should not go beyond the evidence to hunt for doubt, or entertain doubt from mere caprice or conjecture. Such doubt should arise only from a candid and impartial and honest consideration of all the evidence,

and the facts and circumstances presented upon the trial, and if, upon such consideration, doubt does so arise, and by reason of it you cannot say that you are satisfied to a moral certainty of the guilt of the defendant, you should return your verdict of not guilty."—Approved: Dobbs v. State (Okl.), 115 Pac. 370.

§ 5088. Must be Substantial Doubt not Excluding Mere Possibility of Innocence.

"If, upon consideration of all the evidence, you have a reasonable doubt of the defendant's guilt, you should acquit; but a doubt, to authorize an acquittal on that ground, ought to be a substantial doubt touching the defendant's guilt, and not a mere possibility of his innocence."—Approved: State v. Nerzinger, 220 Mo. 36, 119 S. W. 379.

§ 5089. Substantial Doubt Based on the Evidence and Not on Mere Possibility of Innocence.

"The court instructs the jury that before you can convict the defendant, you must believe him guilty beyond a reasonable doubt, but a doubt to authorize an acquittal must be a substantial doubt based on the evidence, and not a mere possibility of innocence."—Approved: State v. Maupin, 196 Mo. 164, 93 S. W. 379.

§ 5090. It is not Required to Hunt for Doubts or Resort to Conjecture.

"If there is a reasonable doubt of the defendant being proven guilty, he must be acquitted. In criminal cases, full and satisfactory proof of guilt is required. No mere weight of evidence will warrant a conviction unless it be so strong and satisfactory as to remove from your minds all reasonable doubt of the guilt of the accused. In considering this case, you should not go beyond the evidence to hunt for doubts, nor should you entertain such doubts as are merely chimerical or based on groundless conjecture. A doubt to justify an acquittal must be reasonable, and arise from a candid and impartial consideration of all the evidence in the case, and then it must be such a doubt as would cause a reasonable, prudent, and considerate man to hesitate and pause before acting in the graver and more important affairs of life. If, after a careful and impartial consideration of all the evidence in the case, you can say and feel that you have an abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge, then you are satisfied beyond a reasonable doubt."—Approved: State v. Pierce, 65 Iowa, 85, 21 N. W. 195.

§ 5091. Preponderance of Evidence is Not Sufficient to Dispel a Reasonable Doubt.

"The jury are instructed that a 'reasonable doubt' is a term often used, probably well understood, but not easily defined. It is not every possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say and feel that they have an abiding conviction to a moral certainty of the truth of the charge. If, upon the proof, there

is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal; for it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the facts charged are more likely to be true than the contrary, but the evidence must establish the facts to a reasonable and moral certainty,—a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This is proof beyond a reasonable doubt, because, if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would defeat criminal prosecutions altogether. A reasonable doubt does not consist of possible or conjectural doubts. If, after a careful, impartial, and candid consideration of all the evidence in this case, the jury have an abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge against him, then they are satisfied beyond a a reasonable doubt."—Approved: Carleton v. State, 43 Neb. 373, 61 N. W. 699.

§ 5092. Proof Beyond Reasonable Doubt When it Produces Conviction Sufficient in Most Important Affairs.

"By reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against him, but it means some actual doubt having some reason for its basis. A reasonable doubt that entitles to an acquittal is a doubt reasonably arising from all the evidence or want of evidence in this case. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the reason and understanding of ordinarily prudent men with a conviction on which they would act in the most important concerns or affairs of life."—Approved: Whitney v. State, 53 Neb. 287, 73 N. W. 696.

§ 5093. Juror Should not Resort to Fanciful Suppositions or Remote Conjectures.

(a) "By a 'reasonable doubt,' as the term has been used, is not meant a doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict. A juror should not create sources of material doubt by resorting to trivial or fanciful suppositions or remote conjectures as to a probable state of facts differing from that established from the evidence. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinarily prudent men with a conviction upon which they would act in their own most important affairs and concerns of life."—Approved: McArthur v. State, 60 Neb. 390, 83 N. W. 196.

(b) "By this term 'reasonable doubt' is not meant every possible or fanciful doubt or conjecture that may suggest itself or be suggested to your minds. It is not a mere guess or surmise, because everything relating to human affairs and dependant upon moral evidence is open to some fanciful doubt or conjecture. A reasonable doubt is a doubt based upon reason, and growing out of the testimony and evidence in the case. A reasonable doubt is that state of the case, which, after ar

entire comparison and consideration of all the evidence, leaves your minds in that condition that you cannot say you feel an abiding conviction, to a certainty, that the accused committed the offense."—Approved: People v. Yun Kee, 8 Cal. App. 82, 96 Pac. 95.

§ 5094. Speculative Doubt in a Skeptical Mind is not Reasonable Doubt.

"The reasonable doubt mentioned beyond which guilt must be affirmatively proved in order to justify a verdict of guilty, means, as its name implies, a doubt resting in reason, and it must arise from the whole evidence fairly and rationally considered. When after a full and impartial consideration of the whole evidence the judgment of the jury is convinced to a moral certainty that the accused are guilty—that there is no reasonable explanation of the facts proved except upon the hypothesis that the accused committed the crime charged, then every reasonable doubt is removed and a verdict of guilty should follow. A mere fanciful or speculative doubt, such as a skeptical mind may suggest, does not amount to a reasonable doubt within the meaning of the law. A doubt such as this, one that ignores a reasonable construction of the whole evidence and proceeds upon mere speculation or suspicion, is unreasonable and would acquit one proven guilty as easily as one not so proven and does not so justify a verdict of not guilty."—Approved: Emery v. State, 101 Wis. 627, 78 N. W. 145.

§ 5095. Reasonable Doubt is That Which a Juror Can Give a Reason for.

"The term 'reasonable doubt' is pretty well understood, but not easily defined. It is not the mere possibility of a doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the defendant, because everything relating to human affairs and depending upon moral evidence is open to some conjectural or imaginary doubt, and because absolute certainty is not required by the law. It is not such a doubt as one might conjure or hatch up in order to acquit a friend, without any reason therefor; but it must be a substantial doubt, and one which would ordinarily impress the judgment of a prudent man in the graver and more important affairs of life. The reasonable doubt which entitles defendant in a criminal case to an acquittal is a doubt of guilt, reasonably arising from all the evidence in the case, and it must be such a doubt as the juror is able to give a reason for. A reasonable doubt is that state of a case which, after the entire comparison and consideration of all the evidence, leaves the mind of the juror in that condition that he cannot say and feel an abiding conviction to a moral certainty of the guilt of the defendant as charged in the information."—Approved: State v. Grant, 20 S. D. 164, 105 N. W. 97.

§ 5096. An Abiding Conviction of the Truth of the Charge.

(a) "But reasonable doubt, gentlemen, is not a mere possible doubt, or imaginary doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt; but it is such a doubt as arises from such a candid and impartial consideration of all the evidence in the case as would cause a reason-

able and prudent man to pause and hesitate in the graver transactions of life; and a juror is satisfied beyond a reasonable doubt if, from a candid consideration of all the evidence, he has an abiding conviction of the truth of the charge."—Approved: Dempsey v. State, 83 Ark. 81, 102 S. W. 704.

(b) "By the term 'reasonable doubt,' as herein used, is not meant a mere caprice, conjecture, or groundless possibility. It is an actual, substantial doubt, based on a reason arising either from the evidence or want of evidence in the case, and sufficient to cause an ordinarily prudent man to hesitate and refuse to act in the most important affairs and concerns of life. The guilt of an accused person is proven beyond a reasonable doubt when, upon the entire comparison and consideration of all the evidence, the minds of the jurors are in that condition that they can say from the evidence they have an abiding conviction to a moral certainty of the truth of the charge."—Approved: Turley v. State, 74 Neb. 471, 104 N. W. 934.

§ 5097. Oath of Juror Imposes no Obligation to Doubt if no Doubt Exists.

"The court instructs the jury that a doubt produced by undue sensibility in the mind of a juror in view of the consequences of his verdict is not a reasonable doubt, and the juror is not allowed to create sources of material for doubt by resorting to trivial or fanciful suppositions, and remote conjectures as to a possible state of facts differing from that established by the evidence. The oath of a juror imposes on him no obligation to doubt where no doubt would exist if no oath had been administered. When a circumstance is of a doubtful character, the accused is entitled to the benefit of the doubt. If, however, all the facts established necessarily lead the mind to the conclusion that the defendant is guilty, though there be a bare possibility, merely, not supported by some good reason therefor that he is innocent, the jury should find him guilty. A juror's duty to the state, to society, and to himself is equally sacred to hold for conviction if he has an abiding satisfaction of defendant's guilt, and if, after deliberation, no juror is possessed of any good reason to doubt the defendant's guilt, it is the duty of the jury to find him guilty."—Approved: State v. Bickle, 53 W. Va. 597, 45 S. E. 917.

§ 5098. The Doubt Must be Upon the Whole Case.

(a) "If, upon the whole case, you entertain a reasonable doubt as to whether or not the defendant has been proven guilty, you should find her 'not guilty.'"—Approved: Steely v. Commonwealth, 129 Ky. 524, 112 S. W. 655.

(b) "The jury are instructed, that the rule requiring the jury to be satisfied of the guilt of the defendant from the evidence, beyond a reasonable doubt, in order to warrant a conviction, is complied with, if, taking the testimony altogether, the jury are satisfied, beyond a reasonable doubt, that the defendant is guilty. The reasonable doubt that the jury is permitted to entertain must be as to the guilt of the accused on the whole evidence, and not as to any particular fact in the

case not material to the issue in the case."—Approved: People v. Scarbak, 245 Ill. 435, 92 N. E. 286.

§ 5099. Each Juror Must be Convinced Beyond a Reasonable Doubt.

"The court charges the jury that before they can convict the defendant the evidence must be so strong as to convince each juror of his guilt beyond reasonable doubt; and if, after considering all the evidence, a single juror has a reasonable doubt of the defendant's guilt, arising out of any part of the evidence, then they cannot convict him."—Approved: Mitchell v. State, 129 Ala. 23, 30 South. 348.

§ 5100. Doubt Causing Prudent Man to Pause and Hesitate.

"The law presumes the defendants innocent of the crime charged in the indictment, and of every material act and element of the crime charged, and this presumption of innocence obtains in favor of the defendants until their guilt has been established by the evidence beyond a reasonable doubt; and if, after a full, fair, candid, and impartial consideration of all the evidence in the case, you entertain a reasonable doubt of the guilt of the defendants, the law requires you to give them the benefit of such doubt, and find them not guilty. The court instructs the jury that a reasonable doubt is that state of the case which, after a full comparison and consideration of all the evidence and circumstances in the case, both for the territory and for the defense, leaves the minds of the jury in that condition that they cannot say that they feel an abiding conviction, amounting to a moral certainty, from the evidence in the case, that the defendants are guilty of the charge as laid in the indictment. If you have any such doubt—if your conviction of the defendants' guilt does not amount to a moral certainty on the evidence in the case—then the court instructs you that you must acquit the defendants. A reasonable doubt is not a mere possible or conjectural doubt, and the jury are not to go beyond the evidence to hunt for doubt. A reasonable doubt must arise from a candid and impartial consideration and investigation of all the evidence in the case; and unless it is such that, were the same kind of a doubt interposed in the graver and more important transactions of life, it would cause a reasonable and prudent man to hesitate, pause, and say, 'I am not satisfied,' it is not sufficient to warrant you in saying that there is a reasonable doubt in the case. And if, after considering all the evidence, you can say you have an abiding conviction, amounting to a moral certainty, of the truth of the charge as laid in the indictment, you are satisfied beyond a reasonable doubt."—Approved: Flohr v. Territory, 14 Okl. 477, 78 Pac. 565.

§ 5101. Reasonable Doubt Aids the Claim of Self-Defense.

"The rule of law that the defendant must be acquitted unless the jury are satisfied as to his guilt beyond a reasonble doubt applies with equal force to self-defense, and if the jury, upon the whole case, entertain a reasonable doubt as to whether the defendant killed the deceased in self-defense, you must give the defendant the benefit of

the doubt, and acquit him."—Approved: State v. Hazlett, 16 N. D. 426, 113 N. W. 374.

§ 5102. Presumption of Innocence Must be Overcome by Proof Beyond a Reasonable Doubt.

(a) "The law presumes the innocence of the defendant, and this presumption continues with him until it has been overcome by evidence which establishes his guilt to your satisfaction and beyond a reasonable doubt; and the burden of proving his guilt rests with the state. If, however, this presumption has been overcome by the evidence, and the guilt of the defendant established to a moral certainty and beyond a reasonable doubt, your duty is to convict. If you have a reasonable doubt of the defendant's guilt, you should acquit; but a doubt, to authorize an acquittal on that ground, ought to be a substantial doubt touching the defendant's guilt, and not a mere possibility of his innocence."—Approved: State v. Adams, 179 Mo. 334, 78 S. W. 588.

(b) "All of the presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proven guilty. If upon which proof there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal."—Approved: Howard v. State, 2 Okl. Cr. App. 200, 101 Pac. 131.

(c) "The defendants are presumed to be innocent until the contrary conclusively appears by competent evidence introduced here in court. The jury start out with the supposition, to begin with, that the defendants are innocent, unless the contrary has been established satisfactorily to you beyond any reasonable doubt. A reasonable doubt, however, is not an imaginary doubt. It is not something which can be called up by some one who has a prejudice against the prosecution of the defendants, but it is a doubt that the reasonable man can present and explain."—Approved: State v. Montgomery, 9 N. D. 405, 83 N. W. 873.

(d) "If you believe from the evidence in this case that the defendant did dig the well — feet deep for the said Joe S—, or if you have a reasonable doubt as to whether he did dig it 54 feet deep or not, you will acquit the defendant. If you believe that the defendant dug a well — feet deep, and that it filled up, or if you have a reasonable doubt thereof, you will acquit the defendant. If the employees of the defendant drilled a well for Joe S— — feet deep, the defendant would not be guilty as charged, and, if you so believe or have a reasonable doubt thereof, you will acquit the defendant. Or if you believe from the evidence beyond a reasonable doubt that the defendant made the false statement alleged in the indictment, but that the defendant had been informed by any of his employees that the said well was — feet deep, that the defendant believed it to be — feet deep at the time he made the statement, he would not be guilty and you will acquit him; or, if you have a reasonable doubt thereof, you will acquit him. Or if you believe from the evidence in this case that the statement alleged to be false was made by the defendant through mistake or under agitation, or through inadvertence, you will acquit the defendant."—Approved: Green v. State (Tex. Cr. R.), 132 S. W. 806.

§ 5103. In Circumstantial Evidence all the Circumstances Taken Together Must Convince.

"The jury are instructed that, in cases depending on circumstantial evidence, it is necessary that all the circumstances taken together must convince the jury beyond a reasonable doubt of the defendant's guilt, and if, after a mature consideration of all the circumstances, the jury has a reasonable doubt they should acquit."—Approved: Carr v. State, 81 Ark. 589, 99 S. W. 831.

§ 5104. They Must Exclude Every Reasonable Hypothesis but Guilt.

"The jury is instructed that the defendant should not be convicted unless the evidence excludes every reasonable hypothesis but that of the defendant's guilt. No matter how strong the circumstances are, they do not come up to the full measure of proof that the law requires if they can be reasonably reconciled with the theory that the defendant acted in self-defense. You are instructed that the defendant is presumed to be innocent, and this presumption remains and abides with him at every stage of the trial, and must prevail, unless overcome by evidence which satisfies your minds beyond a reasonable doubt of his guilt. The presumption of innocence is a fact in the case established by law, and you will consider it as you will any other fact in the case. This fact of the presumption of innocence is one established by law for the protection of the defendant, and you will consider the same in determining his guilt or innocence."—Approved: Bryant v. Territory, 12 Ariz. 165, 100 Pac. 455.

§ 5105. And Must Point to the Defendant and no Other Party.

"You are further instructed as a matter of law that, where a conviction for a criminal offense is sought upon the circumstantial evidence alone, the state must not only show by a preponderance of the evidence that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis, other than that of the guilt of the accused. And in this class of cases the jury must be satisfied, beyond a reasonable doubt, that the crime has been committed by some one in manner and form as charged in the indictment, and then they must not only be satisfied that all the circumstances proved are consistent with the defendant having committed the act, but they must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that the defendant is the guilty person. It is your first duty to determine from the evidence what facts and circumstances are thereby established, and then to draw from such facts and circumstances, after carefully examining and weighing them, your conclusion as to the guilt or innocence of the defendant. It is your duty to exercise great care and caution in drawing conclusions from proved facts. They should be fair and natural, and not forced and artificial, conclusions, and all the facts and circumstances taken together should be of a conclusive nature and tendency, leading on the

whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no one else, committed the offense charged. It is not sufficient that they create a probability, though a strong one, and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. It is essential therefore that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. If then all the facts and circumstances established by the evidence beyond a reasonable doubt cannot be reconciled with any reasonable hypothesis of the defendant's innocence, but do concur in showing the defendant's guilt, and, when taken together, are sufficient to prove beyond reasonable doubt the guilt of the crime charged in the indictment, or any other crime included therein, then you are instructed that it is your duty to convict the defendant of the crime so established."—Approved: State v. Novak, 109 Iowa, 717, 79 N. W. 465.

§ 5106. Not Incumbent on State to Prove Every Surrounding Fact Beyond a Reasonable Doubt.

"It is not necessary that other facts or circumstances surrounding such testimony as has been given on behalf of the state should be established beyond a reasonable doubt. Some of such facts or circumstances may be established by a preponderance of evidence, or may not be established. It is not meant that it is incumbent upon the prosecution to establish every fact surrounding such testimony, as given, beyond a reasonable doubt."—Approved: Horn v. State, 12 Wyo. 80, 73 Pac. 705.

§ 5107. But Each Fact Necessary to a Conclusion of Guilt Must be.

"The state in this case relies upon circumstantial evidence for a conviction at your hands. You are charged that, to warrant a conviction on circumstantial evidence, each fact necessary to a conclusion sought to be established must be consistent to each other and upon the main facts sought to be approved, and the circumstances taken together must be of a conclusive nature, leading on a whole to a satisfactory conclusion, and producing to a moral certainty and beyond a reasonable doubt that the accused committed the offense as charged, and it must exclude every reasonable hypothesis of his innocence."—Approved: Howard v. State, 2 Okl. Cr. App. 200, 101 Pac. 131.

§ 5108. Each Necessary Allegation in Indictment Must be Proved Beyond a Reasonable Doubt.

"The indictment in this cause is no evidence of guilt, but every material allegation alleged therein—and I mean by that every allegation necessary to constitute the crime charged—must be proved beyond a reasonable doubt and to a moral certainty. The defendant is presumed to be innocent, and this presumption of innocence continues until, taking the evidence all together, there remains no reasonable doubt as

to his guilt. Nor will mere probabilities or a mere preponderance of evidence against him satisfy the requirements of the law. Before you can find him guilty you must establish his guilt, as I have said, beyond a reasonable doubt; and this presumption of the law is not an idle form to be disregarded at pleasure, but is a substantial right of the defendant, and such doubt may arise from the evidence actually offered or from a lack of evidence. The doubt, however, must be real—not chimerical or fanciful, not a doubt which is sought for, but one which arises naturally from the case and which is not a doubt produced by undue sensibilities on the part of the jurors as to the consequence of their verdict. Taking the case altogether, if there remains any reasonable hypothesis consistent with the innocence of the defendant you must acquit him."—Approved: People v. Buettner, 233 Ill. 272, 84 N. E. 218.

§ 5109. Presumption of Innocence Overcome only by Proof Beyond a Reasonable Doubt.

"The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt. That if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty. You are further instructed that you cannot find the defendant guilty unless, from all the evidence, you believe him guilty beyond a reasonable doubt."—Approved: Hopt v. People, 120 U. S. 430, 7 S. Ct. 614.

§ 5110. And Jury Must Give Defendant Full Benefit of Such Presumption.

"The law presumes that the defendant is innocent of the crime charged against him in this indictment, and it is your duty, in considering this case, to give him the full benefit of that presumption. If he is to be convicted at all of either of such crimes, it must be upon the testimony which has been produced here upon this trial."—Approved: Boykin v. People, 22 Colo. 496, 45 Pac. 419.

§ 5111. This Presumption is Matter of Evidence.

"In the absence of evidence to the contrary, the law presumes every one charged with the commission of a crime to be innocent; and this legal presumption of innocence is a matter of evidence, to the benefit of which the defendants are entitled in this case."—Approved: McVey v. State, 57 Neb. 471, 77 N. W. 1111.

§ 5112. And Continues With Defendant Until Every Material Allegation is Sufficiently Proven.

"The law, in its humanity presumes all persons charged with the commission of crime to be innocent, and this humane presumption continues until every material element that constitutes the crime is proven to the satisfaction of the jury trying such persons, beyond a reasonable doubt."—Approved: Kirby v. State, 44 Fla. 81, 32 South. 836.

§ 5113. Presumption of Innocence a Humane Provision of the Law.

"The court instructs the jury, as a matter of law, that the rule which clothes every person accused of crime with the presumption of innocence and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt is not intended to aid any one who is, in fact, guilty of crime to escape but is a humane provision of the law, intended, so far as human agencies can, to guard against the danger of any innocent person being unjustly punished."—Approved: State v. Scarbak, 245 Ill. 435, 92 N. E. 286.

CHAPTER CXLI.

OFFENSES—MISCELLANEOUS.

A. Abandonmeent of Wife.
B. Abortion.
C. Adultery.
D. Bastardy.
E. Bigamy.
F. Concubinage—Taking Female for.
G. Defilement of Child.
H. Disorderly and Bawdy Houses.
I. Incest.
J. Kidnapping Child.
K. Lewdness.
L. Rape.
M. Seduction.

A. Abandonment of Wife.

§ 5114. Obligation to Support—Mutual Separation.

§ 5114. Obligation to Support—Mutual Separation.

"A husband is not absolved from his liability to support his wife, however, from the mere fact that she is living separate from him, if she is living apart from him by his procurement, or with his consent, or in accordance with his request or wishes or otherwise without being herself at fault. The obligation and duty to support still rests upon him. And if a wife, being thus apart from her husband, becomes destitute, and her husband, being aware of her destitute condition, willfully remains away from her, leaving her in such condition, this is an abandonment by the husband within the meaning of the law."—Approved: Spencer v. State, 132 Wis. 509, 112 N. W. 462.

B. Abortion.

§ 5115. Abortion—What Constitutes.
5116. Existence of Pregnancy—Quick Child—Homicide.
5117. Sole Intent to Destroy Pregnancy—Homicide.
5118. Produced by Drug—Miscarriage Causing Death.
5119. By Use of Instrument—Murder—Manslaughter.
5120. Elements of Crime—Death Caused—Decedent Aiding and Abetting.

§ 5115. Abortion—What Constitutes.

"If you find from the testimony beyond a reasonable doubt that the defendant, J. J. C—, within what is now Seminole county and state of Oklahoma, at any time since the 16th day of November, 190—, prescribed for Barbara B—, or procured her to take any medicine, drug, or substance, with intent to procure her miscarriage, she being pregnant at the time, unless it was necessary to preserve her life, then it will be your duty to convict the defendant."—Approved: Chandler v. State, 3 Okl. Cr. App. 254, 105 Pac. 375.

§ 5116. Existence of Pregnancy—Quick Child—Homicide.

"In order to warrant you, under the law of the case, in rendering a verdict of guilty against the respondent, you must find from the evidence—First, that Sylvia S— was pregnant at the time charged; secondly, that pregnancy had so far advanced as to have developed into a live unborn child, liable to be killed by violence,—in other words, had become a quick child; thirdly, that the death of Sylvia S— was caused by the respondent, by the thrusting up and into her womb some instrument with intent to destroy such quick child, with which she was then pregnant. If you have any reasonable doubt upon any of these facts, you must acquit the respondent."—Approved: People v. McDowell, 63 Mich. 229, 30 N. W. 68.

§ 5117. Sole Intent to Destroy Pregnancy—Homicide.

"The court instructs the jury that if you believe and find from the evidence that the defendant, in Pulaski county, Missouri, and on or about the 18th day of May, 1904, did willfully and feloniously administer to one Ella G— a certain medicine, drug, and substance for the purpose of destroying the pregnancy of the said Ella G—, and if said medicine was so administered without intending necessary medical or surgical treatment, and without intending any other injury than the destroying of pregnancy, and if the said medicine so administered by defendant to the said Ella G—, did at the time and place aforesaid kill the said Ella G—, you will find the defendant guilty of manslaughter in the first degree, and assess his punishment at imprisonment in the state penitentiary for a term not less than five years."—Approved: State v. Finley, 193 Mo. 202, 91 S. W. 942.

§ 5118. Produced by Drug—Miscarriage Causing Death.

"The court instructs the jury that in this case the defendant is charged with administering to one Ada H— certain medicine or drug for the purpose of procuring an abortion, and unless the state has proven by the facts and circumstances, to your satisfaction, beyond a reasonable doubt, that the said Ada H— was pregnant with child, and that the defendant administered to or caused to be administered to her certain medicine or drugs, for the purpose of procuring an abortion, and did thereby procure an abortion, and that the abortion or miscarriage was the cause of the death of the said Ada H—, as charged in the indictment, then you should find the defendant not guilty."—Approved: State v. Edmonson, 131 Mo. 348, 33 S. W. 17.

§ 5119. By use of Instrument—Murder—Manslaughter.

"If you believe from the evidence, beyond a reasonable doubt, that prior to the finding of the indictment herein, in the county of Union, state of Kentucky, the defendant, C—, did willfully, feloniously, and with malice aforethought kill and murder Cora W— by thrusting into her body an instrument, which by said use was ordinarily dangerous to her life, with the intent to procure an abortion upon her, you should find him guilty as charged in the indictment, and in your discretion fix his punishment at death, or confinement in the penitentiary of the state during his natural life. If, however, the instrument as used by the defendant, if he used any instrument on her, was not necessarily dangerous to life, yet if you believe from the evidence beyond a reasonable doubt, that it was, by the defendant, thrust into the body of Cora W— with the intent to procure an abortion, and she was thereby killed, contrary to the wish and expectation of defendant, he should be acquitted of murder, but you should find him guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary from two to twenty-one years, in your discretion. Though the wound inflicted on Cora W— by the defendant, if he inflicted any, may not have been sufficient of itself to produce death, yet if you believe beyond a reasonable doubt, from the evidence, that such wound, owing to her condition, produced her death, when, but for the wound, she would not then have died, the wound is, in law, the cause of her death, and you should so find."—Approved: Clark v. Commonwealth, 111 Ky. 443, 63 S. W. 740.

§ 5120. Elements of Crime—Death Caused Decedent Aiding and Abetting.

"That, before the defendant in this case can be convicted, each one of the following propositions must be proven beyond a reasonable doubt: (1) That Anne H— was pregnant; (2) that while Annie H— was pregnant she aborted or miscarried; (3) that said abortion or miscarriage was produced by criminal means; (4) that said criminal means were employed by the defendant, or that she aided, abetted, and encouraged the employment of such means; (5) that said Annie H— died as the result of said abortion and miscarriage. If the jury have a reasonable doubt of the truth of any of the foregoing propositions, they must find the defendant not guilty."—Approved: People v. Hagenow, 236 Ill. 514, 86 N. E. 370.

C. Adultery.

§ 5121. Sexual Intercourse—Direct Proof Unnecessary.
5122. Habitual Intercourse—Defendant a Married Man.
5123. Habitual Intercourse—Single Act Insufficient.
5124. Open and Notorious—Occasional Acts.
5125. Adulterous Disposition—Opportunity—Guilt Inferred.
5126. Void Decree of Divorce no Defense.

§ 5121. Sexual Intercourse—Direct Proof Unnecessary.

"Direct proof of sexual intercourse between the defendants is not necessary in order to justify the jury in finding a verdict of guilty, but evidence is necessary which is sufficient to show circumstances from which the jury may infer the guilt of the parties, that is, such circumstances as would lead the guarded discretion of a reasonable and just man to conclusions of guilt. There is, however, no presumption of guilt, unless such circumstances are shown by the government as would justify a reasonable person to be satisfied beyond a reasonable doubt that the defendants had sexual intercourse with each other within three years previous to March 1, 1901."—Approved: United States v. Griego, 11 N. M. 392, 72 Pac. 20.

§ 5122. Habitual Intercourse—Defendant a Married Man.

"Now, therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, John R—, was on or about September 20, 1907, a married man, whose wife's name was Tillie R—, which married relation is admitted by defendant, and did then and there and in said McCullough county, Texas, have habitual carnal intercourse with the said Mary McS—, then you will find the defendant guilty, and assess his punishment at not less than $100 nor more than $1,000."—Approved: Russell v. State, 53 Tex. Cr. R. 500, 111 S. W. 658.

§ 5123. Habitual Intercourse—Single Act Insufficient.

"The gist of the offense in this case as charged is that the parties had habitual carnal intercourse with each other; that such intercourse (if any) was habitual. A single act of intercourse would not be sufficient to warrant a conviction. The jury are to determine from all the facts in the case whether the intercourse (if any) was habitual, and, unless you so find, you will acquit the defendant."—Approved: Mabry v. State, 54 Tex. Cr. R. 449, 114 S. W. 378.

§ 5124. Open and Notorious—Occasional Acts.

"If the jury shall find from the evidence that the defendants were not living together in a state of open and notorious adultery, but were simply at the time charged in the information stopping together in the same room occasionally, and were only guilty of occasional acts of illicit intercourse, then the court should find the defendants not guilty."—Approved: State v. Crowner, 56 Mo. 149.

§ 5125. Adulterous Disposition—Opportunity—Guilt Inferred.

"It is not sufficient, however, in considering a charge of this character, from the standpoint of circumstances or circumstantial evidence, that an opportunity to commit the crime may be shown or inferred from the circumstances. In addition to the evidence, there must be evidence satisfactory to you of the adulterous disposition of the accused, or the disposition to commit the crime charged if the opportunity is offered. The same rule holds with reference to that, however, as I have already charged you with reference to the flagrant act. It is not necessary that the adulterous disposition be proven by direct and

positive testimony to that particular point; but this may be inferred from the conduct of the party, from the associations and relations which you find from the evidence to have existed between the parties."—Approved: State v. La More, 53 Or. 261, 99 Pac. 417.

§ 5126. Void Decree of Divorce no Defense.

"The defendant has offered in evidence a decree of divorce granted to him by the court in Floyd county, and to rebut this the state has introduced in evidence a further decree in that case, rendered by the court of Chickasaw county, which adjudges that the decree rendered by the court of Floyd county was without jurisdiction, and was obtained by the fraud of this defendant, perpetrated in that case. The effect of the judgment and decree in the district court of Chickasaw county is to set aside the decree rendered in Floyd county, and after the judgment was entered in the case in Chickasaw county the other decree was no longer of any validity, and is no defense for the defendant for any unlawful act of his committed since that time; and if you find that the defendant and Roana were lawfully married to each other, and that the defendant has, within the eighteen months prior to the fifth day of October, 1877, had sexual intercourse with the woman Rachel, described in the indictment, he would be guilty of adultery, and the decree in the court in Floyd county would be no defense."—Approved: State of Iowa v. Whitcomb, 52 Iowa, 85, 2 N. W. 970.

D. Bastardy.

§ 5127. Reputation of Defendant for Chastity and Virtue.
5128. Common Law Marriage Defense to Proceeding.
5129. Intercourse with Others Evidence on Question of Paternity.
5129a. Differing Period of Gestation as Circumstance for Jury's Consideration.
5130. General Unchastity of Mother not a Defense.
5131. Affidavit of Prosecutrix Prima Facie Evidence of Guilt.

§ 5127. Reputation of Defendant for Chastity and Virtue.

"The jury is instructed that some testimony has been introduced in regard to the character of the defendant for chastity and virtue. You are further instructed that the character and reputation of the defendant for chastity and virtue are not at issue in this case, and you will entirely disregard such testimony."—Approved: Collister v. Ritzhaupt, 83 Neb. 794, 120 N. W. 489.

§ 5128. Common Law Marriage—Defense to Proceeding.

"The court instructs the jury, if they believe from the evidence that ———— and ———— entered into a marriage contract by and between themselves, and in good faith, and accepted each other as husband and wife, they should return a verdict of not guilty. The contract must have been made before the intercourse when the child was conceived, and both parties must have understood the agreement was in place of a marriage ceremony. If the prosecuting witness did not un-

derstand the agreement to be all that was necessary to constitute a valid marriage, then there was no valid marriage. There was no valid marriage unless both parties acted in good faith, and each intended thereby to become husband and wife."—Approved: Baird v. People ex rel. Wenderlandt, 66 Ill. App. 671.

§ 5129. Intercourse With Others—Evidence on Question of Paternity.

"The state must show by a preponderance of the evidence that the defendant is the father of the child, and if you should find from the evidence that about the time the child was begotten both the defendant and X— had intercourse with the relatrix, and that you are unable to tell which of them is the father of the child, then you must find for the defendant."—Approved: Goodwin v. State, 5 Ind. App. 63, 31 N. E. 554.

§ 5129a. Differing Period of Gestation a Circumstance for Jury's Consideration.

"If you find from the evidence that plaintiff was on or about the ——— day of ———, 1907, delivered of a bastard child, as alleged, which is still alive, and if you find from the evidence that the probable period of gestation of this child differed from the length of time between the birth of the child and the date when plaintiff testified the intercourse occurred, this is a circumstance to be considered by you in deciding whether the preponderance of the evidence is that the defendant is the father of the child."—Approved: Collister v. Ritzhaupt, 83 Neb. 794, 797, 120 N. W. 489.

§ 5130. General Unchastisy of Mother not a Defence.

"You are instructed that in determining whether or not the defendant is the father of said bastard child, it is entirely immaterial as to the plaintiff's chastity prior to the time that the child in question was begotten; and it is improper for you to consider, in passing upon this point, or take into consideration, the fact that the plaintiff was the mother of another bastard child, several years previous to the birth of this one."—Approved: Morgan v. Stone, 4 Neb. Unoff. 115, 93 N. W. 743.

§ 5131. Affidavit of Prosecutrix Prima Facie Evidence of Guilt.

"The jury are instructed that in an issue of paternity in a bastardy proceeding the written examination of the mother is presumptive evidence that defendant is the father of the child, and when such written evidence is introduced by the state, as in this case, it devolves upon the defendant, by a preponderance of evidence, to show he is not the father. Upon failure of defendant to show, by a preponderance of the evidence, that he is not the father, it is the duty of the jury to convict. If the defendant has satisfied the jury, by a preponderance of the evidence, that he is not the father of the child, then the jury should acquit. If, however, the oral testimony taken together, both for the prosecution and the defendant, leaves the minds of the jury in doubt, then the presumption raised by the written examination would not be rebutted, and the defendant would be guilty."—Approved: State v. Williams, 109 N. C. 846. (N. B. This instruction is based on a statute.)

E. Bigamy.

§ 5132. Holding out as Man and Wife.

§ 5132. Holding Out as Man and Wife.

"Whatever be the form of the ceremony, or, if there be no ceremony, if the parties agree to take each other for husband and wife, and from that time on live confessedly in that relation, proof beyond a reasonable doubt of these facts would be sufficient proof of a marriage, binding on the parties."—Approved: Hearne v. State, 48 Tex. Civ. App. 346, 97 S. W. 1050.

F. Concubinage—Taking Female for.

§ 5134. Definition of Taking.
5135. Definition of Concubinage—Intent of Taking.
5136. Taking and Detaining for Purpose of Carnal Knowledge.
5137. Concubine of Easy Virtue or Gave Consent No Defense.
5138. Must be More Than Single Act of Intercourse.
5139. Aiding and Assisting in the Taking.
5140. Domestic Servant Making Father's House Her Home.
5141. Daughter Temporarily from Home Working or Visiting.
5142. Taking Girl to Cohabit With in Another State.

§ 5134. Definition of Taking.

"It is not necessary that the defendant shall have used any physical force in taking the said Florence H— away. It is sufficient in law if you find and believe from the evidence that defendant induced or persuaded the witness, Florence H—, to go away with him from her father's home for the purpose of having sexual intercourse with him, the defendant, William B—."—Approved: State v. Baldwin, 214 Mo. 290, 113 S. W. 1123.

§ 5135. Definition of Concubinage—Intent in Taking.

"The jury are instructed that by the word 'concubinage,' as used in the information and instructions, is meant the act or practice of a man cohabiting in sexual intercourse with a woman to whom he is not married. If the jury believe from the evidence that the defendant, Joseph J. A—, did take the witness, Della May O—, away from her father, and that said Della May O— was at the time a female under the age of eighteen years, for the purpose of cohabiting with her as a man and woman in sexual intercourse, for any length of time, but for more than a single act of sexual intercourse, without the authority of a marriage, it would be sufficient to constitute the offense charged in the information."—Approved: State v. Adams, 179 Mo. 334, 78 S. W. 588.

§ 5136. Taking and Detaining Female for Purpose of Carnal Knowledge.

"The court instructs the jury that if they believe from the evidence beyond a reasonable doubt the defendant, Richard S—, in Henry county, Kentucky, before September 22, 1909, did unlawfully, willfully and

feloniously take and detain Annie F—, a female, and not the wife of him the said Richard S—, against her will, with intent to have carnal knowledge with her, they should find the defendant guilty and fix his punishment at confinement in the state penitentiary for a period of time not less than two or more than seven years, in their discretion.

"If upon the entire case the jury have a reasonable doubt of the defendant having been proven guilty from the evidence, they should find him not guilty."—Approved: Smith v. Commonwealth (Ky.), 127 S. W. 790.

§ 5137. Concubine of Easy Virtue or Gave Consent no Defense.

"The jury are instructed that if you find from the evidence that at the county of Cass and State of Missouri, at any time within three years next before the filing of the information herein, the defendant did take away Della May O— from her father, Henry O—, for the purpose of concubinage, and that said Della May O— was a female under the age of eighteen years, you will find him guilty, and assess his punishment at imprisonment in the penitentiary not less than two years nor more than five years.

"Even should you believe from the evidence that the said Della May O— was of easy virtue, or had previously had sexual intercourse with defendant, or had consented to go away with defendant, or that she consented to have sexual intercourse with the defendant, yet none or all of these facts would constitute any defense to this prosecution."—Approved: State v. Adams, 179 Mo. 334, 78 S. W. 588.

§ 5138. Must be for More Than Single Act of Intercourse.

"If the jury believe and find from the evidence that the defendant, William B—, did take the prosecuting witness, Florence H—, from her father, and that she was at the time a female under the age of eighteen years, for the purpose of cohabiting with her in sexual intercourse for any length of time for more than one single act of sexual intercourse, then the defendant is guilty of the crime charged in the information."—Approved: State v. Baldwin, 214 Mo. 290, 113 S. W. 1123.

§ 5139. Aiding and Assisting in the Taking.

"Although you may believe the witness, Cora S—, was a willing and consenting party to the taking away, and that no compulsion whatever was used in causing her to go away from her father's control and home, it will be no defense or justification to any one who in any way assists or causes her to leave her father's home and his care."—Approved: State v. Jones, 191 Mo. 653, 90 S. W. 465.

§ 5140. Domestic Servant Making Father's House Her Home.

"A girl under the age of eighteen years who, with her father's consent, works out as a domestic servant, and who returns to her father's house and makes his house her home when out of such employment, or who, with the consent of her father, visits a relative, is still under the care and control of her father, while so at service, or visiting such relative, as much as if she were in her father's house."—Approved: State v. Jones, 191 Mo. 653, 90 S. W. 465.

§ 5141. Daughter Temporarily from Home Working or Visiting.

"If you believe from the evidence that the witness, Cora S—, was at the time of the filing of the information, to wit, on the 18th day of March, 1903, an unmarried female under the age of 18 years; that at the time she was under the care and control of her father, Solomon S—, and an inmate of his home in Scotland county, Missouri, or that with his consent and knowledge she was away from home working, or that she was away from home on a visit at the home of her uncle in Memphis, Missouri, or was, with the consent of her father, working at Memphis, Missouri, and if you believe beyond a reasonable doubt that the defendant did make arrangements with her and did afterwards take her, or cause her to go to Keokuk, Iowa, or to Plymouth, Illinois, and then to Keokuk, Iowa, then when taking her away from her father having the intent to abide and live with her as man and woman, for intent and purpose of concubinage, that is, for the purpose of living and abiding and cohabiting with her as man and woman in sexual intercourse, for any length of time without the authority of legal marriage, and if you find that the same was done at any time within three years prior to the filing of the information, you will find the defendant guilty as charged in the information, and assess his punishment at imprisonment in the penitentiary not to exceed five years."—Approved: State v. Jones, 191 Mo. 653, 90 S. W. 465.

§ 5142. Taking Girl to Cohabit with in Another State.

"The court instructs the jury that under the law the state is not required to prove, in order to convict the defendant, that he took the prosecuting witness, Cora S—, from the house or the premises of her father, S—, but that the state is only required to prove that he took her or kept her away from her father's care and custody, or that he met her away at her uncle's at Memphis, Missouri, where she may then be staying, and that then or there he induced her to go to Keokuk, Iowa, or from there to Plymouth, Illinois, and then to Keokuk, Iowa, where he cohabits with her as man and woman; and if you believe that the defendant has done this, you will then find him guilty, as charged in the information, and assess his punishment in the penitentiary as hereafter provided, if you believe it was his intention and purpose at the time of taking her away to abide with her, and while so living to cohabit with her."—Approved: State v. Jones, 191 Mo. 653, 90 S. W. 465.

G. Defilement of Child.

§ 5143. Defined.
5144. Pupil of Defendant in His Care and Protection.

§ 5143. Defined.

"The court instructs the jury that if they believe from the evidence that Mary B— was confided to the care and protection of defendant, being then and there under eighteen years of age, and that the defendant, in Osage county, Missouri, at any time within three years next before the finding of the indictment, defiled the said Mary B— by carnally knowing her and by having sexual intercourse with her, while she was

in his care, custody, and employment, and while she was still under the age of eighteen, they will find him guilty as charged in the indictment, and assess his punishment at imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, and by a fine not exceeding $100."—Approved: State v. Strattman, 100 Mo. 540, 13 S. W. 814.

§ 5144. Pupil of Defendant in His Care and Protection.

"If you believe from the evidence that the defendant was teaching school at the Vienna school house and the prosecuting witness, Anna B—, was, with the consent of her parents, attending this school as a pupil of defendant, and also attending a literary society held under the direction of the teachers, and in connection with, and as a part of the exercises of the school, then said Anna B— was, while attending said school and literary society, confided to the care and protection of defendant, and if you believe that Anna B—, while a pupil in said school, did with the consent of her parents, accompany defendant to the literary society and return therefrom with him, then for the purpose of this case she was confided to his care and protection, while going to and returning from the literary society."—Approved: State v. Hesterly, 182 Mo. 16, 81 S. W. 624.

H. Disorderly and Bawdy Houses.

§ 5145. Definition of Disorderly House.
5146. Definition of Bawdy House.
5147. Definition of House of Prostitution.
5148. Bawdy House, Keeper of, Defined.
5149. House of Ill-fame Shown by Reputation of Inmates.
5150. Keeping or Aiding or Abetting Keeping House of Ill-fame.

§ 5145. Definition of Disorderly House.

"If you find from the evidence that the traverser kept a bar-room and dance-hall, with music, for the purpose and with the intent of bringing together and entertaining prostitutes, and men desirous of their company, and that such persons habitually assembled there to drink and dance together, then you may find said establishment a disorderly house, within the meaning of the indictment, even although you may also believe that the house was quietly kept, and no conspicuous improprieties were permitted inside. The jury being the judges of the law as well as fact, this charge is to be understood as advisory only of what the law is."—Approved: Beard v. State, 71 Md. 275, 17 Atl. 1044.

§ 5146. Definition of Bawdy House.

"The court instructs the jury that a bawdy house or brothel, is a house of ill-fame, kept for the resort and commerce of lewd people of both sexes."—Approved: State of Missouri v. Horn, 83 Mo. App. 47.

§ 5147. Definition of House of Prostitution.

"Prostitution is the common lewdness of a woman for gain, or the offering of her person to indiscriminate intercourse with man; while

lewdness is unlawful indulgence of the animal desire. In determining the question whether said house was resorted to for the purpose of prostitution or lewdness, you are authorized to consider as shown in the evidence the character of the women, if any, resorting or repairing to said house, the conduct of the men visiting the said house, and times they went to said house, their length of stay, and any other facts or circumstances, if any, tending to show why men and women resorted to said house, if you find any did resort to it. To authorize a conviction it is not necessary or incumbent upon the state to show that the defendant kept the house in question as a house of ill-fame for the purpose of gain, the statute does not make that a necessary element of the crime, and it is not necessary to prove it."—Approved: State v. Porter, 130 Iowa, 690, 107 N. W. 923.

§ 5148. Bawdy House, Keeper of Defined.

"The keeper of a bawdy house or brothel is a person who acts as master or mistress or has the care, use or management of any house or building in which a bawdy house or brothel is kept and maintained with his or her knowledge and assistance."—Approved: State of Missouri v. Horn, 83 Mo. App. 47.

§ 5149. House of Ill-fame Shown by Reputation of Inmates.

"In considering the question as to whether or not the house kept by the defendant, if you find that she did keep it, was a house of ill-fame, resorted to by divers persons for the purpose of prostitution and lewdness, you will carefully consider the reputation of the house, the actions of those visiting the house, the time they did so, the reputation of the inmates of the house, as well as the reputation of those who visited the house, and all the facts and circumstances shown in evidence, and from these determine the real character of the house, charged in the indictment to be a house of ill-fame."—Approved: State v. Beebe, 115 Iowa, 128, 88 N. W. 358.

§ 5150. Keeping or Aiding or Abetting Keeping House of Ill-fame.

(a) "And you must also find, beyond a reasonable doubt, that the house in question was a house of ill-fame at the time in question; that it was resorted to for purposes of prostitution or lewdness, that the defendant was the keeper or one of the keepers thereof, or was concerned or aided or abetted in the keeping of the said house of ill-fame for the purpose of prostitution or lewdness."—Approved: State v. Ballew (S. D.), 128 N. W. 716.

(b) "The court instructs the jury, as a matter of law, that any one who aids, abets, assists or encourages in the keeping or superintending of a house or of premises where prostitution, fornication or concubinage is allowed or practiced, is guilty as principal."—Approved: Mach v. People, 220 Ill. 86, 77 N. E. 92.

I. Incest.

§ 5151. Consent of Both Parties Not Essential.
5152. Defendant's Admission of Relationship Competent Evidence.
5153. Facts Constituting Female an Accomplice.

§ 5151. Consent of Both Parties Not Essential.

"The court instructs you that the consent of both parties is not essential to the crime of incest. If the party charged have sexual intercourse with a female related to him within the degree of consanguinity within which marriage is prohibited, he is guilty of the crime of incest, whether the intercourse was with or without the consent of such female."—Approved: People v. Stratton, 141 Cal. 604, 75 Pac. 166.

§ 5152. Defendant's Admission of Relationship Competent Evidence.

"If the defendant B— has been proven to have admitted that G— was his daughter, such admission is competent evidence for the jury to consider upon the question of the relationship of the defendant to B—, and is sufficient to establish the fact she was his daughter, if it satisfies the jury on that fact beyond a reasonable doubt."—Approved: Brown v. State, 42 Fla. 184, 27 South. 869.

§ 5153. Facts Constituting Female an Accomplice.

"Where a female and a male are prohibited by law from intermarrying, and the female should willingly unite with the male in having an incestuous intercourse, and she should knowingly, voluntarily, and with the same intent which actuated the male, unite with him in the commission of the carnal act, then, in such instance, such female would be an accomplice in law, and in the trial of the case against such male upon the charge of incest such male could not be convicted upon the uncorroborated testimony of the female."—Approved: Jordan v. State (Tex. Cr. R.), 137 S. W. 114.

J. Kidnapping Child.

§ 5154. Securing Possession by False Representations to Person in charge.

§ 5154. Securing Possession by False Representations to Person in charge.

"The court further instructs you that if you should find from the evidence that on or about the date charged in the information the defendant went to Steilacoom, in Pierce county, Washington—the place where the said child, Clair Millmore R—, then lawfully was,—and then and there represented to the said child and to the person then having his lawful custody and control that he desired and that it was his purpose and intent to take the said child from said place and from said custody and convey him to Seattle, to his mother, Emma R—, and that, having so obtained the possession of the person of the said child under such representations, he then took the said child out of the state of Wash-

ington with the intent to detain and conceal said child from its guardian or other person having the lawful charge of said child, then he is guilty of the crime charged in the information in this case, and you should find him guilty, notwithstanding the fact that you should further find that after such taking, and after learning the true intent and purpose of the defendant, the said child, Clair Millmore R—, consented thereto, and was willing to go with the defendant."—Approved: State v. Rhoades, 29 Wash. 61, 69 Pac. 389.

K. Lewdness.

§ 5155. Must be Open—Secret Fornication is Not.

"The burden of the offense is the open, lewd, lascivious conduct of the parties living together as husband and wife. It is the publicity and disgrace, the demoralizing and debasing influence, that the law is designed to prevent. If, therefore, you find from the evidence in this case that the defendant and said C— lived together in the same house in the relation of master and servant, and not as husband and wife, and that they only had occasional acts of sexual intercourse, and these in a secret manner, such facts alone would not be sufficient to constitute the crime charged against defendant in this case."—Approved: State v. Kirkpatrick, 63 Iowa, 554, 19 N. W. 660.

L. Rape.

§ 5156. Definition of Rape.
5157. Force and Resistance Defined.
5158. Fear Excusing Want of Physical Resistance.
5159. Force and Fear Defined.
5160. Penetration Must be Shown.
5161. Consent—Reluctant and Otherwise.
5162. Insufficient Resistance.
5161. Consent—Reluctant or Otherwise.
5164. Reformed Prostitute.
5165. Moral Character of Prosecutrix.
5166. Evidence—Early Complaint.
5167. Previous Acts of Intercourse.
5168. Outcry—Signs of Injury—Place and Opportunity.
5169. Corroboration of Prosecutrix.
5170. Outcry Prevented by Threats and Putting in Fear.
5171. Female under Age—General Instruction.
5172. Subsequent Conduct of Prosecutrix.
5173. Female under Age—Statutory Carnal Knowledge.
5174. Female under Age—Penetration Necessary.
5175. Secus under Iowa Statute.
5176. Female under Age—Chastity Necessary.
5177. Female under Age—Corroboration of Prosecutrix not Essential.
5178. Female under Age—Reasonable Doubt as to Age Acquits.
5179. Assault with Intent to Commit—Reasonable Doubt as to Purpose.

5180. Putting in Fear and Pursuing.
5181. Intent to Use Force.
5182. Invitation to have Intercourse is not an Assault.

§ 5156. Definition of Rape.

"Rape is defined to be the unlawful carnal knowledge by a man of a woman or female child, forcibly and against her will."—Approved: Richards v. State, 36 Neb. 17, 53 N. W. 1027.

§ 5157. Force and Resistance Defined.

"You must find that the act was by force and against the will. It is not important whether that act was committed, if it was committed, by power; that is, by strength or in some other manner. It may have been committed because of fear. It will be necessary for you to find that it was committed by force, as far as the young man is concerned, and against the will of the girl—you must find that she was overcome and overpowered, and that resistance must have continued from the inception to the close, because if she yielded at any time it would not be rape."—Approved: People v. Murphy, 145 Mich. 524, 108 N. W. 1009.

§ 5158. Fear Excusing Want of Physical Resistance.

"The court instructs the jury that where a woman submits to sexual intercourse through fear of personal violence, and to avoid the infliction of great personal injury upon herself, and to save her life, then such carnal intercourse is punishable as a rape; and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant had sexual intercourse with the said Blanche S— against her will, then the defendant may be guilty of the crime of rape, although the said Blanche S— did not make the utmost physical resistance of which she was capable to prevent such intercourse, provided the jury further believe from the evidence, beyond a reasonable doubt, that the defendant threatened to use force, and to do her great bodily injury, or to kill her, in case she did not submit, and that she did submit to such intercourse through fear that defendant would do her great bodily injury, or kill her."—Approved: Richards v. State, 36 Neb. 17, 53 N. W. 1027.

§ 5159. Force and Fear Defined.

"Rape is the carnal knowledge of a woman without her consent, obtained by force or threats. The force employed to obtain such carnal knowledge must be such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case. The threats employed must be such as might reasonably create a just fear of death or great bodily harm, in view of the relative condition of the parties, as to health, strength and all other circumstances of the case. To constitute the crime of rape it is necessary that penetration be shown, but, if penetration be shown to have actually taken place as a matter of fact, the degree of penetration is immaterial. But further, to constitute rape there must be an assault. Now, the use of any unlawful violence upon

the person of another, with intent to injure him, whatever be the means or degree of violence used, is an assault and battery; any attempt to commit a battery or any threatening gesture, showing in itself, or by words accompanying it, an immediate intention coupled with an ability to commit a battery, is an assault. The injury intended may be either bodily pain, constraint or sense of shame, or other disagreeable emotion of the mind. In this case, gentlemen, to warrant the conviction of the defendant of rape, it should appear from the evidence: 1. That the defendant, Reuben F—, in Coryell county, Texas, on or about the 30th day of May, A. D. 1885, made an assault on the alleged female, Ida T—. 2. That by such assault, and by actual force and threats, as above defined, the defendant obtained carnal knowledge of the said Ida T— by actual penetration. 3. That such carnal knowledge of the said Ida T— was obtained by defendant without her consent and against her will."—Approved: Fitzgerald v. State, 20 Tex. App. 294, 295, 296.

§ 5160. Penetration Must be Shown.

"The court further instructs the jury that before they can find the defendant guilty of rape as charged, they must find from the evidence that there was some degree of entrance of the private parts of Minnie W— by the private parts of the defendant, and that defendant used force upon her to accomplish it, and that she manifested the utmost reluctance thereto, and did not consent to the same, and made such resistance as she was capable of to prevent it; and whether or not that consent was or was not given may be inferred from all the facts and circumstances given in evidence."—Approved: State v. Dilts, 191 Mo. 665, 90 S. W. 782.

§ 5161. Consent—Reluctant or Otherwise.

"To convict respondent, you must be satisfied beyond a reasonable doubt, which I will explain to you later on, that the intercourse was had by force and against the will of Miss F—, and that she made the utmost resistance on her part to defend herself, and unless so proven you should acquit the respondent. Should you find from the proof in the case that for a time she objected, yet, if at the time the act of intercourse occurred, she consented thereto, then it would not be rape, no matter how reluctantly or tardily consent was given or how much force had been previously employed, if in the act itself she consented, then it would not be rape. Miss F— claims she had been resisting for a long time and when the act was committed she was still resisting to the utmost, and submitted to it because she was overpowered; that she never consented; that she was taken out of the automobile by force and thrown on the ground and choked into submission. To this intercourse the respondent claims she finally consented, got out of the automobile willingly, and submitted to his sexual embraces without resistance. Now gentlemen, it is for you to decide—it is for you to say where the truth is. He claims she consented. If she did, this offense for which he is on trial is not made out and respondent in such case

should be acquitted. She claims she resisted to the utmost, and if she did and only ceased when overpowered by force or from not being able from want of strength to resist him any longer, then the offense is made out and he should be convicted."—Approved: People v. Lambert, 144 Mich. 578, 108 N. W. 345.

§ 5162. Insufficient Resistance.

(a) "If you believe that the defendant had carnal knowledge of the said Guadalupe de D—, at the time and place charged, with her consent, or that she yielded to such carnal knowledge, if any, without sufficient resistance thereof, as hereinbefore defined and explained, or if, from all the facts and circumstances in evidence before you, you have a reasonable doubt thereof, you will acquit the defendant. And you are instructed that in determining these issues you will take into consideration the acts, manner, and condition of the said Guadalupe de D— at the time and just after said carnal knowledge, if any, and all the other facts and circumstances in evidence before you in this case."—Approved: Salazar v. State, 55 Tex. Cr. R. 309, 116 S. W. 819.

(b) "The charge made against the defendant is, in its nature, a most heinous one, and well calculated to create strong prejudice against the accused; and the attention of the jury is directed to the difficulty growing out of the nature of the usual circumstances connected with the commission of such a crime in defending against the accusation of rape. It is your duty to carefully consider all the evidence in the case, and the law as given you by the court, in arriving at what your verdict will be in this case. You must find, on the part of the woman, not merely a passive policy or equivocal submission to the defendant. Such resistance will not do. Voluntary submission on the part of the woman, while she has power to resist, no matter how reluctantly yielded, removed from the act an essential element of the crime of rape. If the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given, or how much force had theretofore been employed, it is not rape, unless you find from the evidence, beyond a reasonable doubt, that the said Blanche S— was prevented from making resistance, and submitted to sexual intercourse with the defendant, through fear of personal violence, as explained in the next instruction."—Approved: Richards v. State, 36 Neb. 17, 53 N. W. 1027.

§ 5163. Mutual Understanding—Sudden Discovery.

"If the jury believe, from the evidence, that on or about the 28th day of last July the prosecutrix went to the barn where the defendant was engaged in harnessing horses, and that mutual overtures were made between them, leading into a mutual understanding and design to have intercourse there in the barn when they were discovered, then the jury are instructed they must find the defendant not guilty."—Approved: Adams v. People, 179 Ill. 633, 54 N. E. 296.

§ 5164. Reformed Prostitute.

"In determining the question as to whether the complaining witness made her utmost resistance to the connection charged, it is the right

of every woman, no matter how far she may have stepped aside from virtue, to return to that path, and, if she desires to follow in the path of rectitude, to be protected by the law. And it would be as much a rape to force a woman to have carnal sexual intercourse against her will, and by force, if she had done wrong at some time, as it would to commit the same offense upon a virtuous woman. The law seeks to protect a woman in endeavoring to do that which is right, and live a proper life. I speak of this, because some testimony was called out with a view, perhaps, of throwing some discredit upon the character of the girl prior to this transaction. As to what that amounts to, why, that is for you to consider. I should say this, however: that if the girl had followed a dissolute life, and been guilty of having sexual intercourse with boys as often as opportunity offered, here and there, you would have a right to take that into consideration in coming to your conclusion as to whether the connection in this case was had against her will or not. But whether she was chaste or otherwise, if at this time, and on this occasion, the connection was forced with her against her consent, and against her will, by force, that is rape, and the law so regards it."—Approved: People v. Crego, 70 Mich. 319, 38 N. W. 281.

§ 5165. Moral Character of Prosecutrix.

"Evidence has been introduced as to the moral character of the prosecuting witness, and as to her reputation for chastity and virtue. You are not to understand from this that a rape cannot be committed on a woman of bad moral character. A woman may be a common prostitute, and may still be the victim of a rape. This evidence has been introduced only for the purpose of affecting her credibility as a witness, and as a circumstance affecting the probability of the act of intercourse being voluntary or against her will,—upon the theory that a person of bad moral character is less likely to speak the truth as a witness than one of good moral character, and that a woman who is chaste and virtuous will be less likely to consent to an act of illicit carnal intercourse than one who is unchaste. So that whatever conviction this evidence may produce in your minds as to whether she is of good or bad moral character, or as to whether she is chaste or unchaste, you will treat it as a circumstance affecting her credibility to aid you in determining whether her story is true or false, and the act of intercourse voluntary or against her will."—Approved: Anderson v. State, 104 Ind. 467, 4 N. E. 63.

§ 5166. Evidence—Early Complaint.

"Upon the trial of a defendant accused of the crime of rape the fact that the prosecutrix made prompt and early complaint of the wrong and injury committed upon her person, and to her character and chastity, is independent and original evidence, and is admissible and may be received and considered by the jury in corroboration of her other testimony given in the case."—Approved: People v. Keith, 141 Cal. 686, 75 Pac. 304.

§ 5167. Previous Acts of Intercourse.

"You are further instructed that evidence of previous act of sexual intercourse between the defendant and the prosecutrix, and of improper familiarity on the part of the defendant towards and with the prosecutrix, both before and after the time charged in the information, is received and admitted in evidence to prove the adulterous disposition of the defendant herein, and as having a tendency to render it more probable that the act of sexual intercourse charged in the information was committed on the 23d day of February, 1902, and for no other purpose."—Approved: People v. Edwards, 139 Cal. 527, 73 Pac. 416.

§ 5168. Outcry—Signs of Injury—Place and Opportunity.

"From the peculiar character of rape and assault with intent to rape, care is to be used in regard to them. The injured female is usually a competent witness in such cases; but the degree of credit to be given to her evidence depends more or less upon the concurrence of the circumstances of the fact with her testimony. For instance, if she be of good fame, if she presently discovered the offense, made pursuit after the offender, showed circumstances and signs of the injury, if the place where the fact was done was remote from the people, inhabitants, or passengers, or if the offender fled, these and the like are concurring evidence to give greater probability to her testimony, when proved by others as well as herself. But if she concealed the injury for any length of time after she had an opportunity to complain, if the place where the fact was supposed to be done, when and where it is probable that she might be heard by others, these and like circumstances carry a strong presumption that her testimony is false or feigned. Such is the care that the law uses in scrutinizing allegations of the crime of rape."—Approved: Jackson v. State, 132 Ga. 546, 64 S. E. 653.

§ 5169. Corroboration of Prosecutrix.

"You are instructed that in the case of rape it is not essential that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense, and if the jury believe from the testimony of the prosecutrix, and the corroborating circumstances and facts testified to by other witnesses, that the defendant did make the assault as charged, the law would not require that the testimony of the prosecutrix should be corroborated by other witnesses as to what transpired at the immediate time and place when it is alleged the assault was made."—Approved: Dunn v. State, 58 Neb. 807, 79 N. W. 719.

§ 5170. Outcry Prevented by Threats and Putting in Fear.

"If you find the defendant committed the alleged offense upon the plaintiff, and that the defendant threatened her and put her in fear, that is a circumstance to be taken into consideration by you in rebutting unfavorable inferences from her not making outcry and offering more physical resistance to the commission of the alleged offense."—Approved: Witzka v. Moudry, 83 Minn. 78, 85 N. W. 911.

§ 5171. Female Under Age—General Instruction.

"The court instructs the jury that if they believe from the evidence in this case, beyond a reasonable doubt, that the defendant had sexual intercourse with the prosecuting witness; and, at the time he had such intercourse, Bertha W— was under the age of 16 years, the defendant would be guilty, and you should so find."—Approved: Curtis v. State, 89 Ark. 394, 117 S. W. 521.

§ 5172. Subsequent Conduct of Prosecutrix.

"The court instructs the jury that they may take into consideration in determining the weight of her evidence the conduct of the prosecuting witness, as shown by the evidence, subsequent to the commission of the alleged crime, such as remaining, if she did remain, with the defendants after reaching the company of others, and there failing to disclose, if she did so fail, its alleged commission."—Approved: Sutton v. People, 145 Ill. 279, 288, 34 N. E. 420.

§ 5173. Female under Age—Statutory Carnal Knowledge.

"The jury are instructed that the material allegations of the information upon which the defendant is prosecuted in this case are as follows: First. That the defendant, John B—, at the time of the intercourse with which he stands charged in the information, was a male person over the age of 18 years. Second. That the said Beulah T—, at the time of the intercourse with which the prisoner stands charged in the information, was a female child under the age of 18 years. Third. That on or about the 5th day of February, 1903, and within three years prior to the 9th day of January, 1904, the said defendant made an assault upon said Beulah T—, and did carnally know and abuse her. Fourth. That said Beulah T—, at the time of the intercourse with which the prisoner stands charged in the information, was chaste, as defined in these instructions. Fifth. That the crime charged in the information was committed in York County, and state of Nebraska, and since the 9th day of January, 1901, and prior to the 25th day of April, 1903."—Approved: Blair v. State, 72 Neb. 501, 101 N. W. 17.

§ 5174. Same—Penetration Necessary.

(a) "The constituent elements of the offense of rape upon a female under 15 years of age are that the offending person, with or without the consent of the female, and with or without the use of force, threats, or fraud, had carnal knowledge of her; that she was at the time under the age of 15 years, and was not his wife; and, further, the proof must show beyond a reasonable doubt that the sexual organ of the female was penetrated by the male organ of the offending party; but it is not required to show that the penetration was to any particular depth, as proof of the slightest penetration is sufficient. It is not required to show emission. If you believe from the evidence beyond a reasonable doubt that the defendant did, as charged in the indictment, on or about the 28th day of August, 1907, as alleged, in the county of Ellis and state of Texas, in a house on the E— farm, have carnal knowledge of Lake C—, and that she was not then and there his wife, and you further believe from the evidence beyond a reasonable doubt that she, the said

Lake C—, was then and there under the age of 15 years, you will find the defendant guilty as charged, and assess his punishment as hereinafter directed. If you do not so believe beyond a reasonable doubt, you will acquit the defendant."—Approved: Banton v. State, 53 Tex. Cr. R. 251, 109 S. W. 159.

(b) "That the proof of the crime of rape, or of carnally and unlawfully knowing and abusing a female child, must show that there was some degree of entrance of the male organ within the private parts of the female, and if the jury find from the testimony in this cause that the private parts of the child were not penetrated by defendant's private organ or penis, then the jury ought to acquit defendant of the crime of rape as charged in the first count of the indictment."—Approved: State v. Cofer, 68 Mo. 120.

§ 5175. Secus under Iowa Statute.

"You will notice from the foregoing statute that it is immaterial as to what the previous character of the female was or what her prior conduct had been, for, as you observe, the law absolutely prohibits the having of sexual intercourse with a female under the age of 15 years; but you are to consider all the testimony that has been offered and introduced before you touching her previous character and conduct as bearing upon the credibility of her testimony and the reasonableness of the story which she tells, and give it such weight and credit as you believe it is fairly and reasonably entitled to under all the facts and circumstances and evidence submitted to you."—Approved: State v. Herrington (Iowa), 126 N. W. 772.

§ 5176. Female under Age Chastity Necessary.

"The court instructs you that before you can convict the defendant, the State must prove beyond a reasonable doubt: First, that the said Jennie A— was over the age of fourteen, and under the age of eighteen years; second, that she was unmarried, and of chaste character prior to the date of the act charged; and third, that the defendant had carnal intercourse with her; and unless the State has proven each and every one of these propositions beyond a reasonable doubt, then you find the defendant not guilty; or, if you have a reasonable doubt as to the truth of either one of said three propositions, then you will find the defendant not guilty."—Approved: State v. Day, 188 Mo. 359, 87 S. W. 465.

§ 5177. Same—Corroboration of Prosecutrix Not Essential.

"I instruct you further in cases of this kind, if you find from the evidence beyond all reasonable doubt, such as I will define to you, that the prosecutrix in this case, viz., Lulu R—, was a female child under the age of 18 years at the time mentioned in the information, and if you further believe beyond a reasonable doubt that the defendant had illicit sexual intercourse with such prosecutrix at the time mentioned in the information, and you further find that her credibility had in no manner been successfully impeached, and you believe her testimony and disbelieve the defendant, you will have a right to return a verdict of

guilty against the defendant, even though there has been no corroborating testimony offered or given in this case in support of the testimony of the prosecutrix as to the particular acts constituting the offense of rape as heretofore defined."—Approved: State v. Roller, 30 Wash. 692, 71 Pac. 718.

§ 5178. Same—Reasonable Doubt as to Age Acquits.

(a) "If the jury believe from the evidence in this case that, at the time the witness, Savannah P—, testified that the defendant had carnal knowledge of her, she, the said witness Savannah P—, was 15 years of age or over, or if the jury have a reasonable doubt as to said fact, then they will acquit the defendant, and say by their verdict 'not guilty.' "—Approved: Robertson v. State, 51 Tex. Cr. R. 493, 102 S. W. 1130.

(b) "The court instructs the jury that the defendant is presumed to be innocent of the crime charged against him until the contrary is proven, and that it devolves upon the state to show by competent proof that the defendant had sexual intercourse with the said Bertha W—, and that the said Bertha W— was at that time under the age of 16 years; and if upon the whole case you entertain a reasonable doubt that the defendant had sexual intercourse with the said Bertha W—, or that the said Bertha W— was under the age of 16 years at the time of said act of sexual intercourse is proven to have been committed, then you should find the defendant not guilty."—Approved: Curtis v. State, 89 Ark. 394, 117 S. W. 521.

§ 5179. Assault with Intent to Commit Reasonable Doubt as to Purpose.

"That if the jury are satisfied beyond a reasonable doubt that an assault was committed by defendant as defined and stated above, and have a reasonable doubt of the felonious purpose to effect an actual sexual intercourse by force and violence and against her will, as stated, they would render a verdict of not guilty of the felony, but guilty of simple assault."—Approved: State v. Garner, 129 N. C. 536, 40 S. E. 6.

§ 5180. Putting in Fear and Pursuing.

"That if the jury are satisfied beyond a reasonable doubt that defendant acted in such a manner as to put Beulah W— in reasonable fear of personal violence from him, and cause her to turn from her path, and escape and avoid him, this would be an assault on his part; and if the jury are satisfied beyond a reasonble doubt that he assaulted her, and that he intended to catch her, and then have sexual intercourse with her by force and violence, and against her will, that he intended to overcome at all hazards any resistance she might offer, they would render a verdict of guilty as charged in the bill of indictment."—Approved: State v. Garner, 129 N. C. 536, 40 S. E. 6.

§ 5181. Intent to Use Force.

"To constitute the crime charged in the second count of the information, there must have been an attempt to commit rape, and that intent must have been manifested by an assault for that purpose upon the

person of the prosecutrix, Louise I. L—; and, in order to convict the defendant, the jury must be satisfied beyond a reasonable doubt that he did use force, and that against the will of the said Louise I. L—, in an attempt to have sexual intercourse with her.

"You are instructed that, to sustain a conviction for assault with intent to commit rape, the evidence must show that the accused had a purpose, not only to have sexual intercourse with the prosecutrix, but must have intended also to use whatever degree of force might be necessary to overcome her resistance and accomplish his object."—Approved: Dunn v. State, 58 Neb. 807, 79 N. W. 719.

§ 5182. Invitation to Have Intercourse is not Assault.

"A mere invitation or request from a man to a woman to have carnal intercourse with him does not constitute an offense punishable under the law. So, if you should find from the evidence that on the occasion under investigation the defendant did request or invite the said Marcy S— to have carnal intercourse with him, but fail to find from the evidence, beyond a reasonable doubt, that he also made an attempt to have carnal knowledge of her by force and against her will and without her consent, as the term 'attempt' has hereinbefore been defined, you will acquit the defendant."—Approved: Holloway v. State, 54 Tex. Cr. R. 465, 113 S. W. 928.

M. Seduction.

§ 5183. Definition of Seduction.
5184. Artifice to Induce Consent.
5185. False and Fraudulent Acts and Promises.
5186. Promise of Marriage Sole Inducement.
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5195. Promise Subsequent to Birth of Child as Corroboration.
5196. Defense that Prosecutrix Refused to Marry Defendant to be Proved by Preponderance of Evidence.
5197. Only Complete Defense—Marriage or Offer in Good Faith to Marry.

§ 5183. Definition of Seduction.

"Seduction means an enticement of a woman on the part of a man to surrender her chastity by means of some art, influence, promise, or deception calculated to accomplish that object, and to include the yielding of her person to him as much as if it was expressly stated."—Approved: Faulkner v. State, 53 Tex. Cr. R. 258, 109 S. W. 199.

§ 5184. Artifice to Induce Consent.

"If you find that the defendant had sexual intercourse with said prosecutrix, Mary B—, and that he induced her to consent thereto by representing and saying to her, in substance, that 'there was nothing wrong in such an act between parties who were going to marry,' this would be artifice, within the meaning of the law."—Approved: State v. Garrity, 98 Iowa, 101, 67 N. W. 92.

§ 5185. False and Fraudulent Acts and Promises.

"The fact that a man and woman, previously virtuous, engage in acts of illicit sexual intercourse, does not, of itself, constitute seduction, but there must be some previous inducement, promise or artifice, deception, or overpersuasion by the man, followed by sexual intercourse as the result of such promise, inducement, or overpersuasion, to constitute the offense of seduction. The willingness of the woman to yield her virtue, and the willingness of the man to despoil her of it, does not, of itself, constitute the offense; but, if the woman is made willing to part with her virtue by the false or fraudulent acts, promises, inducements, or persuasions of the man, then he is guilty of seduction."—Approved: Graham v. McReynolds, 90 Tenn. 673, 18 S. W. 272.

§ 5186. Promise of Marriage Sole Inducement.

"You are further charged, at the request of the defendant, if you believe from the evidence beyond a reasonable doubt that the prosecuting witness, Louise G—, did not rely solely upon the absolute promise of marriage, but that she was moved to let defendant have the alleged sexual intercourse with her through fear, or partly through fear, or party through lust, then it is your duty to acquit the defendant, although you should believe that a promise of marriage was then made and was part, though not the sole and only, reason of inducement."—Approved: Muhlhause v. State, 56 Tex. Cr. R. 288, 119 S. W. 866.

§ 5187. Testimony of Promise to be Corroborated.

"The court instructs the jury to authorize a conviction in this case, you must believe and find not only that said Mayme P. H— was at the time of the seduction, if any, a woman of good repute in the community in which she lived, and that she was then single and unmarried and under twenty-one years of age, and that defendant did in fact seduce her, but you must believe and find from the evidence in the case that defendant accomplished this under a promise to marry her; that she believed his promise to be in good faith, and that so believing she accepted it and consented to become and by him be made his wife, and that subsequently to such promise, if any, she was seduced and debauched by defendant; and to support the charge of such promise of marriage, it is necessary that the evidence of the prosecutrix be supported by that of the witnesses, or by corroboration of acts or circumstances which convince your minds of the truth of the testimony in that respect. A female is said to be debauched, within the meaning of that term, as used in this instruction, when, by arts and blandishments, she

is deceived, corrupted, and drawn aside from the right path. She is said to be 'debauched' within the meaning of that term, as used in the instructions, when she is carnally known. Every illicit connection is not seduction. It cannot be said that a female is drawn aside from the path of virtue unless she is honestly pursuing that path when approached. If her mind is corrupt and polluted by lewd thoughts, and she is ready to submit to improper embraces, as opportunity offers, from her own lustful propensity, and without any arts or blandishments of him with whom she has sexual intercourse, in such case she cannot be said to be seduced by the party with whom she has improper sexual relations. If the jury find from the evidence that the defendant had illicit connection with said Mayme P. H— under or by promise of marriage, but further find that there was no seduction within the meaning of the word, as already defined, they will find the defendant not guilty."—Approved: State v. Fogg, 206 Mo. 696, 105 S. W. 618.

§ 5188. Chastity of Woman to be Presumed—Reformation.

"This is a prosecution for seduction, and it contemplates the obtaining of carnal knowledge of a woman of actual personal chastity by virtue of a false express promise of marriage. The law presumes the woman to be chaste, and, if the defendant maintains that she is unchaste, he must show it by evidence. If a woman lapses from personal chastity, yet if she reforms and maintains her personal chastity for such a time that the jury can see that she is actually personally chaste at the time of the alleged seduction, then if the accused obtains carnal knowledge of her person by a false express promise of marriage, and this is sufficiently proven, the defendant should be convicted. If, however, it appears that the woman at the time of the alleged seduction was not possessed of actual personal chastity, the accused should be acquitted."—Approved: Cooper v. State, 86 Ark. 30, 109 S. W. 1023.

§ 5189. Chastity Required.

"You are charged that before you can convict the defendant, you must believe beyond a reasonable doubt that defendant seduced the prosecuting witness in Haskell county, and that at that time she, the said Bessie J—, was a chaste woman, who had never had sexual intercourse with any one, and unless you believe beyond reasonable doubt that said Bessie J— had never had such sexual intercourse with any one, prior to the time she had such intercourse, if any, with defendant in Haskell county, you must find the defendant not guilty."—Approved: Simmons v. State, 54 Tex. Cr. R. 619, 114 S. W. 841.

§ 5190. Burden on Defendant to Show Unchastity.

"The law presumes that she was chaste, and it throws upon the defendant the burden of making proof that she was not, and, before you can believe that she was not chaste, that proof which the law requires the defendant to offer before you must arise to that dignity as to raise in your minds a reasonable doubt of guilt."—Approved: Tedford v. United States, 7 Ind. T. 254, 104 S. W. 608.

§ 5191. Reasonable Doubt as to Chastity Acquits.

"The prosecuting witness is presumed to have been virtuous, but this presumption can be overcome by evidence, and if the evidence introduced by the defendant raises in your minds a reasonable doubt as to whether or not the prosecuting witness was chaste and virtuous previous to the time the defendant had intercourse with her, you will find the defendant not guilty."—Approved: Willhite v. State, 84 Ark. 67, 104 S. W. 531.

§ 5192. Preponderance of Evidence to Show Lewdness.

"That the defendant is bound to prove by the preponderance of the evidence that the prosecutrix was lewd and unchaste. If you have any doubt as to where the preponderance of the evidence is, that you will give the benefit of that reasonable doubt to the defendant. Understand me that the defendant must prove by the preponderance of the evidence, not beyond a reasonable doubt, that the prosecutrix was lewd and unchaste. If you have any doubt as to where the preponderance of the evidence is, then you will give the prisoner the benefit of that reasonable doubt."—Approved: State v. Turner, 82 S. C. 278, 64 S. E. 424.

§ 5193. Conditional Promise of Marriage.

"You are further charged, at the request of the defendant, that if you believe from the evidence that the defendant promised to marry Louise G—, but that the promise was a conditional promise, or was made on condition that if she got in family way, and that she surrendered and had sexual intercourse with the defendant by reason of such conditional promise, then you are instructed, if you so find, to acquit the defendant."—Approved: Muhlhause v. State, 56 Tex. Cr. R. 288, 119 S. W. 866.

§ 5194. Female Accomplice to be Corroborated.

"Seduction means to lead away a female from the path of virtue, to entice or persuade her, by a promise of marriage, to surrender her virtue and have carnal intercourse with the man making such promise. To constitute the offense of seduction, it must appear that carnal intercourse with the female was accomplished by means of a promise to marry her made prior to the illicit intercourse. Such promise, and yielding her virtue in consequence thereof, constitutes the gist of the offense. In seduction the female seduced is an accomplice of the male offender, and on trial of a person charged with seduction no conviction can be had upon the testimony of the female alleged to have been seduced, unless the same is corroborated by other evidence tending to connect the defendant with the offense charged, and such corroborating evidence must be sufficient to satisfy the jury beyond a reasonable doubt of the truth of the evidence by the female alleged to have been seduced. Now, keeping in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt that in Fisher county, Tex., on or about the 15th day of March, 1905, the defendant, Walter H—, did then and there unlawfully seduce Effie W— an un-

married woman under the age of 25 years, and did then and there obtain carnal knowledge of the said Effie W— by means and in virtue of a promise of marriage to her previously made by him, the said defendant, Walter H—, then you will find the defendant guilty as in the indictment and assess his punishment at confinement in the penitentiary for any term the jury may determine, provided it be for not less than two nor more than ten years. If you do not believe from the evidence beyond a reasonable doubt that the defendant committed the offense charged against him, you will find the defendant not guilty."—Approved: Howe v. State, 51 Tex. Cr. R. 174, 102 S. W. 409.

§ 5195. Promise Subsequent to Birth of Child as Corroboration.

"You are instructed that the defendant in this case cannot be convicted upon the strength of any promises made by the defendant to the prosecutrix subsequent to the birth of her said child, and that the evidence of such promises then made are only to be considered by you as circumstances to corroborate the testimony of the prosecutrix that she was seduced by the defendant upon the express promise there made to marry her, given by him to her at the time she submitted to his embrace."—Approved: Kerr v. United States, 7 Ind. T. 486, 104 S. W. 809.

§ 5196. Defense that Prosecutrix Refused to Marry Defendant to be Proved by Preponderance of Evidence.

"If the jury believe from the evidence, beyond a reasonable doubt, that the defendant obtained carnal knowledge of S— by virtue of an express promise of marriage made by him to her, and that said marriage was by agreement of the parties set to take place on the fourth Sunday in June, 1899, and that said marriage has not taken place, and that the defendant seeks to justify his failure to make said marriage on the ground of the refusal of the said S— to join him in the marriage, then he must prove such refusal on the part of said S— to your satisfaction, by a preponderance of the testimony; in other words, the burden of proof is on the defendant in such matter of defense."—Approved: Caldwell v. State, 69 Ark. 322, 63 S. W. 59.

§ 5197. Only Complete Defense Marriage or Offer in Good Faith to Marry.

"We think the rule of law is and should be that, if any man in this state is guilty of acts which under the law constitute seduction, no act of his less than marrying his victim, or in good faith offering to marry her would be a bar to conviction. In this case there is no contention that appellant offered to marry the prosecutrix in good faith, but the evidence discloses that some time thereafter he did marry another woman. In the case of Merrell v. State, 42 Tex. Cr. R. 19, 57 S. W. 289, it appears that M— had seduced a young woman, and, her condition being discovered, failed to offer in good faith to marry her, but referred the matter to his mother, who refused to grant her consent. Touching this matter the court uses this language: 'This was before her death,

and at a time when he might have married her. And we hold that notwithstanding there may have been an agreement to marry at some future time, and not at that particular time, under the terms of the statute, to relieve himself of prosecution, it was at least his duty then to offer in good faith to marry the prosecutrix. In failing to do so, the statute no longer afforded him a shield, not to wipe out the offense, for that was already committed, but to bar a prosecution for said offense.' "—Approved: Hinman v. State (Tex. Cr. R.), 127 S. W. 221.

CHAPTER CXLII.

OFFENSES—MISCELLANEOUS—CONTINUED.

A. Arrest.
B. Assault and Battery.
C. Assault and Battery (continued).
D. Assault With Intent to Kill.
E. Breach of the Peace.
F. Felonious Wounding.
G. Resisting Officer.
H. Riot and Disturbing Public Assembly.
I. Unlawful Carrying of or Firing Weapons.

A. Arrest.

§ 5198. Arrest Without Warrant and Against Will.
5199. Peace Officer—Breaches of Peace in His Presence.
5200. Constable—Loud and Angry Words—Officer's Presence.
5201. Attempting to Commit Offense in Officer's Presence—Duty to Arrest.
5202. Without Warrant Where No Offense is Committed—Right to Resist.
5203. Private Person Making—Reasonable Ground for Believing Offense Committed—Identity of Offender.
5204. Officer with Warrant—Right to Overcome Resistance.

§ 5198. Arrest Without Warrant and Against Will.

"If you shall believe from the evidence in this case beyond a reasonable doubt that the accused, Lewis W—, did in Elliott county, Ky., at any time before the finding of the indictment herein, without reasonable and just cause, arrest John S— against his will and without his consent so to do, and without then and there having a warrant for the arrest of the said John S—, then you will find the accused guilty as charged, and fix his punishment at confinement in the state penitentiary for not less than one year and not more than twenty years, in your discretion."—Approved: Commonwealth v. White (Ky.), 101 S. W. 331 (not reported in state reports).

§ 5199. Peace Officer—Breaches of Peace in His Presence.

"You are instructed that a city marshal has authority, with or without a warrant, to arrest persons who commit breaches of the peace in his presence within his city, and, if the persons sought to be arrested resist or flee, to use such force as may be reasonably necessary under

the facts and circumstances to apprehend the offender; but, before having a right to resort to such force, such officer must use such language and so act as to make clear to the offender his intention then and there to take him into custody."—Approved: State v. Appleton, 70 Kan. 217, 78 Pac. 445.

§ 5200. Constable—Loud and Angry Words—Officer's Presence.

"The court further instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that, at the time of the shooting of T. P. W— by the accused, the said T. P. W— was then and there a constable of Summers county, for Green Sulphur district, of said county, and that shortly before or at the time of said shooting the accused was in the presence of said W— guilty of contending with angry words to the disturbance of the peace in said district, that such swearing was an offense under the laws of this state, which, if committed in the presence of such constables, was just legal cause for the arrest of the accused by said constable without a warrant."—Approved: State v. Clark, 64 W. Va. 625, 63 S. E. 402.

§ 5201. Attempting to Commit Offense in Officer's Presence—Duty to Arrest.

"The court further instructs the jury that a constable, under the law, has the right to arrest without warrant any person committing or attempting to commit an offense in his view or presence. So if you shall believe from the evidence in the case that the deceased, Charles B. D—, was the constable or acting constable of Carroll township, Texas county, Missouri, and that the defendant in this case was committing an offense against the laws or was about to commit an offense in the presence and in the view of the said Charles B. D—, in said township and county, then you are instructed that Charles B. D— had the right and it was his duty to arrest the defendant at the time without warrant."—Approved: State v. Renfrow, 111 Mo. 589, 20 S. W. 299.

§ 5202. Without Warrant Where no Offense is Committed—Right to Resist.

"The question for the jury to consider is this, was the respondent actually disturbing the public peace, in the salvation army barracks at the time the arrest was made? and not whether he was about to do so, as the latter is not charged in the information in this cause. The officer could arrest without a warrant only for a breach of the peace actually being committed in his presence, and if you believe, from all the evidence in the case, that no such breach of the peace took place until the arrest was made, and then only in resisting such arrest to the extent of striking several blows with the fist, then such resistance was justifiable, and you should acquit the defendant. If an officer does not keep within the law, he is not acting as an officer, nor entitled to protection as one. Rounds had a right to resist an illegal arrest. You must remember that you cannot take into consideration anything that happened at the barracks before Rubert got there; and that you must find Rounds not guilty if it is reasonably possible to reconcile the

facts with innocence. —Approved: People v. Rounds, 67 Mich. 482, 35 N. W. 77.

§ 5203. Private Person Making—Reasonable Ground for Believing Offense Committed—Identity of Offender.

"In order to justify the deceased and his companions in making the arrest of the defendants for having committed a felony on an occasion already past, it must be proved beyond a reasonable doubt that the defendants were still in the commission of a public offense in this territory, and that there was reasonable ground for believing these defendants committed said offense. A mere suspicion alone is not sufficient to justify an arrest. There must be specific circumstances connecting these defendants with the act. There must be a clear-cut belief, founded upon and rising from definite facts and strong reason. A mere honest belief is not sufficient to justify a private person in making an arrest for such an offense, and these facts must be such as would warrant a cautious person in coming to the conclusion that the person arrested is the real offender, and these facts must be known to the person making the arrest at the time."—Approved: Barclay v. United States, 11 Okl. 503, 69 Pac. 798.

§ 5204. Officer with Warrant—Right to Overcome Resistance.

"A constable stands on the same footing as a sheriff. If a warrant is placed in his hands to make an arrest, it becomes his duty to make that arrest, and the law clothes him with the power to do all that is necessary to make the arrest. You see, then, that you will have to inquire as to whether it was necessary for him to go into the house or not. Ordinarily, if a constable goes up to a man, and says, 'I arrest you,' that is usually as far as he has to go, and that is all that is necessary if the other party submits to the arrest. The other party has a right to ask the reason for his arrest and his authority. If he has a warrant, it then becomes his duty to exhibit the same. Then, if the party submits, that is as far as the officer has the right to go. If he refuses to submit to the arrest, then the officer has the right to go to whatever length is necessary to make him submit. If a man is in his own house, he has a right to go to that house and go through the same process. He has the right to go in the house if it is necessary. He has the right to call the person out, and, if he refuses to come out, then he has a right to go in the house. If the door is open, he can go in. If the door is closed, he can demand that it be opened, and, if that is refused, he can break down the door. He represents the majesty of the law, and that may override all resistance. It uses whatever force is necessary, and stops at nothing short of accomplishing its purpose. If it is necessary for them to pull down the house, they have the right to do that. If an arrest is resisted and active resistance is resorted to, then the officer still has the right to use as a matter of fact, whatever force is necessary to accomplish his purpose."—Approved: State v. Franklin, 80 S. C. 332, 60 S. E. 953.

B. Assault and Battery.

§ 5205. Assault Defined.
5206. Attempt to Strike—Ability to Commit Injury.
5207. Pointing Pistol in Threatening Manner.
5208. When Done for no Unlawful Purpose, Pointing Gun is not Assault.
5209. Accidental Discharge of Weapon.
5210. Shooting in Sudden Heat of Passion.

§ 5205. Assault Defined.

(a) "The court instructs the jury that an assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."—Approved: May v. People, 8 Colo. 224, 226.

(b) "In its broad legal sense any unlawful attempt, coupled with the present ability to commit a violent injury upon the person of another, is an assault. I will repeat that because that comprises the definition generally of all assaults. In its broad legal sense any unlawful attempt, coupled with the present ability to commit a violent injury upon the person of another, is an assault."—Approved: Tyner v. United States, 2 Okl. Cr. App. 689, 103 Pac. 1057.

§ 5206. Attempt to Strike—Ability to Commit Injury.

"You are instructed that an assault is an unlawful attempt, coupled with the present ability, to commit a violent injury upon the person of another. By the expression 'coupled with the present ability to commit a violent injury upon the person of another' is meant that the person making an assault must at the time be in such a position, and within such a distance of the person assaulted, as to enable him to strike such person, and commit a violent injury upon him by the means used. So, in this case, before you find the defendant guilty of the crime of assault to kill or aggravated assault, or even of simple assault, you must be satisfied from the evidence, beyond a reasonable doubt, that the defendant not only attempted to strike Napoleon C— with an ax, but that he was also at the time sufficiently near the said C— to enable him to strike him and inflict an injury upon his person. Unless you can find from the evidence beyond a reasonable doubt, it is your duty to acquit the defendant."—Approved: Jones v. State, 89 Ark. 213, 116 S. W. 230.

§ 5207. Pointing Pistol in Threatening Manner.

"If the defendants in a threatening manner, pointed a loaded pistol and rifle, or either, at Richard T. B—, within shooting distance of said B—, such act of defendants constitutes, in law, an assault."—Approved: State v. Dooley, 121 Mo. 591, 26 S. W. 558.

§ 5208. When Done for no Unlawful Purpose Pointing Gun is not Assault.

"I instruct the jury that the pointing of a gun in the air is not an unlawful act, and I charge you that the respondent would have the right

to take a gun out in the field to the east of the house and point the same in the air, so long as in doing so he did not take it there for the purpose of obstructing or resisting the officer, Elisha M—, and did not use it for that purpose. I instruct you that the discharging of the gun, by respondent in the air, is not an unlawful act, and I charge you that the respondent would have the right to take the gun out into the field east of the house and discharge the same in the air, so long as by doing so he did not take it there for the purpose of obstructing or resisting the officer, Elisha M—, and did not use it for that purpose, and did not use it in such manner as to amount to a reckless disregard of human life by so using it. The respondent, under the law, had a right to take the gun with him into the field where the shooting occurred, so long as by doing so he did not take it there for the purpose of obstructing and resisting the officer, Elisha M—, and did not use it for that purpose, and to carry said gun in his hands and to point the same in the air, so long as he did not have the gun there for the purpose of obstructing the officer or resisting the officer, but he would not have the right to knowingly point said gun in the direction of any person."—Approved: People v. Sauer, 143 Mich. 308, 106 N. W. 866.

§ 5209. Accidental Discharge of Weapon.

"If the jury believe from the evidence that the defendant, when the shot was fired, had no intention of shooting at S—, and the pistol was accidentally discharged, then they will find for the defendant."—Approved: Mann v. Commonwealth (Ky.), 110 S. W. 243 (not reported in state reports).

§ 5210. Shooting in Sudden Heat of Passion.

"If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, in this county, and within twelve months before the finding of the indictment herein, did, in a sudden affray, or in sudden heat and passion, without previous malice, and not in self-defense, shoot at James L. S—, without wounding him, then the jury will find the defendant guilty of shooting in sudden heat and passion, or in sudden affray, and will fix his punishment by a fine of not less than $50 nor more than $500, or confinement in jail for not less than six nor more than twelve months, or both, in the discretion of the jury."—Approved: Mann v. Commonwealth (Ky.), 110 S. W. 243 (not reported in state reports).

C. Assault and Battery (continued).

§ 5211. Unlawful Violence on Person of Another—Intent to Injure.
5212. Chastisement by Teacher to Correct Pupil.
5213. Assault Assented to—Not Aggravated.
5214. In Mutual Combat All Participants Guilty.
5215. Aiding and Abetting All Principals.
5216. Using Necessary Force in Keeping Order in One's Own House.
5217. Self Defense Only Justifies Reasonable Force.

§ 5211. Unlawful Violence on Person of Another with Intent to Injure.

"The use of any unlawful violence upon the person of another with intent to injure him or her, whatever be the means or degree of violence, used is an assault and battery. Any attempt to commit a battery, or any threatening gesture showing in itself or by words accompanying it an immediate intention, coupled with an ability, to commit a battery, is an assault. The injury intended may be either bodily pain, constraint, or sense of shame, or other disagreeable emotion of the mind." —Approved: Taylor v. State, 50 Tex. Cr. R. 362, 97 S. W. 94.

§ 5212. Chastisement by Teacher to Correct Pupil.

"Gentlemen of the jury, you are further charged, as part of the law of this case, if you find from the evidence that the defendant did chastise Martin T— by whipping him with a switch, but that the defendant was a school teacher and T— was his pupil, and that the chastisement was administered to him by the defendant because the said T— had violated the rules of his school, and that the said chastisement was inflicted upon him by the defendant for the purpose of correcting him, and in good faith, and without any intention on the part of the defendant to injure him, the said T—, and without spite or ill will toward the said T—, then you will acquit the defendant, and find him not guilty, even though you should find from the evidence that the chastisement administered was more severe than was actually necessary."—Approved: Greer v. State (Tex. Cr. R.), 106 S. W. 359 (not reported in state reports).

§ 5213. Assault Assented to Not Aggravated.

"You are charged by the court that if you find and believe from the testimony that on or about the 15th day of July, 1906, the defendant, Will S—, met the prosecutrix in a corn field some distance from the ends of the rows and near a tree, and you further find and believe from the testimony that said meeting was in pursuance of a previous understanding between the defendant and the said prosecutrix, and you further find that he took hold of her, and hugged her, and that he tried to pull up her clothes, and that he tried to get her down on the ground, and had her around the waist, and you further find that it was with and by her consent, he would not be guilty of an aggravated assault; or, if you have a reasonable doubt as to whether or not she objected to such conduct, he would be entitled to an acquittal."—Approved: Saye v. State, 54 Tex. Cr. R. 430, 114 S. W. 804.

§ 5214. In Mutual Combat All Participants Guilty.

"If the jury believe from the evidence that it was a mutual combat engaged in by both parties for the gratification of their evil passions, and a mutual desire to inflict punishment and hurt on each other, and voluntarily engaged in to gratify their own bad feelings to each other, and is not the result of insult on the part of the prosecutrix or defendant, and is not the purpose of self-defense, and is simply a mutual combat, both would be guilty (of assault), and the defendant on trial

would be convicted."—Approved: Ford v. State, 97 Ga. 365, 23 S. E. 996.

§ 5215. Aiding and Abetting All Principals.

"The court charges the jury that if Ben A— aided, abetted, or encouraged Dee A— in entering into or continuing an unlawful assault on plaintiff, then he would be responsible for whatever Dee A— did in the furtherance of such assault, notwithstanding that he may not have explicitly encouraged, aided, or abetted any one particular act of defendant Dee A—."—Approved: Abney v. Mize, 155 Ala. 391, 46 South. 230.

§ 5216. Using Necessary Force to Keep Order in One's Own House.

"But if he (G—) was not asked there to investigate, but was simply asked to come to the house there to attend a meeting of that kind, and it was a meeting, so far as this defendant, H—, was concerned, which was fair and honorable in its character, it would be the duty of a person who came there under such circumstances to observe proper decorum, not to rudely interfere with the proceedings and religious rite, which, so far as the defendant was concerned, was being held in good faith. He would not have a right to do those things which would interfere with the comfort and peace and enjoyment of other persons who might be there for honest purposes. And if he did do things of that character, whether it was a religious meeting or whether it was not, I think this defendant would have a right to use reasonable means to restrain such conduct. If he only went so far as seemed to him at the time to be reasonably necessary to preserve decorum there in his own house, and protect the comfort and peace of those whom he had invited to his house there, then I think he would be justified in what he did."—Approved: People v. Hughes, 116 Mich. 80, 74 N. W. 309.

§ 5217. Self Defense Only Justifies Reasonable Force.

"The court instructs the jury that in defending himself against an unlawful attack of another, a man is justified in resorting to such violence and the use of such force as the particular circumstances of the case may require for his protection. Now, the degree of force to be employed in protecting one's person must be in proportion to the attack made, and must depend upon the circumstances in each particular case, and the imminence of danger as it appears to him at the time. The only purpose which justifies the employment of force against the assault is to defend one's self; that is the object to be attained, and a man is only justified in using such an amount of force as may appear to him at the time to be necessary to accomplish that purpose. As soon as that object is attained, it is his duty to desist. * * * If he uses a kind of force towards his assailant in excess or out of proportion to what may be necessary to his own defense, as it honestly appeared to him at the time, he is himself guilty of an assault."—Approved: Kent v. Cole, 84 Mich. 579.

D. Assault with Intent to Kill.

§ 5218. Elements to Constitute.
5219. Lower Offenses of Assault or Assault and Battery Embraced in Indictment.
5220. Shooting with Intent to Kill.
5221. Reasonable Doubt as to Intent Gives Benefit to Defendant.
5222. Stabbing with Knife While Another Holds Him.
5223. Knife a Deadly Weapon—Not Under Heat of Passion.
5224. Deadly Weapon—No Adequate Cause.
5225. Raising Assault and Battery to Intent to Kill.
5226. Cutting and Stabbing—Great Bodily Harm.
5227. Intent Drawn from Circumstances—Different Verdicts.
5228. Presumption from Use of Dangerous Weapon.
5229. Defendant Bringing on Difficulty.
5230. Mistaken Identity Immaterial.
5231. One Shooting and Others Aiding and Assisting.
5232. Raising Battery to Intent to Do Great Bodily Harm.
5233. Wife's Communication of Improper Proposal No Justification.
5234. Provocation—Reducing Offense to Aggravated Assault.
5235. Resisting Illegal Ejection by Sheriff.
5236. Self Defense—Reasonable Apprehension.
5237. Self Defense—Use of Knife.
5238. Proof Must Support Particular Charge Laid.

§ 5218. Elements to Constitute.

"To constitute the offense charged you must find and believe that the defendant, intending to kill witness, Agnes W—, assaulted her, the said Agnes W—, with a razor or knife, the same being a deadly weapon, and you must also find that such assault was made with the intention, on the part of the defendant, on purpose, and of malice aforethought, to kill the said witness, Agnes W—."—Approved: State v. Miller, 93 Mo. 263, 6 S. W. 57.

§ 5219. Lower Offenses of Assault or Assault and Battery Embraced in Indictment.

"The following crimes are included necessarily in the charge contained in the indictment, viz., assault, assault and battery, assault with intent to do a great bodily injury, assault with intent to commit manslaughter, and assault with intent to commit murder; and the defendant may, if the evidence justifies the finding, be convicted of either one of these crimes."—Approved: State v. Graham, 51 Iowa, 72, 50 N. W. 285.

§ 5220. Shooting with Intent to Kill.

"Therefore, in this case, if you believe from the evidence beyond a reasonable doubt that the defendant, W. T. C—, did on or about the time alleged in the information, in the county of Carter and state of Oklahoma, intentionally and wrongfully, with a pistol in his hand and held, shoot at Elmer F—, with said pistol, with intent to kill the said Elmer F—, as alleged in said information, then under such circum-

stances you are instructed that it is your duty to find the defendant guilty, as charged in the information."—Approved: Caples v. State, 3 Okl. Cr. App. 72, 104 Pac. 493.

§ 5221. Reasonable Doubt as to Intent Gives Benefit to Defendant.

"The court instructs the jury, for the defendant, that if they believe the evidence in this case shows that defendant had another load in his gun, and could have used it, and killed said F—, if he had so desired, but did not do so because he did not want to kill him, the jury should take this into consideration, along with all the other facts and circumstances in the case, in determining whether the defendant did intend to kill and murder F—, and if, from all the facts and circumstances in evidence, they have a reasonable doubt as to whether he really meant to murder, they cannot lawfully convict him of assault and battery with intent to kill and murder."—Approved: McCaa v. State (Miss.), 38 South. 228 (not reported in state reports).

§ 5222. Stabbing One with Knife While Another Holds Him.

(a) "The court further instructs the jury, however, that the law allows a person to use only such force as may be necessary to overcome the force used against him, or which he believes is being used or about to be used against him; and if you should believe from the evidence in this case that the said Paul P— did assault the said Ed. D— and the said Bogy C—, but should you further find from the evidence in this case, beyond a reasonable doubt, that the said Ed. D— and the said Bogy C—, or either of them, had overcome the said Paul P—, and had the said Paul P— within their power, and in such a condition that he could do no injury to them or either of them, and that thereupon the said Bogy C— held the said Paul P—'s hands while the said Ed. D— stabbed him with a knife, with the intent to kill the said Paul P—, and said knife was then and there a deadly weapon, then it would be your duty to find both the defendants guilty of the crime of assault with intent to kill."—Approved: Dooling v. State, 3 Okl. Cr. App. 491, 106 Pac. 982.

(b) "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, in this county, before the finding of the indictment, did willfully and maliciously shoot at James L. S—, with the intent to kill him, but without wounding him, then they will find the defendant guilty, and fix his punishment at confinement in the penitentiary for not less than one nor more than five years."—Approved: Mann v. Commonwealth (Ky.), 110 S. W. 243 (not reported in state reports).

§ 5223. Knife Deadly Weapon—Not under Heat of Passion.

"If from the evidence you are satisfied beyond a reasonable doubt that the defendant, Sandy McD—, on or about the time charged in the indictment, in the county of Kaufman and state of Texas, with a knife, and that the same was a deadly weapon, with malice aforethought, did assault said Ketie McD—, with intent then and there to kill and murder her; and if you are further satisfied by the evidence and be-

yond a reasonable doubt that said assault, if any, was not made under the immediate influence of sudden passion produced by an adequate cause, as the same is hereafter explained to you in these instructions, then you will find the defendant guilty of an assault with intent to murder and so say by your verdict."—Approved: McDonald v. State (Tex. Cr. App.), 116 S. W. 47.

§ 5224. Deadly Weapon—No Adequate Cause.

"If from the evidence you are satisfied beyond a reasonable doubt that the defendant, John B—, on or about the time charged in the indictment, in the county of McLennan and state of Texas, with a deadly weapon and with malice aforethought, did assault the said G. W. T— with the intent then and there to kill and murder him, and you are further satisfied by the evidence and beyond a reasonable doubt that said assault was not made under the immediate influence of sudden passion produced by an adequate cause as the same is hereinafter explained to you, and not in defense of himself against an unlawful attack producing a reasonable expectation or fear of death or serious bodily injury, then you will find defendant guilty of assault with intent to murder, and so say by your verdict."—Approved: Barr v. State, 56 Tex. Cr. R. 372, 120 S. W. 422.

§ 5225. Raising Assault and Battery to Intent to Kill.

"An assault or assault and battery becomes and is an assault with intent to murder when it is committed with a deadly weapon with intent to kill the person assaulted and with malice aforethought, and under such circumstances that, had death resulted therefrom to the person assaulted, the killing would have been murder. If, then, under the foregoing instructions, you find from the evidence beyond a reasonable doubt that the defendant, Sam H—, did in Shelby county, Texas, at any time within three years before the 10th day of April, 1891, commit an assault upon T. P. McG— by attempting to shoot the said T. P. McG— with a pistol, and that such pistol, at the distance it was from the said T. P. McG—, and the manner in which the defendant attempted to use such pistol, was a deadly weapon, and that the said assault was committed with malice aforethought as the same has been hereinbefore explained to you, and under such circumstances as that had defendant killed the said T. P. McG— the said killing would have been murder, you will find the defendant guilty of assault to murder," etc.—Approved: Hooper v. State, 29 Tex. App. 614, 16 S. W. 655.

§ 5226. Cutting and Stabbing—Great Bodily Harm.

"The court instructs the jury that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, John H—, at the county of Lawrence and state of Missouri, on or about the 29th day of January, 1907, did unlawfully and feloniously make an assault upon one Joe Q—, and did then and there unlawfully and feloniously cut, stab, and wound said Q— with a knife, with intent the said Q—, feloniously and unlawfully to kill or do great bodily harm, you

will find him guilty of an assault with intent to kill."—Approved: State v. Harris, 209 Mo. 423, 108 S. W. 28.

§ 5227. Intent Drawn from Circumstances Different Verdicts.

"In this case the intent must be derived from the evidence of the deed committed, in connection with the other evidence in the case; and it is for you so say from the evidence in the case whether or not an intent existed in the mind of the respondent, at the time of the commission of the alleged offense, to commit upon the person of the injured man great bodily harm, less than the crime of murder, or whether he committed a simple assault and battery, or whether he is guilty of any offense at all. The extent of the injury inflicted, no matter how severe or disproportionate to the provocation, if there was any provocation, will not take the case out of that of an assault and battery, unless you find the existence of the intent to do great bodily harm, less than the crime of murder. But the severity and aggravated character of the assault, and extent of the injury received, as well as the weapon with which it was committed, may be considered by you, in connection with other evidence in the case, in your endeavor to find from the evidence whether or not such intent stimulated the respondent's action. If, from the evidence, you find that the respondent struck the complainant with a dangerous and offensive weapon, and that the result was serious bodily harm to the complaining witness, less than the crime of murder, you may take all these facts into consideration in determining whether or not the respondent intended to do great bodily harm, less than the crime of murder, at the time he committed the assault, if he committed an assault at all. In this case the intent is the gist of the offense charged in the information, and the law usually presumes that a man intends the natural result of his own acts. And this rule applies in this case, with the usual conditions that if the circumstances and surroundings of the case shown by the evidence establish the fact that there was no intention to do what was done, in the way of inflicting the injury, or leaves in your mind a reasonable doubt of such intent, then your duty is to acquit the respondent of the offense charged in the information."—Approved: People v. Resh, 107 Mich. 251, 65 N. W. 99.

§ 5228. Presumption from Use of Dangerous Weapon.

"The law presumes that all persons intend the natural and probable consequences of their acts, and, where it appears that one person has assaulted another with a dangerous and deadly weapon, the presumption is that he intends the natural and probable consequences of his acts. If you believe from the evidence, beyond a reasonable doubt, that the defendant assaulted the witness S— with a garden hoe, struck him on the head with such force and violence as to crush his skull, and further find from the evidence, beyond a reasonable doubt, that such assault was made purposely and maliciously, then, in such case, you would be justified in finding the defendant guilty as charged in the information."—Approved: Krchnavy v. State, 43 Neb. 337, 61 N. W. 628.

§ 5229. Defendant Bringing on Difficulty.

"I further charge you that, if you believe from the evidence, beyond a reasonable doubt, that the defendant sought the meeting with the said W. H. R— for the purpose of slaying the said R— and, having found him, did some act, or used some language, or did both, with intent to produce the occasion and bring on the difficulty, and that the same, under the circumstances, was or were reasonably calculated to provoke a difficulty, and on such account the said W. H. R— attacked him, and he then attempted to slay said R— in pursuance of his original design, then the defendant cannot justify on the ground of self-defense, but such attack, on defendant's part, would be assault with intent to murder, provided, if said R— had been killed under such circumstances, it would have been murder of either the first or second degree; but, if defendant had no such purpose in seeking the fatal meeting, or, having had the meeting, did no act reasonably calculated to provoke the difficulty, and was attacked by the said W. H. R—, then his right of self-defense would not be forfeited, and he could stand his ground and defend himself by the use of such means of defense as the facts and circumstances indicated to be necessary to protect himself from danger, or what reasonably appeared to him at the time to be danger, viewed from his standpoint."—Approved: Prescott v. State, 54 Tex. Cr. R. 481, 113 S. W. 530.

§ 5230. Mistaken Identity Immaterial.

"If you believe from the evidence beyond a reasonable doubt that defendant intended to make an assault with a deadly weapon upon a negro, with the specific intent to kill him, but that he made a mistake as to the identity of the person he intended to assault, and that he otherwise made the assault on Tom S—, with the specific intent to kill him, then you are charged that the defendant would be guilty of an assault with the intent to murder, the same as if the assault had been made upon the negro."—Approved: Moore v. State, 52 Tex. Cr. R. 364, 107 S. W. 833.

§ 5231. One Shooting and Others Aiding and Assisting.

"The court instructs the jury: If you believe from the evidence, to the exclusion of a reasonable doubt, that in Nelson county, before the finding of the indictment herein, the defendants, Webb G—, Charles Mack G—, and Russell G—, acting together and in concert with each other, or that one or more of said defendants, willfully and maliciously shot and wounded Overton N— with a pistol with intention to kill said N—, or willfully and maliciously cut said N— with a knife with intention to kill him, or willfully and maliciously struck said N— with a shotgun with intention to kill him (if you believe from the evidence, to the exclusion of a reasonable doubt, said shotgun was a weapon reasonably calculated to produce death when used by a person of the physical strength of and in the manner in which it was used by one of the defendants on said occasion, if either of them did strike N— with a shotgun), you should find the defendants or defendant who

so shot or cut or struck said N—, if any of the defendants did, guilty of malicious wounding, and fix the punishment of such defendant or defendants at confinement in the penitentiary for any time not less than one nor more than five years, and if you further believe from the evidence, to the exclusion of a reasonable doubt, that at the time said N— was so shot, cut, and struck, or at the time he was either so shot, cut, or struck, if he was so shot, cut, or struck by defendants, or any of them, the other defendant or defendants were present or near enough to aid and assist said shooting, cutting, or striking, and that the defendant or defendants thus present or thus near did willfully and maliciously aid, assist, abet, or counsel any one or more of their codefendants to so shoot, cut, or strike said N— with intention to kill him, you should find said defendant or defendants who thus aided, assisted, abetted, or counseled said shooting, cutting, or striking, if any of them did, guilty of malicious wounding, and fix their punishment at confinement in the penitentiary for any time not less than one nor more than five years."—Approved: Greenwell v. Commonwealth, 125 Ky. 192, 100 S. W. 852.

§ 5232. Raising Battery to Intent to do Great Bodily Harm.

"A great bodily injury is an injury to the person of a more grave and serious character than an ordinary battery, and the indictment charges that defendant intended to inflict such an injury on the boy, M—. It is not only necessary for the state to prove that the defendant committed an assault, but it must go further and prove the intent with which he committed it, and that it was to inflict a grave and more serious injury than an ordinary battery or whipping. If the proof should show an assault and battery, but fail to show the ulterior intent charged, the conviction could only be for assault and battery." —Approved: State of Iowa v. Gillett, 56 Iowa, 459, 9 N. W. 362.

§ 5233. Wife's Communication of Improper Proposal no Justification.

"You are instructed that although you may believe from the evidence that the defendant's wife communicated to him the fact that the witness, Elmer F—, had made overtures to her to have carnal intercourse with her, in the manner testified to in the evidence before you, and you further believe that this was the reason that prompted the shooting at the said Elmer F— by the defendant, if you find that he did so shoot at him, then you are instructed that such communication referred to did not excuse or justify the defendant in shooting at the said F—, as alleged in the information, and if you find that such communications were the reason for such shooting, then you are instructed to find the defendant guilty."—Approved: Caples v. State, 3 Okl. Cr. App. 72, 104 Pac. 493.

§ 5234. Provocation Reducing Offense to Aggravated Assault.

(a) "A serious bodily injury is one which creates alarm or apprehension concerning the life of the injured party. I further charge you that if you believe, from the evidence, that Mag C— made an assault and battery on the defendant that caused him either pain or

bloodshed, and that this produced in the mind of the defendant a degree of anger, rage, sudden resentment, or terror sufficient to render it for the time incapable of cool reflection, and in such state of mind the defendant committed an assault on Lulu C—, but he believed that he was making said assault on Mag C—, then you will find the defendant guilty of an aggravated assault, even if you believe from the evidence, beyond a reasonable doubt, that the weapon used was a deadly weapon and the assault was made with the intent to kill Mag C—."—Approved: Olds v. State, 54 Tex. Cr. R. 411, 113 S. W. 272.

(b) "If you believe from the evidence beyond a reasonable doubt that the defendant in the county of Potter and state of Texas, on or about the time charged in the indictment, with a deadly weapon, to wit, a knife, did unlawfully assault the said W. H. R—, as charged, but at the time of making such assault the defendant was by some adequate cause (as hereafter explained) moved to such a degree of anger, rage, sudden resentment, or terror as to render him for the time incapable of cool reflection, and in such a state of mind he committed said assault, and that such assault was not in defense of himself against an unlawful attack producing a reasonable expectation or fear of death or serious bodily injury, then you will find the defendant guilty of an aggravated assault, and assess his punishment at a fine not less than $25, nor more than $1,000, or by imprisonment in the county jail not less than one month, nor more than two years, or by such fine and imprisonment, as you may determine and state in your verdict."—Approved: Prescott v. State, 54 Tex. Cr. R. 481, 113 S. W. 530.

§ 5235. Resisting Illegal Ejection by Sheriff.

"Now, defendant claims that he was conducting a store in the building where the shooting occurred as a tenant in good faith of said premises, having entered, as he claims, before the commencement of proceedings to oust George S—, who had been occupying the building. If this were true, and the goods belonged to him, then, under the peculiar terms of the writ, the sheriff would not have a right to remove John S— or his goods from said premises, and the defendant would have the right to use reasonable force to prevent the removal." —Approved: State v. Smith, 101 Iowa, 369, 70 N. W. 604.

§ 5236. Self-Defense—Reasonable Apprehension.

"Upon the law of self-defense you are instructed that, if from the acts of the said W. H. R—, or from his words coupled with his acts, there was created in the mind of defendant a reasonable apprehension that he (the defendant) was in danger of losing his life, or of suffering serious bodily injury at the hands of the said W. H. R—, then the defendant had the right to defend himself from such danger, or apparent danger, as it reasonably appeared to him at the time, viewed from his standpoint. And a party so unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant. If

you believe that the defendant committed the assault as a means of defense, believing at the time he did so (if he did so) that he was in danger of losing his life, or of serious bodily injury at the hands of said W. H. R—, then you will acquit the defendant."—Approved: Prescott v. State, 54 Tex. Cr. R. 481, 113 S. W. 530.

§ 5237. Self-Defense—Use of Knife.

"If you believe the prosecuting witness, Genaro B—, knocked the defendant down with his fist or a quirt or a pistol, and then commenced to beat the defendant on the head or face with a pistol, or to cut him in the face with a knife, and the defendant had no other means of defending himself than to use his knife, and that he believed and had reason to believe that the prosecuting witness was about to kill him, or to do him some great bodily harm, and he used his knife to protect himself, then you will find him not guilty."—Approved: Territory v. Baca, 11 N. M. 559, 71 Pac. 460.

§ 5238. Proof Must Support Particular Charge Laid.

"The jury are instructed that unless you find that the assault on officer G—, complained of in the information filed in this case, is distinct and separate from, and forms no part of, the assault on one William G—, for which defendant has already been tried and convicted, you will find the defendant not guilty."—Approved: State v. Temple, 194 Mo. 228, 92 S. W. 494.

E. Breach of the Peace.

§ 5239. Vile Epithets Intended to Annoy Another.
5240. Using Abusive Language in Presence of Female.

§ 5239. Vile Epithets Intended to Annoy Another.

"I instruct you, as a matter of law, that a person who, on the public streets of a city, in the presence of several persons, applies to another vile epithets, with the intention of annoying, offending, and disturbing such person, commits a breach of the peace."—Approved: State v. Appleton, 70 Kan. 217, 78 Pac. 445.

§ 5240. Using Abusive Language in Presence of Female.

"If, after considering all the evidence, the jury have a reasonable doubt arising out of any part of the evidence as to whether the language used by the defendant was in the presence or hearing of a female, then the jury must find the defendant not guilty."—Approved: Rollings v. State, 136 Ala. 126, 34 South. 349.

F. Felonious Wounding.

§ 5241. Disfiguring with a Whip.
5242. Gross Carelessness in Shooting Pistol.

§ 5241. Disfiguring with a Whip.

"If you believe and find from the evidence, that the defendant Olive M. N—, in Perry county, and state of Missouri, within three years next

before the 9th day of April, 1907, did willfully and feloniously whip Maggie S— with a whip by which said Maggie S— was wounded, or disfigured, then you will find the defendant guilty, as she is charged in the indictment, of wounding, or disfiguring, said Maggie S— by said whipping, as you, from the evidence, shall believe her to have been so wounded or disfigured. And if you shall believe and find from the evidence, Olive M. N—, at said time and place, and upon such whipping, by her, of said Maggie S—, and in continuance by her of the punishment so inflicted upon said Maggie S—, by said whipping, did willfully and feloniously burn said Maggie S— with a hot iron stove-lid lifter, by which said Maggie S— was wounded or disfigured, then you will find the defendant guilty, as she is charged in the indictment, of wounding, or disfiguring said Maggie S— by said burning, as from the evidence you shall believe and find her to have been so wounded or disfigured."—Approved: State v. Nieuhaus, 217 Mo. 332, 117 S. W. 73.

§ 5242. Gross Carelessness in Shooting Pistol.

"If from the evidence and under these instructions you find that at the city of St. Louis, Missouri, on or about the ——— day of ———, defendant shot, struck and wounded one A. P— with a bullet fired and discharged by said defendant out of and from a pistol loaded with gunpowder and leaden bullets, and you further find that such striking and wounding of said Abraham P— was not intentionally done by defendant, but was done while he was shooting at some other person than said Abraham P—, and that such striking and wounding of said P— was the direct result of defendant's gross and culpable negligence and of his then and there acting in a careless and reckless manner incompatible with a proper regard for human life, then you should convict defendant of felonious wounding and assess his punishment at imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the city jail for not less than six months, or by both a fine of not less than $100 and imprisonment in the city jail of not less than three months, or by a fine of not less than $100."—Approved: State v. Groves, 194 Mo. 452, 92 S. W. 631.

G. Resisting Officer.

§ 5243. Executing Legal Process—Aiding Resistance.
5244. Interfering with Legal Custody of Property.
5245. Seizure of Exempt Property—Reasonable Force to Prevent.

§ 5243. Executing Legal Process—Aiding Resistance.

"If any person knowingly and willfully resist or oppose any officer of this state or any persons authorized by law, in executing or attempting to execute any legal writ, rule, order, or process whatever, he is guilty of a crime, and in this case the certified copy of an order of the circuit court of Polk county, Iowa, of date the twenty-fourth day of April, 1880, marked Exhibit A, and the amendment thereto of date the twenty-seventh day of July, A. D. 1880, marked Exhibit C, constitutes a legal order, and Stephen A— was authorized thereby to execute said

order. Therefore, if you find that said A— did go to the premises mentioned in said order and in the indictment, on or about the twenty-fifth day of August, A. D. 1880, to execute said order, and attempted so to do, and was by the defendants, or any of them, knowingly and willfully resisted or opposed in his attempt to execute said order, all of the defendants who did so are guilty as charged—that is, all of them who knew that said A— had said order, and were informed by him that he had come to execute it, and afterwards resisted or opposed him in the execution thereof, are guilty as charged in the indictment; and if you find that the defendants, or any of them, did, on or about the time aforesaid, knowingly and wilfully resist or oppose said A— in his attempt to execute said order, you should find all of them who did so guilty as charged in the indictment. But if you fail to find that any one of them did so, you should find all of them not guilty; and those of the defendants whom you may fail to find guilty, you should find not guilty.

"If you find that said A— went to the gate or bars affording an entrance into said premises, and found one of the defendants there guarding said entrance, who refused to permit said A— to enter, and with angry demonstrations and threatening words prevented the entrance of said A— into said premises; and while this was going on the other defendants came there and joined the defendant who was at said entrance when said A— approached, and aided and encouraged in making demonstrations and threats against said A—, either by their manner of expressions or demonstrations, or both, indicating that he would encounter violence if he attempted to take possession of the premises and the property mentioned in the order of the court,—all who did so were resisting or opposing said A— in executing said order of the circuit court of Polk county, Iowa. But if any of the defendants came there, and did not in any way aid or encourage the opposition to the execution of said order, (if there was any opposition), of course you cannot find any such guilty."—Approved: State of Iowa v. Rivers, 64 Iowa, 729, 12 N. W. 792.

§ 5244. Interfering with Legal Custody of Property.

"It must appear beyond a reasonable doubt that there was either forcible means taken against the officer himself, or forcible means taken to interfere with his custody of the property, if you find it to have been lawfully in his custody at the time in question. * * * If you find beyond a reasonable doubt that Wellington B— was in the execution of his office—that is, that these animals had been running at large, and that he had impounded them in accordance with duties imposed upon him by statute—and further find beyond a reasonable doubt that without his consent and against his protest the defendant did forcibly tear down the fence and drive these cattle from the premises, then it would be your duty to return a verdict of guilty as charged in the indictment."—Approved: Campf v. State, 80 Ohio St. 321, 88 N. E. 887.

§ 5245. Seizure of Exempt Property—Reasonable Force to Prevent.

"The team, wagon, and harness, which the sheriff sought to take from the defendants in this case, are exempt from levy and sale on exe-

cution, and he had no right to take them from their possession, and defendants had a right to use such reasonable force as was necessary to prevent the sheriff from taking such property from them; and having such right they are not guilty under the statute of resisting the sheriff in the service of process, unless you find they used more force than was necessary for that purpose. It was the duty of the sheriff, when he went to serve the papers, to inform the defendants of the nature of the process he held against them, and ascertain whether they claimed the team as exempt; and if you find he did not do so, but immediately proceeded to take the team from their possession, in disregard of their right to hold it as exempt, they were fully justified by the law in using sufficient force to prevent his taking it."—Approved: People v. Clements, 68 Mich. 655, 36 N. W. 792.

H. Riot and Disturbing Public Assembly.

§ 5246. Riot—What Participants Guilty.
5247. Disturbing Public Assembly—Church Congregation.

§ 5246. Riot—What Participants Guilty.

"That all concerned in the unlawful assembly are equally guilty of the subsequent acts done by any of them in furtherance of the common objects of the assembly; and all who joined them after the original meeting, and who were present at any subsequent act, and were either active in doing, countenancing, or supporting, or ready, if necessary to support the unlawful act, thereby became parties to the riot, and are equally guilty of all their subsequent acts."—Approved: United States v. Fenwick, 4 Cranch, C. C. (U. S.) 675, 680.

§ 5247. Disturbing Public Assembly—Church Congregation.

"Now if you believe from the evidence beyond a reasonable doubt that the defendant, Romey W—, in the county of Burnet and state of Texas, did at the time and place alleged in the information willfully disturb any congregation, or any part of or any one of such congregation, there assembled for the purpose of conducting or participating in a Sunday school, etc., you will find him guilty."—Approved: Wyatt v. State, 56 Tex. Cr. R. 50, 119 S. W. 1147.

I. Unlawful Carrying of or Firing Weapons.

§ 5248. Unlawful Carrying—Definition.
5250. Unreasonable Delay in Taking Home.
5251. Deviation from Route.
5252. Carrying Pistol to Borrower.
5253. Carrying at Place of Business.
5254. Abandoning Lawful Purpose in Carrying.
5255. Carrying by Traveler Pursuing His Journey.
5256. Unlawful Firing—Reckless Shooting on Public Highway.
5257. Shooting in Good Faith at Dog.
5258. Concealed Pistol in Buggy Unknown to Defendant.

§ 5248. Unlawful Carrying—Definition.

"The jury are instructed that any person who carries a pistol as a weapon, who is not an officer or upon a journey, or on his own premises, unless he carries it uncovered and in his hand, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than $50 nor more than $200, or by imprisonment in the county jail not less than thirty days, nor more than three months, or by both fine and imprisonment."—Approved: Henderson v. State, 91 Ark. 224, 120 S. W. 966.

§ 5250. Unreasonable Delay in Taking Home.

(a) "The jury are instructed that a person may legally purchase a pistol and transport same to his home or room by the usual traveled route, and that a reasonable delay in route would not change the rule (unless unreasonable and for an unlawful purpose). Hence if you find from the evidence that the defendant purchased on December 31, 1905, and was taking the same to his home or room by the usual traveled route (and did not unreasonably and did not for an unlawful purpose loiter about the streets or other places, saloons or otherwise), you will find him not guilty, though you may find that he stopped on the road for a reasonable time on legitimate business (and for lawful purpose and intent)."—Approved: Garrison v. State, 54 Tex. Cr. R. 600, 114 S. W. 128.

(b) If the defendant carried the pistol as alleged, but for the purpose alone of carrying the same home, then you will find the defendant not guilty. But if he stopped by the wayside, and engaged in pleasure, then the same would be no defense."—Approved: Banks v. State, 52 Tex. Cr. R. 167, 105 S. W. 821.

§ 5251. Deviation from Route.

"While defendant would have the right to carry his pistol home, it would be his duty, while he carried the pistol, to proceed home with it in a reasonable time, and upon the commonly pursued route; and he would not have the right to make unnecessary departure from his direct route, or to visit places with his pistol not necessary to be visited in the exercise of the right that the law gives him to carry his pistol home."—Approved: Cordova v. State, 50 Tex. Cr. R. 353, 97 S. W. 87.

§ 5252. Carrying Pistol to Borrower.

"If by previous arrangement, the defendant and Cal S— the defendant was to deliver to said S— a pistol owned by the defendant, and on the day he is alleged to have carried the pistol he was requested or instructed by said S— to carry the pistol to S—'s house, and if at the time he was seen with the pistol he was carrying it to S—'s house, or on the way from his house to S—'s house, on the usually traveled route, then he would not be guilty of unlawfully carrying a pistol, and you will acquit him."—Approved: Lewis v. State, 52 Tex. Cr. R. 7, 104 S. W. 901.

§ 5253. Carrying at Place of Business.

"You are instructed that it is no violation of the law for a person to carry a pistol at his place of business; and if you believe from the evidence that defendant carried the pistol only at his place of business and did not carry it at any place other than his place of business, you will acquit him."—Approved: Hutchins v. State, 51 Tex. Cr. R. 339, 101 S. W. 795.

§ 5254. Abandoning Lawful Purpose in Carrying.

"If, however, you believe from the evidence in the case that the defendant, at the time he was so carrying the said pistol on and about his person, if in fact he so carried said pistol, was carrying it because he had been directed by his employer to clean the same, and that the defendant, at the time he was so carrying the said pistol, if in fact he was so carrying it, had no intent to violate the law, then he, the said defendant, would be entitled to an acquittal; but in this connection you are charged that if the defendant, at the time of so carrying the pistol, if in fact he did so carry the said pistol, was not carrying the same for the purpose of cleaning it, or had abandoned such purpose, if he ever had had such purpose, then defendant would not be entitled to an acquittal on the ground that he was so carrying it for such purpose; but you are especially instructed, in this and all other connections, that the defendant ought not to be found guilty unless, under all the instructions given you by the court, you believe from the evidence beyond a reasonable doubt that the defendant is guilty as charged in the information."—Approved: Jones v. State, 52 Tex. Cr. R. 418, 107 S. W. 821.

§ 5255. Carrying by Traveler Pursuing His Journey.

"The foregoing statute does not apply to persons traveling, as long as they continue their journey, and are engaged in business connected with their journey. The word 'traveler' is used in its ordinary sense. But this exemption does not apply to travelers who stop in their journey, and engage in business or pleasure not connected with their journey. If you believe from the evidence, beyond a reasonable doubt, that the defendant had on his person a pistol, as charged, but you should further believe from the evidence, or have a reasonable doubt of same that, at the time he so had said pistol, he was a traveler, pursuing his journey, and engaged in business connected with the same, then you will acquit the defendant under first count. If you believe from the evi-

dence, beyond a reasonable doubt, that the defendant had on his person a pistol, as charged, but that, at the time he so had said pistol, he was a traveler, but should you further believe beyond a reasonable doubt that at said time he was not in pursuit of his journey, or engaged in business connected with his journey, then you will find the defendant guilty, and assess his punishment, etc."—Approved: Navarro v. State, 50 Tex. Cr. R. 326, 96 S. W. 932.

§ 5256. Unlawful Firing—Reckless Shooting on Public Highway.

"If you shall believe from the evidence beyond a reasonable doubt that the defendant, Robert H—, in this county and within twelve months before the finding of this warrant herein, willfully fired off a gun or pistol on the public highway at the time and place mentioned in evidence, at random—that is to say, carelessly and recklessly, without firing at a definite object, with reasonable care in pointing his weapon—then you shall find the defendant guilty as charged in the warrant, and fix his punishment at a fine of not less than $50 and not more than $100, or at confinement in the county jail not less than ten and not more than fifty days, or you may both fine and imprison the defendant, within the above limits, according to the proof."—Helton v. Commonwealth (Ky.), 104 S. W. 255 (not reported in state reports).

§ 5257. Shooting in Good Faith at Dog.

"If you shall believe from the evidence that the defendant, at the time of the shooting, if he did shoot, fired his pistol in good faith at a dog, then you should find the defendant not guilty."—Approved: Helton v. Commonwealth (Ky.), 104 S. W. 255 (not reported in state reports).

§ 5258. Concealed Pistol in Buggy Unknown to Defendant.

"If you believe from the evidence that the defendant, Hiram L—, borrowed a buggy from his brother, Charles T—, on October 4, 1908, for the purpose of going to Belleville, Tex., on the following day, to wit, October 5, 1908, and that Charles T— had previously placed the pistol under the cushion of the buggy, and that the defendant did not know of the pistol being under the cushion of said buggy when he came to the town of Belleville on October 5, 1908, then you will find the defendant not guilty."—Approved: Leonard v. State, 56 Tex. Cr. R. 84, 119 S. W. 98.

CHAPTER CXLIII.

OFFENSES—MISCELLANEOUS—CONTINUED.

A. Bribery.
B. Conspiracy.
C. Elections.
D. Embezzlement.
E. Enticing Labor.
F. Extortion.
G. Gaming and Betting.

A. Bribery.

§ 5259. Attempt to Corrupt Juror.
5260. Collecting "Protection Money" from Abandoned Women.
5261. Money Paid to Officer for Fraudulent Certificates.
5261a. Paying Money to Officers with Power of Appointment to Office.

§ 5259. Attempt to Corrupt Juror.

"If you find and believe from the evidence in this case beyond a reasonable doubt that on or about the twenty-fifth day of March, 1895, the case of state of Missouri against William P. T— and George E. T— wherein they were charged with having feloniously killed and murdered one Gus M— was pending in the circuit court of Carroll county, Missouri, and that a panel of forty jurors had been summoned, selected, and qualified, from which panel of forty a jury of twelve jurors was to be selected, and that Charles D— was one of said panel of forty jurors in said cause summoned, selected, and qualified and that the defendant on or about March 25, 1895, at Carroll county, Missouri, did unlawfully and knowingly attempt to corrupt the said Charles D—, one of the panel of forty jurors in said cause summoned, selected, and qualified, by offering and promising to well pay the said Charles D— if he would hang the jury of twelve jurors to be chosen as aforesaid in said cause of State against said William P. T— and George E. T—, with the intent then and thereby to bias the mind of the said Charles D— and incline him to be more favorable to the defendants, William P. T— and George E. T—, than to the plaintiff, the state of Missouri, then you will find the defendant guilty as charged and assess his punishment at imprisonment in the penitentiary for a term of not less than two years nor more than five years, or by a fine of not less than $100 and imprisonment in the county jail not less than three months."—Approved: State v. Williams, 136 Mo. 293, 38 S. W. 75.

§ 5260. Collecting "Protection Money" from Abandoned Women.

"The court instructs the jury that it is the law generally that any act of an assumed agent, and a recognition of his authority by the alleged principal, may, in a proper case, prove the agency to do other similar acts. And if you find in this case that C— was authorized or directed by the defendant to collect in his behalf money from one or more of these women, other than A. M—, such fact is proper to be considered in determining whether or not defendant authorized C— to collect money from her. Indeed, if you find that C— had general authority to collect protection money from abandoned women, or from a certain class of them, which included A. M—, then you would be justified in finding that in receiving money from A. M—, if in fact he received it, he received the same for the defendant, and in that event will find that he himself received the money."—Approved: State v. Ames, 90 Minn. 183, 96 N. W. 330.

§ 5261. Money Paid to Officer for Fraudulent Certificates.

"As a general proposition to direct you in this, I will say that the respondent cannot be convicted unless you find beyond a reasonable doubt that, at the time claimed by the people, the money was given to S—, by or through the agency of the respondent, with the corrupt intention and for the purpose of corrupting him and influencing his official action in issuing fraudulent certificates mentioned in the information. As I said to you before, that must have been the purpose, and whether or not S— ever issued them would make no difference, if he received the money. If he had then said, 'I won't issue any certificates,' the crime would be just as complete as it would be if he had issued them, if it was paid to him with the corrupt intention of influencing him in his official action."—Approved: People v. Gorsline, 132 Mich. 549, 94 N. W. 16.

§ 5261a. Paying Money to Officer with Power of Appointment to Office.

"The jury are instructed that in order to convict the defendant in this case, it devolves upon the state to prove affirmatively, and by competent evidence, that defendant, within three years prior to the finding of the indictment, offered to pay, or did actually pay to R— money, gratuity, reward, or some other valuable consideration, with the intent to induce or procure him, the said R—, to appoint defendant to the office of city engineer of the steam fire-engine of the city of S—, and that, at the time of paying such money, gratuity, reward, or other consideration the said R— was an officer of the city of S—, and authorized to make such appointment."—Approved: State v. Graham, 96 Mo. 120, 124, 8 S. W. 911.

B. Conspiracy.

§ 5262. Defined.
5263. Acts of One in Furtherance of.
5264. Prior Acts Binding Those Subsequently Joining.
5265. Abandonment Relieving as to Prior Acts.
5266. For Intimidation—Participation in Overt Acts.
5267. Personal Presence Not Necessary in Overt Acts.
5268. Conspirator Going Beyond Common Purpose.
5269. Acts in Furtherance of Common Purpose Negativing Self Defense.
5270. Distinction Between Purpose to Commit Trespass and Felony.
5271. Declarations of Co-Conspirator.
5272. To Murder—Identity of Actual Perpetrator Not Necessary to be Shown.
5273. Inferred from Acting Toward Common Object.
5274. Two or More But Not all Need be Convicted.

§ 5262. Defined.

(a) "The court instructs the jury that a criminal conspiracy, as charged in the indictment herein, means a corrupt combination of agreement between two or more persons to do by concert of action an unlawful act, or to do a lawful act by unlawful means."—Approved: Commonwealth v. Ellis, 133 Ky. 625, 118 S. W. 973

(b) "A conspiracy is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means."—Approved: Hardin v. State, 4 Tex. App. 355.

§ 5263. Acts of One in Furtherance of.

"The court instructs the jury that when two or more persons act together in the commission of an unlawful act or purpose, what either does in carrying out such unlawful act or purpose is, in law, the act of each of said persons."—Approved: State v. Hottman, 196 Mo. 110, 94 S. W. 237.

§ 5264. Prior Acts Binding Those Subsequently Joining.

"The court instructs the jury, as a matter of law, that all who take part in a conspiracy after it is formed and while it is in execution, and all who, with the knowledge of the facts, concur in the facts originally formed and aid in executing them, are fellow-conspirators. Their concurrence, without proof of an agreement to concur, is conclusive against them. They commit the offense when they become partners to the transaction or further the original plan."—Approved: People v. Poindexter, 243 Ill. 68, 90 N. E. 261.

§ 5265. Abandonment Relieving as to Prior Acts.

"Where a conspiracy arises out of a concert of action simply, and without any previous agreement or compact as to its extent or purpose, the responsibility of any one of the parties thereto would cease when

he abandoned the common purpose and withdrew from any further concert of action with the others, and withdrew all his aid, countenance, and encouragement from the enterprise; but his responsibility for the acts of all, done in furtherance of the common purpose, would continue until he did this."—Approved: State v. McCahill, 72 Iowa, 111, 33 N. W. 599.

§ 5266. For Intimidation—Participation in Overt Acts.

"The court further instructs the jury that, if they believe from the evidence in this case beyond a reasonable doubt that in this county, and before the finding of the indictment herein, the defendant Jake E— did unlawfully, willfully, and feloniously conspire and confederate with his codefendants, Will McC—, Henry T—, and other persons to the grand jury unknown, or any one of said codefendants, McC— or T—, or with some other person, or persons, to the grand jury unknown, for the purpose of intimidating, alarming, or disturbing the witness Mose T—, and, in pursuance of said conspiracy and confederation or banding together, the defendant Jake E—, with any one or more of the defendants, Will McC— or Henry T—, or with any other person or persons to the grand jury unknown, acting with him and he with them, did in pursuance of said agreement or confederation go forth for the purpose of alarming, disturbing, or intimidating said T—, they will find the defendant guilty as charged in the indictment, and fix his punishment at confinement in the state penitentiary for not less than one year, nor more than five years, in their discretion."—Approved: Commonwealth v. Ellis, 133 Ky. 625, 118 S. W. 973.

§ 5267. Personal Presence Not Necessary in Overt Acts.

"The court further says to the jury that, if they believe from the evidence beyond a reasonable doubt that in this county, and before the finding of the indictment herein, the defendant Jake E— did unlawfully willfully, and feloniously conspire and confederate with Will McC—, Henry T—, or other persons to the grand jury unknown, or with any one or more of them, or with some other person, or persons, to the grand jury unknown, for the purpose of alarming, intimidating, or disturbing Mose T—, and in pursuance and in execution of said conspiracy or confederation the codefendants, Will McC—, Henry T—, or other person, or persons, to the grand jury unknown, or any one or more of said defendants, or any one or more of said unknown parties with whom defendants did conspire and confederate (if he did so conspire and confederate with any one or more of them), acting in pursuance of said conspiracy or confederation, did unlawfully, willfully, and feloniously go forth for the purpose of intimidating, alarming, and disturbing said Mose T—, and shall further believe from the evidence that defendant did not go forth with his codefendants, McC— or T—, or either of them, nor with said unknown person, or persons, and was not present, but was absent at the time and place of the going forth, they will find him guilty as charged in the indictment, if they believe from the evidence beyond a reasonable doubt that he did so unlawfully, willfully, and feloniously confederate and conspire with Will McC—,

Henry T—, or either of them, or with other person or persons, to the grand jury unknown, or with any one or more of them for the purpose of alarming, intimidating, or disturbing Mose T—, and they will fix his punishment at not less than one year, nor more than five years, in their discretion."—Approved: Commonwealth v. Ellis, 133 Ky. 625, 118 S. W. 973.

§ 5268. Conspirator Going Beyond Common Purpose.

"The court instructs the jury that if you find and believe from the evidence that defendant James F— conspired and agreed with William M— and Edgar G. B— to assault and beat Albert F—, but not to the extent of doing him great bodily harm, and absolutely without any intention in F—'s mind of shooting said F—, and that in pursuance of said agreement any one or all of the parties thereto assaulted said Albert F— with the intention aforesaid, and that thereafter or thereupon Edgar G. B—, without the consent, aid or encouragement of defendant, James F—, shot and killed Albert F—, then and in that case you will find the defendant guilty of manslaughter in the fourth degree."—Approved: State v. Forsha, 190 Mo. 296, 88 S. W. 746.

§ 5269. Acts in Furtherance of Common Purpose Negativing Self-Defense.

"If the jury believe and find from the evidence that B—. F—, and M— confederated together and engaged in a common design to take deceased out on the night in question and beat him up; and that it was part of their common design and purpose, if deceased made resistance, to kill him or to do him some great bodily injury, then whatever B— did in carrying out the common purpose was in law the act of F—, the defendant, and they are equally liable for such act; and if the defendant and B— and M—, in pursuance to such common design, brought on the difficulty in which Albert F— was killed, and entered into it with the intention of killing or inflicting great personal injury upon F—, if he should resist them, then the danger in which they, or any of them, found themselves or himself, would not extenuate the offense or reduce its grade, and there could be no self-defense in the case."—Approved: State v. Forsha, 190 Mo. 296, 88 S. W. 746.

§ 5270. Distinction Between Purpose to Commit Trespass and Felony.

"If two or more persons conspire together to do an unlawful act, and in the prosecution of the design, an individual is killed, or death ensue, it is murder in all who enter into, or take part in the execution of the design. But if the unlawful act be a trespass only, to make all guilty of murder, the death must happen in the prosecution of the design. If the unlawful act be a felony, or be more than a mere trespass, it will be murder in all, although death happen collaterally, or beside the original design."—Approved: State v. Shelledy, 8 Iowa, 477.

§ 5271. Declarations of Co-Conspirator.

(a) "The jury are instructed that the declarations of M— before the crime charged was committed, in the absence of the appellant, were proper to be considered by them, with all the other facts and circum-

stances proven on the trial, in determining the guilt or innocence of appellant, if the jury believed from the evidence, beyond a reasonable doubt, that appellant prior to the murder entered into a conspiracy with said M— to rob or murder or to burglarize the house of the deceased, and that such declarations were made in furtherance of such conspiracy or common design; and the fact, if it be a fact, that M— has been tried and acquitted of said charge, will not make such statements or declarations incompetent, if such conspiracy has been shown by the evidence."—Approved: Musser v. State, 157 Ind. 423, 61 N. E. 1.

(b) "You are instructed that the statements of one conspirator made during the existence of the conspiracy are evidence proper to be considered against co-conspirators."—Approved: Cumnock v. State, 87 Ark. 34, 112 S. W. 147.

§ 5272. To Murder—Identity of Actual Perpetrator Not Necessary to be Shown.

"The court instructs the jury that a conspiracy may be established by circumstantial evidence, the same as any other fact, and that such evidence is legal and competent for that purpose. So as to whether an act which was committed was done by a member of the conspiracy, may be established by circumstantial evidence, whether the identity of the individual who committed the act be established or not; and, also, whether an act done was in pursuance of the common design may be ascertained by the same class of evidence; and if the jury believe, from the evidence in this case, beyond a reasonable doubt, that the defendants, or any of them, conspired and agreed together, or with others, to overthrow the law by force, or destroy the legal authorities of this city, county, or state by force, and that in furtherance of the common design, and by a member of such conspiracy, Matthias J. D— was killed, then these defendants, if any, whom the jury believe, from the evidence, beyond a reasonable doubt, were parties to such conspiracy, are guilty of the murder of Matthias J. D—, whether the identity of the individual doing the killing be established or not, or whether such or combination between them existed, and is established."—Approved: Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898.

§ 5273. Inferred From Acting Toward Common Object.

"The fact of conspiracy need not necessarily be established by direct and positive evidence, but may be proved and established by circumstantial evidence. If from the acts and conduct of the defendants, as shown by the evidence, and by the circumstances and transactions admitted in evidence, the nature of the connection between the defendants, and the relation in which they stood to each other in such transactions, the nature of the business in which they were engaged, and the part taken by each of them in the several transactions and delivery of the notes, you are satisfied beyond a reasonable doubt, and believe as reasonable men, that they were working and acting together with the common object and purpose of obtaining said notes by means of false and fraudulent pretenses and representations, in pursuance of a combination or prearranged plan, then you should find that the conspiracy

or combination between them existed and is established."—Approved: State v. Grant, 86 Iowa, 216, 53 N. W. 120.

§ 5274. Two or More But Not all Need be Convicted.

"The court further instructs the jury that the defendant George H. S— is not being tried at this time, and, in so far as your consideration of the case is concerned, you will consider the case as to the guilt or innocence of the defendants A. C. St. C—, Con. S. D—, and H. H. M—; and as to the said defendant George H. S— you may consider him only in connection with the said conspiracy as one of the parties thereto; that is, notwithstanding whether or not you find any two of the defendants, A. C. St. C—, Con. S. D—, and H. H. M—, agreed and conspired with each other for the commission of the offense charged in the first and second counts of the information, yet, if you find that any one of said defendants conspired to commit the offense with the said George H. S—, you may find such defendant guilty of conspiracy the same as if the said George H. S— was a defendant in the said case and being tried with the said defendant."—Approved: Moore v. People, 31 Colo. 336, 73 Pac. 30.

C. Elections.

§ 5275. Registering Under False Name.

§ 5275. Registering Under False Name.

(a) "If you find and believe from the evidence in the cause that on the 21st day of September, 1904, a general registration of electors and voters was held in the city of St. Louis and in every election precinct of said city, by the duly appointed and acting judges, clerks and officers of election and registration; that the 9th precinct of the 16th ward mentioned in the evidence was then and there one of the election precincts of said city of St. Louis; and if you further find that on said twenty-first day of September, 1904, and while said registration of electors and voters was in progress and being held (if you find that said registration was so held as aforesaid) the defendant did appear at the place of registration in said ninth election precinct of the sixteenth ward before the duly appointed and acting judges, clerks, and officers of registration of said election precinct, and willfully, knowingly, fraudulently and falsely stated to said judges, clerks and officers of registration for said election precinct that his name was John F. G—, and that he was a resident of said precinct, and had the right to register and vote in said precinct, and willfully, knowingly, fraudulently, and falsely requested said judges, clerks and officers of registration of said election precinct to register him, the said defendant, as an elector and voter; and if you further find that said judges, clerks and officers of registration did then and there enter the name of ——— as the name of defendant upon the official registers and books of registration of said election precinct as a registered elector and voter of said precinct, and that said defendant then and there willfully, knowingly, fraudulently and falsely signed the said official registers and books of registration by writing thereon the name 'J. Gray,' as and for his own name; and

if you further find the fact to be the true name of defendant was not John F. G—, but Paddy C—, and that defendant at the time he did the acts set out in these instructions (if you find that he did the acts as set out in these instructions) knew that his name was not John F. G—, but Paddy C—, then you will find the defendant guilty, and assess his punishment at imprisonment in the penitentiary for a term of not less than two nor more than five years, and unless you find the facts to be as set out, in these instructions you will acquit the defendant."—Approved: State v. Cummings, 206 Mo. 613, 105 S. W. 649.

D. Embezzlement.

§ 5276. Appropriating Money as Employee.
5277. Collector with Right to Commissions.
5278. Retention of Money Under Honest Claim of Right.
5279. Intent to Appropriate to Own Use.
5280. Intent Essential Element in Embezzlement.
5281. Clerk Fraudulently Converting.
5282. Employee Receiving Money for Specific Use and Converting.
5283. Small Amounts Taken Under Formed Design.
5284. Possession by Virtue of Office in Corporation.
5285. Public Officer—Intention to Return at Future Time.
5286. Public Officer—Failure to Turn Over to Successor.
5287. Public Officer Drawing Check on Public Funds.
5288. Intrusting by Placing in Bank Subject to Check.
5289. Lodge Officer—Its Books as Evidence.
5290. Treasurer of Labor Union Appropriating its Funds.
5291. Acts Barred by Limitation as Proof of Intent.
5292. Entrusting to Sell—Appropriating Proceeds.

§ 5276. Appropriating Money as Employee.

"If you believe and find from the evidence and under these instructions that on or about the twentieth day of May 1903, or at any time within three years next before the filing of the information herein, the defendant, W. H. W—, was the agent, collector, and servant of the Crocker-Wheeler Company and was then over the age of sixteen years, and that then and there while he was such agent, collector and servant, and by virtue of his employment as such agent, collector and servant, he received and took into possession twelve hundred dollars lawful money of the United States of the value of thirty dollars or more, belonging to the said Crocker-Wheeler Company; and that the said Crocker-Wheeler Company was at that time a corporation duly organized under the laws of New Jersey; and that the said W. H. W— unlawfully, feloniously and fraudulently did embezzle and convert to his own use the said twelve hundred dollars, or any part thereof of an amount and value of thirty dollars or more, and so unlawfuly, feloniously and fraudulently did embezzle and convert the same to his own use, without the consent of the said Crocker-Wheeler Company and with intent at the time unlawfully, feloniously, and fraudulently to convert the same to his own use to permanently deprive the said Crocker-

Wheeler Company thereof without its consent, you will find the defendant guilty of embezzlement, and assess his punishment at imprisonment in the penitentiary for a term of not less than two years nor more than five years, and unless you find the fact so to be, you will acquit him.

"Feloniously, as used in these instructions means wickedly, and against the admonition of the law."—Approved: State v. Wissing, 187 Mo. 96, 85 S. W. 557.

§ 5277. Collector With Right to Commissions.

"The jury are instructed that, if they believe from the evidence that she was, at the time of the alleged embezzlment, a collector for the the company, with the right to retain her commissions—that is, that she was not required to pay over to the company the gross sum or sums of money collected by her, but might first deduct her commissions, and then pay over the balance or net amount due the company—she was not such an agent or servant as is contemplated in the statute defining embezzelment, and the verdict should be 'Not guilty.' "—Approved: McElroy v. People, 193 Ill. 271, 66 N. E. 1058.

§ 5278. Retention of Money Under Honest Claim of Right.

"If the moneys shown to have been retained by the accused were so retained by him under a belief, honestly entertained by him, that he had the right to so retain the same, he would not be guilty of embezzlement of such money as to which such belief obtained even though he had in fact no right to retain such moneys, for in such case the fraudulent intent necessarily would be absent."—Approved: State v. Lanyon (Conn.), 76 Atl. 1095.

§ 5279. Intent to Appropriate to Own Use.

"You are further instructed that the mere conversion of money to the agent and collector's use after receiving the same in such capacity and by virtue of his agency and collectorship, and the failure to pay it over to his employer, do not constitute the offense of embezzlement charged in the information, but there must have been in the mind of the agent and collector at the time of such conversion an unlawful, felonious, and fraudulent intent to appropriate such money to the agent and collector's use, and to deprive the owner of such use thereof absolutely. But you are further instructed that it is not necessary that the state should prove by direct and positive evidence that the conversion of the moneys mentioned in the information and in instruction 'first' herein, if you believe and find from the evidence there was a conversion of the moneys as defined in the last-mentioned instruction, was without the consent of the Crocker-Wheeler Company; it is sufficient if, from all the evidence, the jury are satisfied beyond a reasonable doubt that it was without such consent; and it is not necessary that the intent with which the defendant may have acted should be proved by direct and positive evidence, but may infer his intent from all the facts and circumstances attending and surrounding the acts."—Approved: State v. Wissing, 187 Mo. 96, 85 S. W. 557.

§ 5280. Intent an Essential Element in Embezzlement.

"An essential element in the crime charged in this case is a felonious intent, and, before you can convict the defendant, you must find from the evidence that he intended to convert to his own use the money in question, and to cheat, wrong, and defraud the county of Pacific out of the same. If you find from the evidence that the failure of the defendant to pay over this money was due to neglect and carelessness, and that he had no intention of cheating and defrauding the county out of the same, your verdict must be not guilty."—Approved: State v. Leonard, 56 Wash. 83, 105 Pac. 163.

§ 5281. Clerk Fraudulently Converting.

"The court instructs the jury that if they shall believe and find from the evidence that the defendant George E. L—, at any time within three years next before the eighth day of April, 1899, at the county of Barry and state of Missouri, was a clerk in the employment of the co-partnership firm of L. G. Brown & Son, and that defendant at the time of his employment as such clerk was not a person under the age of sixteen years, and that during such employment as such clerk of the said L. G. Brown & Son, and within three years next before the eighth day of April, 1899, defendant, while acting in the capacity of such clerk, and by virtue of his employment as aforesaid, did take or receive into his possession or care, the money of the said L. G. Brown & Son of the amount of seventy-five dollars, as alleged in the indictment, or any portion thereof, to the amount of thirty dollars or more, and that after taking and receiving said money, the defendant did, at the county of Barry and state of Missouri, and within three years next before the eighth day of April, 1899, feloniously' unlawfully' and intentionally embezzle and fraudulently convert said money or any portion thereof of the amount of thirty dollars or more to his own use, without the assent of the said L. G. Brown & Son, and that the said money so embezzled and converted by the defendant then and there belonged to and was the property of the said L. G. Brown & Son, then the jury should find the defendant guilty of embezzlement."—Approved: State v. Lipscomb, 160 Mo. 125, 60 S. W. 1081.

§ 5282. Employee Receiving Money for Specific Use and Converting.

"If you should find from the evidence or if you should believe that the said Will G— was employed by the Snyder Mercantile Company at the time the money came into his possession, charged in the indictment herein, and that the same was turned over to him as his own funds, with no specific directions as to how the same should be applied, but with the intention that the same should become the funds and property of the said Will G—, and that he thereafter used the same, then he would not be guilty of embezzlement, although the use thereof may have indebted him to the Snyder Mercantile Company, but, if the money was turned into his possession for the specific purpose of paying freights due by said company on goods which the said defendant was to receive, then such money would not become the property of the defendant, but would be that of the Snyder Mercantile Company, and in

this connection I further charge you that if the defendant received said money for the specific purpose of paying freight charges due by the said mercantile company for goods, and he thereafter, and with no intent to defraud the said mercantile company of the same, and without any intent to appropriate the same to his own use, lost said money, then he would not be guilty of embezzlement, though he may have failed to account for the same thereafter, and, if you have a reasonable doubt as to whether he lost the same, you will acquit him."—Approved: Garner v. State, 51 Tex. Cr. R. 578, 105 S. W. 187.

§ 5283. Small Amounts Taken Under Formed Design.

"The court instructs the jury that it is not necessary in this case, in order to find the defendant guilty of embezzlement of thirty dollars or more, for the state to prove that the amount of thirty dollars was taken at the same time or on the same day. Therefore, if the jury believe from the evidence that the defendant formed the design to embezzle and convert money of the said Farmers' Loan and Building Association, and that, in the pursuance of such formed design, he did, within three years next before the filing of the information, fraudulently, embezzle and convert to his own use money belonging to the said Farmers' Loan and Building Association, to the amount of thirty dollars or more, then that is sufficient."—Approved: State v. Shour, 196 Mo. 202, 95 S. W. 405.

§ 5284. Possession by Virtue of Office in a Corporation.

"The court instructs the jury if they believe and find from the evidence, beyond a reasonable doubt that the Farmers' Loan and Building Association was, prior to June 3, 1904, an incorporated association doing business in the state of Missouri, and that the defendant was its secretary, and that there came into his possession or under his care and control, by virtue of his office as such secretary, money belonging to the said association, and that at any time within three years prior to June 3, 1904, in the county of Livingston, state of Missouri, the said defendant, while over the age of 16 years, did then and there, by virtue of his office as said secretary of said association, have, receive, and take into his possession or under his care and control, money belonging to the said Farmers' Loan and Building Association, and that the defendant, or another with his knowledge and consent, did then and there fraudulently convert to his own or such other person's use, thirty dollars, or more, of the said money belonging to the said Farmers' Loan and Building Association, which came into his care and under his control by virtue of his being the secretary of said Farmers' Loan and Building Association, with the fraudulent intention then and there on the part of the defendant to convert the said money to his own or such other person's use without the assent of the said Farmers' Loan and Building Association, you should find the defendant guilty of embezzlement."—Approved: State v. Shour, 196 Mo. 202, 95 S. W. 405.

§ 5285. Public Officer—Intention to Return at Future Time.

(a) "By the twelfth instruction the jury were told that the term 'conversion of money' means an unauthorized assumption and exercise

of the right of ownership over the moneys belonging to another, and the alteration of its condition to the exclusion of the owner's right; and such conversion must be with the intention to use or dispose of the said moneys for the benefit of the person converting it, or to the benefit of some other person or corporation than the owner thereof; and it would be a conversion in law even though the party intended, at the time of the appropriation, at some future time to repay the money so appropriated."—Approved: Bartley v. State, 53 Neb. 310, 73 N. W. 644.

(b) "If the jury believe and find from the evidence that the defendant did, within three years prior to the finding of the indictment, receive into his possession the money mentioned in the indictment, or any portion thereof to the value of $30 or more, and that he received the same into his possession as state treasurer of the state of Missouri, and, by virtue of his office as treasurer, and that he did, within three years prior to the finding of this indictment, at the county of Cole, in the state of Missouri, feloniously, unlawfully and intentionally embezzle and fraudulently convert the same to his own use, you will find defendant guilty of embezzlement as charged in the indictment, notwithstanding the jury should believe and find from the evidence that the defendant intended at some future time to restore said money."—Approved: State v. Noland, 111 Mo. 473, 19 S. W. 715.

§ 5286. Public Officer—Failure to Turn Over to Successor.

"You are instructed that if you find, from the evidence, beyond a reasonable doubt, that the defendant was city treasurer of the city of Omaha; and if you further find, beyond a reasonable doubt, that the said city of Omaha, through its proper officer, or through a person authorized so to do, made a demand upon the defendant to settle and account to the said city of Omaha for funds received by the defendant during his term of office as such city treasurer, in the regular course of his business as such officer; and if you further find that the defendant neglected and refused to make settlement; and if you further find, from the evidence, beyond a reasonable doubt, that there was any money received by the said Henry B—, defendant, as such city treasurer, such moneys being received in the regular course of business, while the said Henry B— was treasurer of the said city of Omaha, and the said money being the property of the said city of Omaha,—such demand for settlement, and such refusal to turn over to the person authorized by the city of Omaha to receive such money, if you find that the said defendant did receive and hold any money, the property of the city of Omaha, is prima facie evidence that the defendant did embezzle such money as you find, beyond a reasonable doubt, that the defendant did receive for safe-keeping, transfer, and disbursement, of the moneys of the said city of Omaha, and which he refused and neglected to turn over and account for to the said city of Omaha."—Approved: Bolln v. State, 51 Neb. 581, 71 N. W. 444.

§ 5287. Public Officer Drawing Check on Public Funds.

"If you find from the evidence that the Omaha National Bank was a state depository, and if you further find the defendant drew a check

upon said bank against the funds of the state therein deposited to the credit of the state, and that said check was paid at said bank, that would constitute a taking of public money of the state by the defendant at the bank, whether the defendant was present at the time of payment of the check or not; nor would it be material whether the check was drawn in favor of the defendant or not, or by whom presented."—Approved: Bartley v. State, 53 Neb. 310, 73 N. W. 744.

§ 5288. Intrusting by Placing in Bank Subject to Check.

"The placing of money in a bank, to be drawn upon by another, is not, in legal effect, the intrusting of money to that person; but, if one has placed money in a bank, to be drawn by the other, the money so drawn by the other is money, in legal effect, intrusted to him or given to him."—Approved: De Leon v. Territory (Ariz.), 80 Pac. 348 (not reported in state reports).

§ 5289. Lodge Officer—Its Books as Evidence.

"You are instructed that mere discrepancies in accounts do not constitute larceny or embezzlement, but that the larceny or embezzlement, if any, must be shown by the plaintiff as a material fact; and in that regard you may consider the accounts of the lodge, as shown by the books received in evidence, and as bearing upon the question as to whether or not the said Rowley did, as such officer, during said time covered by defendant's bond, have plaintiff's moneys in his possession that were not paid out according to the direction of the lodge, nor turned over to his successor in office."—Approved: Union Pacific Lodge, No. 17, A. O. U. W., v. Bankers' Surety Co., 79 Neb. 801, 113 N. W. 263.

§ 5290. Treasurer of Labor Union Appropriating its Funds.

"The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant did, within three years from and before the date of the filing of the information, to wit, the 26th day of June, 1909, receive into his possession the money mentioned in the information, or any portion thereof to the value of less than $30, and that he received the same into his possession as treasurer of the said local union No. 149, United Mine Workers of America, and by virtue of his official position as such treasurer, and that he did, within three years prior to the filing of the information in this case, at the county of Randolph, in the state of Missouri, unlawfully, fraudulently, and feloniously embezzle and convert the same to his own use, they will find the defendant guilty of embezzlement as charged in the information, and assess his punishment at imprisonment in the county jail not exceeding one year nor by fine not exceeding $100, or by both such fine and imprisonment."—State v. Martin (Mo.), 132 S. W. 595.

§ 5291. Acts Barred by Limitation as Proof of Intent.

"If you find from the evidence that defendant fraudulently misapplied or converted to his own use public money at any time not within three years prior to the presentment of the indictment in this case, to wit, June 17, 1904, you are instructed that you cannot convict for such mis-application or conversion if any such there was. In connec-

tion herewith, you are further instructed as follows: With reference to an item which has been called the 'Judge Gibson item;' and an item of $268.25, which it was claimed was paid by the agent of the Cotton Belt Railroad at Rusk to the defendant; and an item of $270.54, which the state claims was the difference between the amount paid to the defendant by the Internaional & Great Northern Railroad and the amount reported by the defendant to W. M. C. H—; and an item $221.18, which is claimed by the state to be the difference between the amount reported by the defendant to W. M. C. H—; and any other items which you may find from the evidence may have been paid to the defendant prior to June 17, 1901—you cannot consider or take as the basis of the charge upon which to found a conviction, and the defendant cannot be convicted upon any of the said charges. While evidence to said items has been admitted to be considered by you, in connection with other evidence in the case, as bearing on intent of defendant and as bearing on the state of the account between the state and defendant, still you are charged that none of said items or matters can be taken as the basis upon which to found a conviction."—Approved: Busby v. State, 51 Tex. Cr. R. 289, 103 S. W. 638.

§ 5292. Entrusting to Sell—Appropriating Proceeds.

"If you believe from the evidence that the defendant received from the said C— the organ in question, under an agreement that the defendant should act as the agent of the said C— in the sale of said organ, and that defendant should sell said organ, and pay over to and deliver to said C— a certain sum in money or notes that defendant should secure from the sale of said organ, and you further believe that the defendant sold said organ as his own property, and not as agent for said Caylor, and that at the time of said sale the defendant had the fraudulent intent to appropriate the proceeds of said sale to his own use, and that in pursuance of said intent the defendant afterwards appropriated the proceeds of said sale to his own use and benefit, without the consent of said C—, the defendant would, under such circumstances, be guilty of embezzling the organ; but if you believe it was the intention of the defendant to act in good faith towards said C—, and carry out his alleged agreement, and that he, after said sale, conceived for the first time the intention to appropriate the proceeds of the sale, he would not be guilty of embezzling the organ."—Approved: Epperson v. State, 22 Tex. App. 694, 697.

E. Enticing Labor.

§ 5293. Distinction Between Tenant and Laborer.

§ 5293. Distinction Between Tenant and Laborer.

"The jury are instructed that if they find from the evidence in the case that Neal J— rented the land from J. J—, as the agent of Mrs. C—, and that Neal J— was to make a crop on said land, and was to have the control and management of the farm, and was to manage and control the farming operations on said land, and control as to the man-

ner of working and cultivating said crop, said Neal J— would then be a tenant, and not a laborer. But if you find from the evidence that said Neal J— was to occupy the place, and work and cultivate said crop, under the direction and management of Mrs. C—, or her agent, J. J—, and as such was to receive one-half of the crop raised, he would then be a laborer."—Approved: Mondschien v. State, 55 Ark. 389, 18 S. W. 383.

F. Extortion.

§ 5294. Collecting Illegal Fees.
§ 5295. Collecting Under Threats From Keeper of Bawdy House.

§ 5294. Collecting Illegal Fees.

"The court charges you that the prosecution in this case must not only prove beyond a reasonable doubt that the defendant charged and collected illegal fees, but you must also be satisfied by the evidence beyond a reasonable doubt that he charged such illegal fees willfully, knowingly, and corruptly."—Approved: Skeen v. Chambers, 31 Utah, 36, 86 Pac. 492.

§ 5295. Collecting Under Threats From Keeper of Bawdy House.

"The court instructs the jury that, the keeping of a bawdy house is an offense against the ordinances of the city of Pensacola, and if the defendant threatened to turn M— over to the criminal court for keeping a bawdy house unless she paid money, this would be threatening to accuse her of a crime against the ordinances of the city of Pensacola."—Approved: Wallace v. State, 41 Fla. 547, 26 South. 713.

G. Gaming and Betting.

§ 5296. Express Understanding Between Parties.
5297. What Constitutes Keeping a Gambling House.
5298. Permitting Betting Upon Pool Table.
5299. Keeping Gambling Device.
5300. Option Contracts Consummated Elsewhere.

§ 5296. Express Understanding Between Parties.

(a) "You are further instructed that a bet under the foregoing definition may be acts without words, and it is entirely unnecessary that there be an express understanding between the bettors, and the question as to whether or not a bet has been made is entirely independent of the parties thereto having any conversation between themselves with reference to the betting."—Approved: Taylor v. State, 55 Tex. Cr. R. 47, 115 S. W. 37.

§ 5297. What Constitutes Keeping a Gambling House.

"The court instructs the jury that the defendant is charged with keeping a certain gaming table commonly called a faro-bank. Section 230 of the 'Act concerning Crimes and Punishments,' is the one under which this case is prosecuted. Every person who shall set up or keep

any table or gambling device commonly called A. B. C. faro-bank, E. O. roulette, equality, or any kind of gambling table, or gambling device, adapted, devised, and designed for the purpose of playing any game of chance, for money or property, and shall induce, entice, or permit any person to bet, or play at or upon any such gaming table or gambling device, or at or upon any game played at or by means of such table or gambling device, or on the side or against the keeper thereof, shall, on conviction, be adjudged guilty of a misdemeanor, and punished by imprisonment in a county jail, not exceeding one year, and by fine not exceeding one thousand dollars. The defendant is presumed to be innocent of the offense charged, and before you are warranted in a verdict against him, each one of the facts which go to make up the offense charged, which are essential parts of the offense, as set forth in the indictment, must be established by the testimony introduced before you, to your satisfaction beyond any reasonable doubt. The transaction complained of must have taken place within the limits of this county to give jurisdiction to this court, and within two years prior to the commencement of this prosecution, December 9, 1864, to avoid the statute of limitations. It must appear from the testimony, 1st. That at the place mentioned by the witness a gambling device or instrument was in existence. 2d. That that gambling device was what is generally known as a faro-bank. 3d. That the defendant was the keeper of that faro-bank. To establish the fact of one being the keeper of a faro-bank, it is sufficient to show that he appeared thus acting as the one having control, in charge, superintending the same. It is not necessary to show that he was actually the owner. 4th. That the defendant being the keeper, kept such gambling device for the purpose of gain. 5th. That defendant being the keeper and keeping the said device for purposes of gain, induced or permitted other persons to bet and play upon such gambling device either on his side or against him."—Approved: Rice v. State, 3 Kan. 141.

(b) "The legal meaning of the term 'bet' is the mutual agreement and tender of a gift of something valuable which belongs to one of the contending parties, according to the result of the trial of chance or skill, or both combined, and the question as to whether or not a bet has been made is entirely independent of the parties thereto, having any conversation between themselves with reference to the betting."—Approved: Rainbolt v. State, 51 Tex. Cr. R. 153, 101 S. W. 217.

§ 5298 Permitting Betting Upon Pool Table

"You must believe from the evidence beyond a reasonable doubt that bets were made upon the pool table owned, held, and kept by defendant; that defendant was informed or knew of such bets being made and permitted same to be made, before you can convict the defendant; and, unless you so believe, you will find the defendant not guilty."—Approved: Berry v. State, 49 Tex. Cr. R. 376, 92 S. W. 1081.

§ 5299. Keeping Gambling Device.

"The court instructs the jury, that if they find and believe from the evidence that the defendant F. M. H—, at the county of Christian and

state of Missouri, at any time within one year prior to the filing of the indictment in this case, to wit, March 7, 1899, permitted what is commonly known as a slot-machine—that is to say a machine or device wherein the player deposited a nickel, five cent piece—and turned a crank or moved a lever thus putting in motion said machine or device, resulting in the loss of the nickel or the winning of more than one nickel, or put in five nickels and turned the crank or moved the lever, taking the chance of losing three nickels against the chance of winning more than five nickels to be determined upon the stopping of a wheel, put in motion by the turning of said crank or moving of said lever to be run and operated upon premises occupied by him, by permitting persons to play thereat, then you will find the defendant guilty as charged in the indictment; for if you find that said machine or device was so used and operated as above set forth, then under the law it was a gambling device. And if you find the defendant guilty you will assess his punishment at imprisonment in the county jail for a term of not less than thirty days nor more than one year, or by a fine of not less than fifty, nor more than five hundred dollars."—Approved: State of Missouri v. Howell, 83 Mo. App. 198.

§ 5300. Option Contracts Consummated Elsewhere.

"You are charged that if you find from the evidence that the alleged contract in this case was wired into the Memphis Exchange (C. P. Hunt, manager), at Memphis, in the state of Tennessee, and was there consummated, and was from there wired into the New York Exchange at New York City, and that the said contract was not consummated in the state of Texas, then you will find defendant not guilty."—Approved: Salmon v. State, 56 Tex. Cr. R. 408, 120 S. W. 427.

CHAPTER CXLIV.

BURGLARY—OTHER CRIMES.

A. Burglary.
B. Larceny.
C. Receiving Stolen Property.
D. Robbery.

A. Burglary.

§ 5301. Breaking Necessary—Breaking Defined.
5302. Opening Screen Door.
5303. Nighttime Entry—Slight Force.
5304. Daytime—Entry by Force.
5305. Forcible Breaking and Entering with Intent to Steal.
5306. Intent Must be Proven.
5307. Joint Attempt—Each Liable for Acts of the Other.
5308. Breaking Window.
5309. Nighttime—Daytime—Degrees.
5310. Recent Possession of Stolen Goods—Failure to Account For.
5311. Recent Possession—False Account.
5312. Recent Possession—Doubt as to Honest Possession.
5313. Possession Unexplained.
5314. Verdict—Burglary—Larceny.

§ 5301. Breaking Necessary—Breaking Defined.

"To constitute burglary, where the indictment (as in this case) does not in specific terms allege that the offense was committed either in the day time or night time, the evidence must show to the satisfaction of the jury beyond a reasonable doubt that the entry was effected by breaking—that is, by actual force applied to the building itself. The slightest force, however, applied to the building, is sufficient to constitute a breaking, such as lifting or unfastening the latch of a door that is shut, or the turning of the lock of a door that is shut and fastened by means of such lock, or by any other actual force applied to the building itself."—Approved: Montgomery v. State, 55 Tex. Cr. R. 502, 116 S. W. 1160.

§ 5302. Opening Screen Door

"The court instructs the jury that if they find from the evidence that the screen door mentioned in the evidence was kept closed by means of hinges and springs attached to the same in such manner that some force was necessary to open said door and that the defendants opened said door by using such force, then the jury can find that there

was a breaking of the dwelling house mentioned in the evidence."—Approved: State v. Henderson and Younger, 212 Mo. 208, 110 S. W. 1078.

§ 5303. Nighttime Entry—Slight Force.

"An entry, in burglary, may be constituted by the introduction of any instrument into the house for the purpose of taking from the house any personal property, although no part of the body of the offender should be introduced. It is not necessary that there should be any actual breaking when the entry is made in the nighttime; but there must be some degree of force. However, slight force is sufficient. The entry by a chimney, or climbing through a window, or the entry at any unusual place, would constitute force."—Approved: Hays v. State, 51 Tex. Cr. R. 111, 100 S. W. 926.

§ 5304. Daytime—Entry by Force.

"You are instructed that the indictment in this case, having charged that the burglarious entry was made by force in the day time, with intent to commit the crime of theft, before you would be warranted in finding the defendant guilty, you must be satisfied from the evidence, beyond a reasonable doubt, that the entry was so made in the day time by force directly applied to the house, and with the intent to commit the specific crime of theft."—Approved: Smith v. State, 53 Tex. Cr. R. 643, 111 S. W. 939.

§ 5305. Forcible Breaking and Entering With Intent to Steal.

"If, upon consideration of all the evidence in the case, in the light of the court's instructions, you believe and find from the evidence that at the city of St. Louis and state of Missouri, on or about the 31st day of January, 1904, the defendant, Morris S—, unlawfully and forcibly did break and enter into the store, shop and building of W. A. G— with the intent to steal therein, and that in said store, shop, and building certain goods, wares, and personal property of any kind and of some value, however small, were at the time by said W. A. G— kept and deposited, you will find the defendant guilty of burglary in the second degree and assess his punishment in the penitentiary for a term of not less than three years.

"Before you can find the defendant guilty of burglary you must find from the evidence that he unlawfully and forcibly both broke and entered into said store, shop, and building, but to constitute such breaking no particular amount of force is necessary. It is sufficient if he broke an outside window or sky-light of said store, shop, and building and then entered thereby or opened a closed outside door of said store, shop, and building and then entered thereby."—Approved: State v. Speritus, 191 Mo. 24, 90 S. W. 459.

§ 5306. Intent Must be Proven.

"I charge you, gentlemen of the jury, that, in order to obtain at your hands a verdict of guilty, the state must establish by competent evidence to your satisfaction beyond a reasonable doubt every essential element of the crime of burglary. One of the essential elements of the crime of burglary, as charged in this indictment, is that, after breaking by force

the car described in the indictment, under circumstances such as would constitute a burglarious breaking under the instructions already given you, the defendant entered into such car with intent to steal the coal therein contained. This intent to steal thus required to be established by the state to your satisfaction beyond a reasonable doubt on the part of the defendant at the time of breaking and entering the car must have been the intent on the part of the defendant to take, steal, and carry away the coal in said car contained, without the consent of the owner, and with the intent to deprive him thereof; such taking, stealing, and carrying away to be accomplished by fraud and stealth. If, therefore, the defendant's intent at the time of entering said car, or at the time of forcibly breaking the same, if you find he did so forcibly break the car under the instructions already given you, was not to steal the coal therein contained, but that such entry was made under the belief that he had a right to take the coal, or if you have a reasonable doubt that it was his intent to steal the coal, then your verdict must be not guilty." —Approved: State v. Tough, 12 N. D. 425, 96 N. W. 1025.

§ 5307. Joint Attempt—Each Liable for Acts of the Other.

"You have observed that the charge is that defendant attempted to break and enter said building with intent to commit a larceny. If another man than the defendant feloniously broke and entered said building, with intent to commit a larceny, he must have first attempted to do so before consummating the breaking and entering, and if the defendant was concerned in the commission of that offense, and co-operating with the person committing it in its commission, then he is chargeable with the attempt made by such a person the same as if he had made the attempt himself. If such a breaking and entering was with intent to commit a larceny, and the defendant was concerned in the commission of the breaking and entering with that intent, he is chargeable with such an intent."—Approved: State v. Mahoney, 122 Iowa, 168, 97 N. W. 1089.

§ 5308. Breaking Window.

"If the jury believe from the evidence that the defendants, at any time within three years prior to the finding of the indictment in this case, to wit: March 28, 1881, at the county of Saline, state of Missouri, broke and entered the said dwelling-house of William P. W—, by forcibly breaking and bursting the window, in which there was at the time a human being, with the intent of stealing and carrying away any goods, wares, merchandise or other property then being in said dwelling-house, then they will find the defendants guilty of burglary in the first degree, and assess their punishment at imprisonment in the state penitentiary for a term of years not less than ten. The breaking of the window by pulling off the plank and undoing the fastening is a forcible bursting and breaking within the meaning of the statute."—Approved: State v. Butterfield, 75 Mo. 301.

§ 5309. Nighttime—Daytime—Degrees.

"But if the evidence satisfies you beyond a reasonable doubt that the defendant broke and entered the dwelling-house charged with the in-

tent to steal and carry away the property of the D—'s at some time about the the time alleged, and does not satisfy you beyond a reasonable doubt that it was during the hours constituting nighttime, you should then convict of the offense charged. But, if you do find beyond a reasonable doubt that the defendant broke and entered the building with the intent to steal as stated, and also find beyond a reasonable doubt that such breaking and entry was made in the nighttime, as this time has been defined to you, then you should acquit."—Approved: State v. Egan, 136 Wis. 114, 116 N. W. 755.

§ 5310. Recent Possession of Stolen Goods—Failure to Account for.

"Where property has been stolen, by means of a burglary, proven beyond a reasonable doubt, and recently thereafter the same property, or any part thereof, is found in the possession of another, such person, in whose possession the same is found, is presumed to be the thief who stole the same, and is also presumed to have used all means necessary to have secured access to and possession of such property, and if he fails to account for his possession of such property in a manner consistent with his innocence, or unless such presumption be overcome by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, then this presumption that the person in whose possession such property is found is the thief, and used all means necessary to secure such property, becomes evidence against him, so that unless such possession be explained or the presumption arising therefrom be overcome by evidence as aforesaid, to your satisfaction, then from such possession of property recently stolen you are authorized to presume such person guilty of both the larceny and the burglary."—Approved: State v. James, 194 Mo. 268, 92 S. W. 679.

§ 5311. Recent Possession—False Account.

"The jury are instructed that, where a burglary is connected with a larceny, mere possession of stolen goods, without any other evidence of guilt, is not to be regarded as prima facie or presumptive evidence of burglary, but where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the actual or exclusive possession of a person who gives a false account, or who refuses to give any account, of the manner in which the goods came into his possession, proof of such possession and guilty conduct is evidence tending to prove not only that he stole the goods, but that he made use of the means by which access to them was obtained. There should be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary is superadded to that of larceny."—Approved: Taylor v. Territory, 7 Ariz. 224, 64 Pac. 423.

§ 5312. Recent Possession—Doubt as to Honest Possession.

(a) "If you find from the evidence beyond a reasonable doubt, that some person stole from the said dwelling-house the beds or bedding, or some portion thereof, introduced in evidence in this case, by breaking

and entering the said dwelling-house in the nighttime, with intent to steal the same, and you further so find that recently thereafter such property thus stolen, if any, was found in the possession of the defendant, then and in such case you would be warranted in concluding that the defendant stole the property, if any, thus found in his possession, by breaking and entering said dwelling-house in the nighttime, with intent to steal such property, unless the facts and circumstances shown by the evidence raise in your mind a reasonable doubt as to whether he did not come honestly into such possession. But if such facts and circumstances do raise such reasonable doubt, then you would not be warranted in drawing such conclusion from such recent possession, if established."—Approved: State v. Frahn, 73 Iowa, 355, 35 N. W. 451.

(b) "If you find from the evidence in this case, beyond a reasonable doubt, that the goods or articles of merchandise introduced in evidence, or some part of them, were by some one or more persons stolen from the said building in the nighttime, by breaking and entering such building, and you further find that, within a few days thereafter, such goods or merchandise, or a portion thereof, were found in possession of defendants, you would, in such case, be warranted in concluding that the goods, if any thus found in the possession of defendants, were stolen by defendants from said building by breaking and entering the same in the nighttime, unless the facts and circumstances disclosed by the evidence raise in your minds a reasonable doubt as to whether they did not come honestly into such possession."—Approved: State v. Rivers, 68 Iowa, 611, 27 N. W. 781.

(c) "If you believe the defendant bought the suit of clothes claimed to have been taken from the alleged burglarized house, or if you have a reasonable doubt thereof, you must acquit the defendant."—Hawthorn v. State (Tex. Cr. R.), 136 S. W. 776.

§ 5313. Possession unexplained.

"Possession of goods recently stolen does not in itself create presumption or amount to prima facie proof that the possessor is guilty of breaking and entering the building in which the goods were kept; but if other evidence in the case shows beyond a reasonable doubt that the building was broken and entered by some one, that the theft of the goods was accomplished at the time and by the means of the breaking and entering, proof of possession unexplained, or in the absence of circumstances raising a reasonable doubt as to whether the possession of the goods had been acquired otherwise than by the crime charged, is sufficient to warrant a conviction."—Approved: State v. Donovan, 125 Iowa, 239, 101 N. W. 122.

§ 5314. Verdict—Burglary—Larceny.

(a) "The jury are instructed that under an information for burglary the accused may be found guilty of larceny; and if, in this case, the jury are not satisfied from the evidence, beyond a reasonable doubt, that the defendant committed the burglary as charged in the information, still, if the jury believe from the evidence, beyond a reasonable doubt, that the defendant did steal the goods described in the information from the

possession of the said Adolph Z—, then the jury may, under this information, find the defendant guilty of larceny."—Approved: Ferguson v. State, 52 Neb. 432, 72 N. W. 590.

(b) "Under the information and instructions in the cause, you may find the defendant guilty of both offenses, or you may acquit him of both offenses, or you may convict him of burlary and acquit him of the larceny, or you may acquit him of the burglary and convict him of the larceny, according as you may find the facts to be from the evidence."—Approved: State v. Speritus, 191 Mo. 24, 90 S. W. 459.

B. Larceny.

§ 5315. Definition of Larceny.
5316. Of Check from Possession of Owner—Value.
5317. Property Need Not be in Owner's Actual Custody.
5318. Asportation—Removing Property from Position with Intent to Appropriate.
5319. Custodian Removing Property from Trunk.
5320. Original Taking—Unlawful Intent.
5321. Fraudulent Taking Defined.
5322. Burglary with Taking Includes Larceny.
5323. Robbery Includes Larceny.
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5325. Cattle Stealing—Grand Larceny.
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5332. Estray—Present Intent Though Owner is Unknown.
5333. Estray—Subsequent Intent When Owner is Unknown.
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5342. Recent Possession—Presumption When Conclusive.
5343. Recent Possession of Part of Stolen Property—Presumption.
5344. Possession Presumed Recent in Certain Circumstances.
5345. Recent Possession of Range Cattle—Presumption.
5346. Good Character to Rebut Presumption from Recent Possession.
5347. Other Takings to Show Intent.
5348. Place of Taking—On Building or Outside.
5349. Variance as to Ownership—Materiality.

§ 5315. Definition of Larceny.

" 'Larceny' is the felonious taking of the property of another without the knowledge or consent of that other, and with the intent of the party taking, at the time of the taking, to permanently deprive the owner thereof, and with the further intent at said times to wholly and permanently appropriate it to the use of the party taking."—Approved: State v. Minor, 106 Iowa, 642, 77 N. W. 330.

§ 5316. Of Check from Possession of Owner—Value.

"If in this case you believe from the evidence, beyond a reasonable doubt, that the defendant did, in the county of Collin and the state of Texas, at any time within five years next before the 23d day of January, 1909 (which is the date of the filing of the indictment in this case), fraudulently take from the possession of Newt L— the check for $75, as alleged in the indictment, without the consent of the said Newt L—, and with intent to deprive the said Newt L— of the value of the same, and to appropriate it to the use of him, the said defendant, and that said Newt L— was at the time the owner of said check, and if you find the value of the check to be $75, then you will find the defendant guilty as charged."—Approved: Worsham v. State, 56 Tex. Cr. R. 253, 120 S. W. 439.

§ 5317. Property Need not be in Owner's Actual Custody.

"You are further instructed the fraudulent taking, in order to constitute theft, need not be the taking from the actual possession of the owner; but if taken without his consent, when not in his actual custody, with the intent to deprive him of the value thereof and to appropriate it to the use and benefit of the person taking it would constitute theft." —Approved: Rose v. State, 52 Tex. Cr. R. 154, 106 S. W. 143.

§ 5318. Asportation—Removing Property from Position with Intent to Appropriate.

"Before you can find the defendant guilty of any degree of the crime charged in the indictment you must be satisfied beyond a reasonable doubt that he in fact took and carried away the three tubs of butter mentioned in the indictment, or some of them. While it is not necessary in order to constitute a taking and carrying away of the property, that the same should have been taken and retained in the possession of the defendant, yet it must be shown beyond a reasonable doubt that the defendant did in fact take some or all of said butter tubs from their original place and position in the car, and remove the same to some extent, with intent on his part to steal the same or some of them, the lifting, shoving, or pushing the same on the bottom of said car in any manner and to any extent would be such moving."—Approved: State v. Rozeboom, 145 Iowa, 620, 124 N. W. 783.

§ 5319. Custodian—Removing Property from Trunk.

"You are further instructed that if you find from the evidence that C. H. R— and his wife went to the house of the defendants during the month of September, 1902, taking with them a part of the property described in the indictment, and when they left the premises of the de-

fendants that they left such property in their trunks, and in the care and custody of the defendants, and you further find from the evidence that, after C. H. R— and his wife had left the place of the defendants, that the defendants, or either of them, opened the trunk so left in their care and custody, and took the property therefrom with the felonious intent to deprive the owners thereof, then the defendants, or one of them, that took such property under the circumstances above stated, is guilty of larceny, and you should so find."—Approved: Flohr v. Territory, 14 Okl. 477, 78 Pac. 565.

§ 5320. Original Taking—Unlawful Intent.

(a) "If the original taking of the flaxseed in question was in pursuance of a prior understanding with his brother, as claimed by defendant, then the subsequent sale of the second load would not constitute larceny. In order to constitute the crime of larceny, the original taking from the possession of the owner must have been with felonious intent of depriving the owners of their property therein, and without consent of the owner or custodian thereof."—Approved: State v. Larson, 85 Iowa, 659, 52 N. W. 539.

(b) "If the jury believe from the evidence that the defendant had no felonious intent to steal the property at the time he took it, then you must acquit, even if you believe he subsequently conceived the intent to appropriate it."—Approved: State v. Riggs, 8 Idaho, 630, 70 Pac. 947.

§ 5321. Fraudulent Taking—Defined.

"By 'fraudulent taking,' as used above, is meant that the person taking knew at the time of the taking, if any, that the property was not his own; that the property was taken, if taken at all, without the consent of the owner; and that the property was taken, if taken, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking."—Approved: McCoy v. State, 56 Tex. Cr. R. 551, 120 S. W. 858.

§ 5322. Burglary with Taking Includes Larceny.

"The court further instructs you that, if you acquit the defendant of burglary, as heretofore defined, you will then consider whether or not he is guilty of grand larceny, in which connection the court instructs you: If you find and believe from the evidence that at the said city of St. Louis, at any time within three years next before the finding of the indictment herein, the defendant, Morris S—, unlawfully and fraudulently did steal, take and carry away a one-horse wagon and sixteen sets of single harness from the possession of ——— with the intent to unlawfully and fraudulently convert the same to his own use and permanently deprive the owner thereof without his consent, and that the same was the property of said W. A. G— and of the value of $30 or more, you will find the defendant guilty of grand larceny, and assess the punishment at imprisonment in the penitentiary for a term of not less than two nor more than five years."—Approved: State v. Speritus, 191 Mo. 24, 90 S. W. 459.

§ 5323. Robbery Includes Larceny.

"I instruct you that if, in this case you find from the evidence beyond a reasonable doubt that the defendants or either of them are guilty of stealing from the person of Peter W— the sum of money described in the indictment, or some part thereof, but do not so find that the defendants, or either of them assaulted said W— with intent, if resisted, to kill or wound said W—, then you should find the defendants, or either of them that you find so guilty, of the crime of larceny from the person."—Approved: State v. Parr, 54 Ore. 316, 103 Pac. 434.

§ 5324. Receiving Stolen Property Does Not Include Larceny.

"And although the jury may believe from the evidence that the animals described in the information were stolen from Miller & Lux, Incorporated, a corporation, and were received by the defendant with a knowledge that they were so stolen, still the defendant is not on trial for, nor charged with, the crime of receiving stolen property, and unless you are satisfied to a moral certainty and beyond all reasonable doubt that the defendant did actually steal said animals, or that he was concerned in the commission of the larceny, and aided and abetted, or, not being present, advised and encouraged, its commission, you should find the defendant not guilty."—Approved: People v. Del Cerro (Cal.), 100 Pac. 887.

§ 5325. Cattle Stealing is Grand Larceny.

"It will be noticed from this definition of grand larceny that every felonious stealing, taking, and driving away of cows steers, bulls, and calves is grand larceny, regardless of the value of the property taken; and in this case, as there is no evidence of anything other than calves, cows, steers, and bulls having been taken, you would not be at liberty to find the defendant guilty of petit larceny, but your verdict must be guilty of grand larceny, if you should believe from the evidence beyond a reasonable doubt, and to a moral certainty, that the defendant, as charged in the information, did steal, feloniously, a cow, steer, bull, or calf; or if you should, upon this proposition, have a reasonable doubt of the guilt of the defendant, your verdict should be not guilty."—Approved: People v. Prather, 120 Cal. 660, 53 Pac. 259.

§ 5326. Larceny by Fraud or Stealth Defined.

(a) "Fraud, within the meaning of the statute on larceny, is the getting possession of property by means of falsehood, deception, or artifice. The meaning of the word 'stealth,' as applied to larceny, is the taking of property secretly and without the knowledge or consent of the owner."—Approved: Flohr v. Territory, 14 Okl. 477, 78 Pac. 565.

(b) "You are further instructed that before you can find the defendants, or either of them, guilty, the territory must prove to your satisfaction, beyond a reasonable doubt, the following propositions: First, that the property charged in the indictment, or some part of the same, was taken; second, that it was taken either by fraud or stealth, or by both fraud and stealth; third, that it was the property of C. H. R— and Luella W. R—, or one of them; fourth, that it was taken with the

felonious intent to deprive the owners thereof; fifth, that the defendants were the persons who took the property."—Approved: Flohr v. Territory, 14 Okl. 477, 78 Pac. 565.

§ 5327. Obtaining Money by Trick—Fake Betting.

"If, however, the property was received or taken by the defendant with a felonious intent at the time, he is guilty of larceny, even though it were by the owner's consent. Any preconcerted plan to obtain money, and an intent to steal coupled with that plan, is felonious. If money is obtained by trick, artifice, or device, as fraudulently obtaining it under color of a bet, inducing a person to bet merely for the purpose of getting possession of the stakes deposited, and with the intent to appropriate them, regardless of the event on which the bet was made, is larceny. So you are to consider whether or not this whole transaction was a mere scheme or device to steal R—'s money. If it appears to you beyond a reasonable doubt that the defendant entered into such scheme, either by himself or with others, intending all the time to steal this money from R—, and you should believe that beyond a reasonable doubt, and further find that he did get the money by such scheme, you should find him guilty as charged in the indictment."—Approved: State v. Ryan, 47 Ore. 338, 82 Pac. 703.

§ 5328. Removing Stock from Accustomed Range.

"If you believe from the evidence that the defendant, Dave S—, at or about the time and in the county alleged, willfully took into his possession the said cattle, and removed the same from their accustomed range, without the consent of the alleged owner, and with intent to defraud the said owner; and if, moreover, you believe from the evidence that the said cattle were not, at the time of such removal, the property of the defendant, but were in fact the property of the parties charged in the indictment to have been the owners, you will, if you so believe and find, find the defendant guilty of theft, and assess his punishment at confinement in the penitentiary not less than two nor more than five years; or you may assess the punishment at a fine in any sum not exceeding $1,000; or you may, in your discretion, assess both such fine and imprisonment."—Approved: Smith v. State, 21 Tex. App. 133, 17 S. W. 558.

§ 5329. Lost Property—Finder with Present Intent to Appropriate.

"The jury are instructed as follows: First. That, to render the finder of lost property guilty of larceny in appropriating it to his use, it is necessary that he find it under circumstances which give him knowledge or means of inquiry as to the true owner. Second. That there must exist, on the part of the finder, both the belief that the owner can be found and the intent to deprive him of his property at the time of the finding."—Approved: State v. Hoshaw, 89 Minn. 307, 94 N. W. 873.

§ 5330. Owner Unknown and no Marks to Identify.

"If you find from the evidence that said goods were lost; that the same were found by the defendant; that at the time he found the same he did not know who owned them; that there were no marks upon or

about the goods showing to whom they belonged, so that defendant could identify the owner at once—even though defendant could afterwards have discovered the owner by honest diligence,—then you must acquit the defendant."—Approved: State v. Dean, 49 Iowa, 73.

§ 5331. Estray—Converting When Owner is Known.

"You are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant took the animal mentioned in the information into his possession, or found it running with his stock, and, at the time he so took it or found it, knew it was not his own, and that he then and there intended to steal and convert it to his own use, and to deprive the owner of his property, whoever he might be, and at the time took possession of the animal, and held such possession with such intention, this would amount to the crime of larceny, provided you find all other material allegations of the information proved by the evidence beyond a reasonable doubt."—Approved: Lamb v. State, 40 Neb. 312, 58 N. W. 963.

§ 5332. Same—Present Intent Though Owner is Unknown.

"The jury are instructed that although they might believe the mare may have wandered from the inclosure of any person, where it was left by the owner or any other person having lawful possession of said mare, and the owner did not know where the said mare was, yet if the defendant coming across said mare, and with the intent at the time of taking to convert her to his own use, and deprive the owner of her property, took possession of the said mare, and carried her off, and feloniously converted her to his own use, he is none the less guilty of larceny because he was ignorant of the true owner; the ownership draws along with it the possession, under such circumstances."—Approved: State v. White, 126 Mo. 591, 29 S. W. 591.

§ 5333. Same—Subsequent Intent When Owner Unknown.

"You are instructed that if you find from the evidence in this case that the calf described in the information was an estray, and that the defendant took it into his possession, or found it running with stock that was in his care, and took care of it, and fed it with his stock or with other stock that was in his care, and that when he first took possession of the calf or discovered it with his stock that was in his care he did not intend to steal it or feloniously convert it to his own use, then he would not be guilty of larceny or receiving stolen property, although you find from the evidence beyond a reasonable doubt that he afterwards converted it to his own use with intent to deprive the owner of it."—Approved: Crockford v. State, 73 Neb. 1, 102 N. W. 70.

§ 5334. Aiding Thief to Dispose of Property.

"The jury is instructed that if you believe that the only part that the defendant took in the alleged larceny was that he, after the said mules were stolen, aided or assisted the person who stole them in selling or disposing of them, or participated in the profits thereof, then he cannot be convicted of grand larceny, and, in such case, you will acquit

the defendant."—Approved: People v. Disperati, 11 Cal. App. 469, 105 Pac. 617.

§ 5335. Larceny in Nighttime—Punishment.

"If you believe and find from the evidence and under these instructions that at the city of St. Louis and state of Missouri, on or about the 23rd day of November, 1903, or at any time within three years next before the filing of the information herein, the defendant, Graham S—, alias D—, either acting alone or with some other person with a common intent with such other person, unlawfully and fraudulently did take, steal, and carry away from the possession and from the person of George W—, in the nighttime, four dollars, lawful money of the United States, or any part thereof, mentioned in the information with the intent then and there unlawfully and fraudulently to convert the same to his or their own use and deprive the owner of the same permanently without his consent, and that said money so taken, stolen, and carried away was the property of the said George W— and was of some value less than thirty dollars, you will find the defendant, Graham S—, alias D—, guilty of larceny from the person in the nighttime as charged in the information, and assess his punishment at imprisonment in the penitentiary for a term of not fewer than two years nor more than seven years, or at imprisonment in the city jail for not more than three months; and unless you so find the facts you will acquit said defendant."—Approved: State v. Smith, 190 Mo. 706, 90 S. W. 440.

§ 5336. Taking Under Claim of Right—Honest Mistake.

(a) "You are instructed that if this defendant took this horse under a claim of right, and you find a fair pretense for so taking said horse, it is your duty to acquit this defendant, though you should find he was mistaken in his claim to said horse."—Approved: State v. Eubank, 33 Wash. 293, 74 Pac. 378.

(b) "The defendant, George B—, is charged by the information filed herein with the crime of grand larceny, as follows: That he did on the first day of March, A. D. 1901, at Mill precinct, Tooele county, state of Utah, one calf of the value of $10.00, of the personal property of one Peter D—, unlawfully and feloniously steal, take, drive, and carry away. Under the laws of this state, larceny is the felonious stealing, taking, carrying, leading or driving away the personal property of another; and when the property taken is a horse, mare, colt, gelding, cow, heifer, steer, calf, bull, sheep, mule, jack or jenny it is grand larceny. The burden of proving each element of the crime charged, beyond a reasonable doubt, is upon the state; and, before you would be justified in finding the defendant guilty of the crime as charged in the information, you must find from the evidence, beyond a reasonable doubt, that the defendant did on or about the first day of March, 1901, at and within the county of Tooele, state of Utah, steal, take, and drive away a calf, and that such calf was the property of Peter A. D—. If you find from the evidence that defendant took from the possession of D— the calf mentioned in the information, and that such taking was under a claim of right,—for instance, that the defendant claimed to be

the owner of the calf,—then I instruct you that such taking would not be larceny, even though the defendant was in fact mistaken, and that the said calf belonged to D—."—Approved: State v. Bates, 25 Utah, 1, 69 Pac. 70.

(c) "If you find from the evidence that there is an honest mistake in this case, you will say who has made the mistake. If the defendant claimed this horse through an honest mistake, he could not be held guilty of the crime charged, or of any other crime; but, if the colt is not his, you will say from the testimony whether he made an honest mistake. If he did, he could not be convicted. If the colt wasn't his, and he took it willfully, without knowing it to be his or honestly believing it to be his, and took it in manner and form described, then he would be guilty."—Approved: State v. Bjelkstrom, 20 S. D. 1, 104 N. W. 481.

§ 5337. Same—Reasonable Doubt as to Honest Claim.

(a) "If the property mentioned in the indictment was the property of the defendant, you will acquit him; or, if you have a reasonable doubt as to whether it was defendant's property or not, you will acquit him. If the property mentioned in the indictment was the property of the party named in the indictment at the time of the taking by the defendant, yet if the defendant believed that said property was his, you will acquit him; or, if you have a reasonable doubt as to whether he thought the property was his when he took it, you will acquit him."—Approved: Johnson v. United States, 2 Okl. Cr. App. 16, 99 Pac. 1022.

(b) "If you believe defendant took the hog or hogs of B—, but you also believe he took the same under a mistaken claim of ownership, in good faith believing the same was his own property, or if from the evidence you have a reasonable doubt as to whether or not he took it or them under such mistake, you will find the defendant not guilty."—Approved: Lockett v. State (Tex. Cr. R.), 129 S. W. 627.

§ 5338. Misappropriating Property Held as Security.

"You are further instructed that if you find from the evidence that on or about the 10th day of June, 1902, the prosecuting witness C. H. R— was indebted to the defendant Charles F— in the sum of eighteen hundred dollars and accumulated interest thereon, and that at or about that time the said C. H. R—, as security for the payment of said indebtedness, made and executed to the said Charles F— a bill of sale of the drug stock and the fixtures, and that the key to the drug store wherein such property was contained was turned over to the defendants, or either of them, because of their having such bill of sale as security for their claim, and in order to place them in possession of the property upon which they had the bill of sale, and in order to give them possession under their lien, then in such a case the defendants could not be found guilty of larceny for the misappropriation of property coming into their hands under such circumstances."—Approved: Flohr v. Territory, 14 Okl. 477, 78 Pac. 565.

§ 5339. Changing Address on Packages in Custody of Carrier.

"The removal of the stamps or address on said tubs, or any of them, and placing the stamp of defendant thereon, being the address of

Merrill & Elbridge, if you find defendant did so change stamped address on said tubs, or any of them, with intent to steal the tubs of butter or any of them, is not in law larceny, and will not alone warrant a conviction."—Approved: State v. Rozeboom, 145 Iowa, 620, 124 N. W. 783.

§ 5340. Evidence—Recent Possession Unexplained.

(a) "The jury are instructed that the possession of stolen property, recently after the larceny thereof, when unexplained, may be sufficient to warrant the jury in inferring the guilt of the party in whose possession it is found. Whether such inference should be drawn is a fact exclusively for the jury."—Approved: Palmer v. State, 70 Neb. 136, 97 N. W. 235.

(b) "In this case, if the jury believe from the evidence, beyond a reasonable doubt, that the horse described in the information was stolen, and that the defendants were found in the possession of the horse soon after it was stolen, then such possession is, in law, a strong criminating circumstance tending to show the guilt of the defendants, unless the evidence and the facts and circumstances proved show that they may have come honestly into possession of the same."—Approved: State v. Collett, 9 Idaho, 608, 75 Pac. 271.

(c) "If the jury believe from the evidence that the property mentioned in the information, or any portion thereof, was feloniously taken from the person of the prosecuting witness, James A. C—, as described in the information, and received into the possession of the defendant shortly after being so feloniously taken, the failure, if failure there be, of the defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession, in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence disclose any such."—Approved: People v. King, 8 Cal. App. 329, 96 Pac. 916.

§ 5341. Recent Possession Explanation Raising Reasonable Doubt.

(a) "The court instructs the jury that the possession of stolen property soon after the commission of the theft is prima facie evidence that the person in whose possession it is found is guilty of the wrongful taking, and is sufficient to warrant a conviction, unless the other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of such guilt. If there is a reasonable doubt, you must acquit. You have heard the testimony of the defendant in explanation of his being found in the place in question where the suit case was left, and you are instructed that it is not necessary for the defendant to explain to your satisfaction his possession of the property, if he was in possession of it, and that he came by it honestly. If the explanation he has given is sufficient to cause you to have a reasonable doubt as to his guilt, and if under all the evidence in this case you have such a reasonable doubt, then you should acquit the defendant."—Approved: State v. McDermet, 138 Iowa, 86, 115 N. W. 884.

(b) "If you believe from the evidence in this case that defendant purchased the property alleged to have been stolen from another or

others in good faith, believing that he was lawfully acquiring title thereto, you cannot convict the defendant, or if you have a reasonable doubt of the existence of such facts you will render a verdict of not guilty."—Approved: Wilson v. State (Tex. Cr. R.), 129 S. W. 836.

§ 5342. Recent Possession—Presumption When Conclusive.

"Possession of personal property recently after the same is proven to have been stolen, raises the presumption that the person so in possession is the person who stole the same, and this presumption becomes conclusive unless it is overcome, or refuted, by the circumstances of the taking, or the circumstances of the possession, or by proof, reasonably satisfactory, that such possession was innocently or honestly acquired. If, therefore, you shall believe that the horse named in the indictment was stolen, and that recently thereafter the defendant was in possession of such horse, you must find that defendant is the person who stole such horse, unless you shall further find that the presumption above named, as running with the possession of stolen property, is overcome, or refuted, by the circumstances of the stealing of such horse, or by the circumstances under which the defendant was in the possession of the same, or by an explanation of such possession by proof which reasonably satisfies you that such possession was innocently or honestly acquired. In the matter of explaining, or accounting for, the possession of property proved to have been stolen, the burden is for the defendant; but he is not required to establish the honesty or innocence of his possession beyond a reasonable doubt. It is only necessary that evidence upon such matter should, as heretofore stated to you, be such as reasonably satisfies you."—Approved: State v. Moore, 101 Mo. 316, 14 S. W. 182.

§ 5343. Recent Possession of Part of Stolen Property—Presumption.

"Under the law, the unexplained possession of stolen property immediately after the same has been stolen creates the presumption that the person having such possession is the thief; but this presumption is one which may be rebutted by other evidence affording an explanation of such possession, or raising a reasonable doubt as to the guilt of the party having the same. And if, in this case, the jury find from the evidence, beyond a reasonable doubt, that all of the property of the said prosecuting witness, described in the indictment, was, during the evening or night of the day named in the indictment, abstracted and stolen from within the building named in the indictment, by one and the same person, and that on the next day, or within a few hours thereafter, the defendant was found in the possession of the said property, or a considerable part of the same, the jury would then be warranted in concluding that the property in question was stolen by the defendant from the said building, unless the explanation given by the defendant of his possession of the property found with him, either alone or in connection with the other facts and circumstances disclosed by the evidence, raises in your minds a reasonable doubt as to the honesty of the defendant's possession of the said property. But if the explanation offered by the defendant in his testimony, or the facts and circumstances

proven in the case, create in the minds of the jury a reasonable doubt as to the guilty possession of the defendant, you should acquit him."—Approved: State v. Wilson, 95 Iowa, 341, 64 N. W. 266.

§ 5344. Possession Presumed Recent in Certain Circumstances.

"And, if you find from the evidence that these horses or any of them were running upon the range by the permission of their owner, and the defendant was found in possession of these horses, that evidence would raise a presumption that this possession was recently acquired by him, and throws upon him the burden of explaining such possession. * * * As I have said to you before, if you find that these horses, or any of them were running upon the range within this state by permission of the owners, proof of their possession or possession of any one of them by persons accused of stealing them raises a presumption that such person or persons acquired such possession recently, and has the effect of throwing upon such person or persons the burden of explaining the possession. If such person or persons fail to make any explanation or a reasonable explanation, the jury is warranted in drawing the inference, if they think it fair and proper under such circumstances, that such person or persons stole such property; but if such person or persons give a fair and reasonable explanation, one which the jury in view of all the circumstances deems a reasonable one and which exculpates the accused person, they are not bound to draw such inference and should not do it."—Approved: State v. McIntyre, 53 Wash. 178, 101 Pac. 710.

§ 5345. Recent Possession of Range Cattle—Presumption.

"If you find from the evidence that Charles J— was the owner of the gelding described in the information, and that said gelding was permitted to run on the range, proof of the further fact that said gelding was shortly thereafter in the possession of the defendant is sufficient to put upon defendant the burden of explaining such possession. The presumption, if any, arising from such fact of possession of range stock, if you find such fact from the evidence, is one of fact only, and is rebuttable, and such presumption is overcome whenever a reasonable explanation is made or arises from the evidence; that is, an explanation which you deem reasonable, considering all the facts and circumstances of the case, is given, and is not shown to be untrue."—Approved: State v. Eubank, 33 Wash. 293, 74 Pac. 378.

§ 5346. Good Character to Rebut Presumption from Recent Possession.

"The court instructs the jury that the recent possession of stolen property raises the presumption that the party found in possession recently after the same has been stolen is the party who stole the same, and such presumption becomes conclusive unless such presumption of recent possession is satisfactorily accounted for or explained to the reasonable satisfaction of the jury, or unless such recent possession has been rebutted by proof of good character of the defendant."—Approved: State v. Wright, 199 Mo. 161, 97 S. W. 874.

§ 5347. Other Takings to Show Intent.

"That if they should be satisfied from the evidence that defendant, while in the employment of the prosecutor as clerk, took the other watches, and other property named in the evidence, other than the M— watch, for which he was being tried, and converted it to his own use, or any of it, then such taking and conversion might be considered upon the question of the intent with which the watch charged in the bill on trial was taken, if they should find from the evidence that he took and converted that watch."—Approved: State v. Hight, 150 N. C. 817, 63 S. E. 1043.

§ 5348. Place of Taking—In Building or Outside.

"Larceny is the felonious stealing, taking, and carrying away of the personal property of another. If the defendant actually took into his hands the property named in the indictment, and lifted it from the place where the owner had placed it so as to entirely remove it from the place where it was put, he is guilty of larceny. As to the place from which it is claimed said property was stolen, you are instructed that if you do not find beyond a reasonable doubt that said defendant took said property from said Union Depot at Marshalltown, as charged in the indictment, but if you do find beyond a reasonable doubt that defendant took and carried away said property from a place outside of any building, then your verdict should be guilty of larceny, fixing therein the value of the property stolen."—Approved: State v. McDermet, 138 Iowa, 86, 115 N. W. 884.

§ 5349. Variance as to Ownership—Materiality.

"You are further instructed that the indictment in this case charges the property which is alleged to have been stolen as belonging to C. H. R— and Luella W. R—. If you find from the evidence, beyond a reasonable doubt, that the offense is described with sufficient certainty in other respects to identify the act of larceny, but find that the property taken all belonged to C. H. R— individually, or that some of the property belonged to Luella W. R— individually, or that some of the property belonged to C. H. R— individually and some of it to Luella W. R— jointly, then the variance between the allegation in the indictment as to the ownership of the property alleged to have been stolen and the ownership as shown by the evidence is not material."—Approved: Flohr v. Territory, 14 Okl. 477, 78 Pac. 565.

C. Receiving Stolen Property.

§ 5350. Knowledge of Buyer that Property is Stolen Property.
5351. It is Essential to Show Criminal Intent.
5352. Intent to Deprive Owner.
5353. Whether Purchase Bona Fide or a Sham for the Jury.
5354. Subsequent Knowledge of Property being Stolen.
5355. Corroboration of Accomplice.
5356. Stolen Property Left at House Without Defendant's Knowledge or Consent.

§ 5350. Knowledge of Buyer that Property is Stolen Property.

"One of the essential ingredients of this crime is knowledge on the part of the buyer or receiver that the goods have been stolen, and this knowledge must exist at the time of the receipt or purchase of the goods. This, however, need not be such direct knowledge as comes from witnessing a theft. It is sufficient that circumstances were such accompanying the transaction as to make the defendant believe the goods had been stolen."—Approved: State v. Druxinman, 34 Wash. 257, 75 Pac. 814.

§ 5351. It is Essential to Show Criminal Intent.

"To constitute the crime of receiving stolen goods, as charged, it is essential to show a criminal intent. The receiver must know that the goods were stolen, and this knowledge must exist at the very instant of the receiving; otherwise the crime does not exist."—Approved: Butler v. State, 35 Fla. 246, 17 South. 551.

§ 5352. Intent to Deprive Owner.

"This felonious intent to warrant conviction must have consisted of his intentional receipt of said stolen property, knowing the same to be stolen, with further intent in defendant in receiving the same to deprive the owner of said property, or to derive gain, profit, or consideration himself from receiving or concealing said property or the disposal thereof."—Approved: State v. Denny, 17 N. D. 519, 117 N. W. 869.

§ 5353. Whether Purchase Bona Fide or a Sham for the Jury.

"The court instructs the jury that they are the judges, from all the facts and circumstances of the case, whether or not a purchase of the alleged stolen property was in fact a bona fide purchase, or whether or not it is a device and sham."—Approved: Bowers v. State (Tex. Cr. App.), 71 S. W. 284 (not reported in state reports).

§ 5354. Subsequent Knowledge of Property being Stolen.

"In this connection also comes the question of the intentional receiving of said property, if the same was received by defendant, knowing the same to have been stolen, as the defendant must have intentionally received said property with guilty knowledge—that is, with

knowledge that the same was stolen property—to be guilty of the charge contained in the information, that of receiving stolen property, knowing the same to have been stolen. The knowledge of the stolen character of the property must have been in the mind of the defendant at the time of the receiving of the same, if he did receive it; and, if the defendant received said property without knowledge that the same was stolen property, and after the reception thereof learned that the same was stolen, the defendant cannot be found guilty. And, in addition to the reception of said property with knowledge that the same was stolen, before the defendant can be found guilty you must find that he took said horses, or received them, with the intent to deprive the owner thereof."—Approved: State v. Denny, 17 N. D. 519, 117 N. W. 869.

§ 5355. Corroboration of Accomplice.

"You are charged, as part of the law of this case, that you cannot convict defendant upon the uncorroborated testimony of Tom S—. Before you would be authorized to convict upon his testimony, it is necessary for him to be corroborated upon both the theft of said cotton and also the act of receiving and concealing said cotton after it was stolen; and in this connection the court further instructs you that no act, statement, or declaration made by said Tom S— subsequent to the alleged theft and the alleged receiving and concealing of said cotton can be considered by you as corroborating his testimony. The court instructs you that said corroboration is absolutely essential to a legal conviction; that although the jury might believe the testimony of Tom S— to be true, still they cannot convict, unless they further believe that there is other testimony, outside of Tom S—'s testimony, tending to connect defendant with the commission of the offense charged."—Approved: Hanks v. State, 55 Tex. Cr. R. 405, 117 S. W. 149.

§ 5356. Stolen Property Left at House Without Defendant's Knowledge or Consent.

The jury are instructed that if goods are left at a man's house without his knowledge or consent, even though they may have been stolen by the person leaving them, this in itself, does not make the person at whose house the goods were left a receiver of stolen goods."—Approved: Butler v. State, 35 Fla. 246, 17 South. 551.

D. Robbery.

§ 5357. Robbery Defined.
5358. By Violence or Fear and without Honest Claim.
5359. Taking from the Person through Violence or Fear.
5360. Necessity of Fraudulent Intent.
5361. Must be with Force and Intent to Steal.
5362. Ownership of Property.
5363. Force, Violence and Fear.
5364. Presence of Person Robbed.
5365. Presence—Within Hearing but out of View.
5366. Concert among Robbers Provable by Circumstances.
5367. Agreement to Commit Crime Generally—Aiding in Escape.
5368. Conspiracy to Rob and Arming therefor.
5369. Recent Possession of Goods taken—Presumption.
5370. May Include Larceny from Person.
5371. Assault with Intent to Rob—Defined.
5372. Assault with Intent to Use all Necessary Force.
5373. Assault with Intent to Rob—Joint Participants—Common Purpose.
5374. Retaking one's own Property by Putting Possessor in Fear.

§ 5357. Robbery Defined.

"The court instructs the jury, in the language of the statute, that robbery is the felonious and violent taking of money, goods, or other valuable thing from the person of another by force or intimidation. Every person guilty of robbery shall be imprisioned in the penitentiary."—Approved: People v. Scarbak, 245 Ill. 435, 92 N. E. 286.

§ 5358. By Violence and Fear and Without Honest Claim.

"The term 'robbery' as mentioned in these instructions, means the felonious taking of the money or property of another from his person, or in his presence and against his will, whether by violence to his person, or by putting him in fear of some immediate injury to his person, with intent to permanently deprive the owner of such money or property, and without any honest claim to it."—Approved: State v. Bateman, 196 Mo. 35, 95 S. W. 413.

§ 5359. Taking from the Person through Violence or Fear.

"If upon consideration of all the evidence in the light of these instructions you believe and find from the evidence, that at the city of St. Louis and State of Missouri, on or about the 26th day of March, 1902, or at any time within three years next before the finding of the indictment herein, the defendant, Joseph S—, did assault the prosecuting witness, George A. M—, and by violence to his person, or by putting him in fear of immediate injury to his person, did, against his will, take from his person one bunch of keys, one gold-filled watch, one fob, and forty-nine dollars in money, or some part of said property or money, with the intent at the time to wrongfully

take and carry away and to fraudulently convert the same to his own use, and permanently deprive the owner thereof, without his consent, and that the property so taken was the property of said George A. M— and was of any value, then you should find the defendant guilty of robbery in the first degree, as charged in the indictment."—Approved: State v. Spray, 174 Mo. 569, 74 S. W. 846.

§ 5360. Necessity of Fraudulent Intent.

"Among the essential elements necessary to constitute the offense of robbery is that there must be fraudulent intent in the taking of the property at the time. A fraudulent taking is a taking of property with an intent to deprive a person of property that belongs to another. Now, you are instructed that, if you believe from the evidence that the property was taken by defendant, if it was, still if you believe there was no fraudulent taking, and if the defendant took same under an honest claim of right, believing it was his property, then you will find defendant not guilty; and if you have a reasonable doubt whether such are the facts in the case, you will find defendant not guilty."—Approved: Carr v. State, 55 Tex. Cr. R. 352, 116 S. W. 591.

§ 5361. Must be with Force and Intent to Steal.

"The fact that the defendant took the property in question from the person, and that it was afterwards found in his possession, is not sufficient to convict him of robbery. You must further find from the evidence, beyond all reasonable doubt, that the defendant took it from the person by force, and in spite of his resistance, with the intent to rob or steal; and unless you do so find, you must find the defendant not guilty."—Approved: Stevens v. State, 19 Neb. 647, 28 N. W. 304.

§ 5362. Ownership of Property.

"If you believe from the evidence beyond a reasonable doubt that in Navarro county, Tex., on or about December 14, 1907, the defendant unlawfully assaulted one George A—, and by means of such assault and violence committed upon him took from his person a watch of the value of $40, one overcoat of the value of $10, about $12 in silver coin money, of the value of $12, one $10 bill, of the value of $10 and five $5 bills, of the value of $5 each, all said coins being current money of the United States of America, or any of said property or money, and that said property belonged to said George A—, and that such money and property, or any of it, was taken with the fraudulent intent on defendant's part to deprive said A— of the value thereof, and to appropriate the same to the use or benefit of him, the defendant, you will find him guilty as charged, and assess his punishment at confinement in the penitentiary for life or for any term of years not less than five.

"If you are not satisfied by the evidence beyond reasonable doubt that defendant did take from the person of A— all or some of the property or money above mentioned, and that the same, if taken, was taken by assault and violence, you will acquit."—Approved: Walling v. State, 55 Tex. Cr. R. 254, 116 S. W. 813.

§ 5363. Force, Violence and Fear.

"If you find from the evidence, beyond a reasonable doubt, that the defendant, in this county and state, at a time within three years next preceding the finding of the indictment in this case, did steal and take from the immediate presence of the Nellie B— named in the indictment the property named in the indictment, or some part of it, and that the stealing and taking, if any, was accomplished with force or violence towards said Nellie B—, or by putting her in fear; and you further so find that the property, if any, thus stolen was at the time owned by, or in the possession of, said Nellie B—, and was of some value,—then and in such case you should return a verdict of guilty of robbery. But if you do not so find as to these several matters, you cannot find defendant guilty of robbery."—Approved: State v. Calhoun, 72 Iowa, 432, 34 N. W. 194.

§ 5364. Presence of Person Robbed.

"You are further instructed that it is not necessary, to constitute the stealing or carrying away from the immediate presence of the deceased, that it should have been done, if done, in his immediate view, where he could see it done; and if you find from the evidence beyond a reasonable doubt that he had made a violent assault upon the deceased, by choking him and causing him to fall upon the ground, and that he then took from his pockets the sum of money as charged in the information, then you will find the defendant guilty of robbery as charged in the information."—Approved: State v. Mitchell, 32 Wash. 64, 72 Pac. 707.

§ 5365. Presence Within Hearing, but out of View.

"It is not necessary, in order to constitute a stealing and carrying away 'in the immediate presence of said Nellie B—,' that it should have been done (if done) in her immediate view, or where she could see it done. And if you find from the evidence, beyond a reasonable doubt, that the defendant made a violent assault upon said Nellie B—, by choking her and causing her to fall upon the floor of one of the rooms or apartments of her house, and then tied her hands and feet for the purpose and with the intention of stealing some money or property in the house; and you further so find that she, through fear of personal violence, told defendant where her money or watch was in an adjoining room or rooms; and you further so find that thereupon defendant passed through a door or doors into such room or rooms, and did there, within hearing of said Nellie B—, take and carry away from said room or rooms the property described in the indictment, or some part thereof; and you further so find that such property was under her immediate control, and that such taking, if any, was against the will of the said Nellie B—, and was without any right, or claim of right, of defendant in said property, and with the intent to permanently deprive her thereof,—then and in such case there would be a sufficient stealing and taking from the 'immediate presence' of the said Nellie B— within the meaning of the law."—Approved: State v. Calhoun, 72 Iowa, 432, 34 N. W. 194.

§ 5366. Concert Among Robbers Provable by Circumstances.

"While the law requires that, to find the defendants guilty in this case the evidence should show that they were acting in concert, still it is not necessary that it should be positively proved that they actually met together and agreed to rob R—. Such concert may be proved from circumstances; and if, from all the evidence, the jury are satisfied that the defendants acted together, each aiding in his own way, it would be sufficient."—Approved: Miller v. People, 39 Ill. 464.

§ 5367. Agreement to Commit Crime Generally—Aiding in Escape.

"If you are satisfied beyond a reasonable doubt, after considering and comparing all the evidence in the case, that L— and his associates went to Lansing with the common purpose and design to commit any crime that the circumstances might give them an opportunity to commit, and that the intention of L— was to aid and abet his associates in anything they might do in the consummation of such design, either by rowing them to Lansing or waiting in the boat there for them while they went ashore, or in aiding them afterwards to escape, if for the purpose of evading justice, whether done for a general compensation of $25 or other sum, or with intent to share in the proceeds of any robbery his associates might commit, whether he left the boat or not, he is equally guilty with his associates of any robbery they or either of them committed."—Approved: State v. Lucas, 57 Iowa, 501, 10 N. W. 868.

§ 5368. Conspiracy to Rob and Arming Therefor.

"If you find that these men entered into an arrangement, either before or after reaching Somerset Center, to rob Mr. W—, or his place of business, and to that end armed themselves with revolvers, to be used if found necessary to accomplish the robbery, or prevent injury or capture while attempting the robbery, then the defendant would be equally guilty, even though he was not present in the store, if he were acting his assigned part, though it were only to watch or warn; but if these three persons did not arrange to arm themselves with revolvers, to be used, if necessary, in accomplishing the robbery, or in protecting themselves from capture or injury while attempting the robbery, or the defendant was not a party to such an arrangement, if there was one, and did not participate in the carrying out of such arrangement, then he could not be found guilty."—Approved: People v. Cleveland, 107 Mich. 367, 65 N. W. 216.

§ 5369. Recent Possession of Goods Taken—Presumption.

"The possession of the fruits of a crime recently after the crime, if unexplained to the satisfaction of the jury, becomes a very strong circumstance of guilt. In this case the witness Arnold T— was knocked down and robbed on the streets of Ft. Madison the night of November 9, 1894. The defendant is seen next day with the watch, and gives his explanation of his possession. A few days later he gives other explanations of his possession, and in his testimony here on the stand gives his explanation. The witness M—, from whom he claims,

personally testifies, denying his having the watch; and it is for you to consider all these matters and determine whether the defendant has explained his possession of the watch in such a way as to raise a reasonable doubt in your mind as to his guilt. If he has not, then the law makes that possession a very strong presumption of guilt, and very justly so, for the reason that any one getting property honestly can usually present ample proof of it."—Approved: State v. Harris, 97 Iowa, 407, 66 N. W. 728.

§ 5370. May Include Larceny from Person.

"You are instructed that the crime of robbery as charged in this indictment also includes the crime of larceny from the person and larceny. If from the evidence you are not convinced beyond a reasonable doubt as defined in these instructions that the defendant is guilty of the crime of robbery then you should next ascertain whether or not from the evidence he is guilty of the crime of larceny from the person, and should you not find him guilty of either robbery or larceny from the person, then you may ascertain whether or not he is guilty of the crime of larceny as herein defined. And should you not find him guilty of robbery or larceny from the person and find him guilty of larceny, then you should from the evidence find the value of the property stolen."—Approved: State v. Taylor, 140 Iowa, 470, 118 N. W. 747.

§ 5371. Assault—with Intent to Rob—Defined.

"You are instructed that if you believe and find from the evidence in this case that the defendant, B—, on the 3rd day of September, A. D. 1903, or at any time within three years next before the filing of the information in this case, to wit, 30th day of December, A. D. 1903, at the county of Greene and State of Missouri, did then and there feloniously make an assault in and upon one Charles I—, with intent him, the said Charles I—, then and there to rob, you will find the defendant guilty as charged in the information. 'Feloniously' as used in the information and these instructions, means 'unlawfully,' against the admonitions of the law."—Approved: State v. Bateman, 196 Mo. 35, 95 S. W. 413.

§ 5372. Assault with Intent to Use all Necessary Force.

"You are further instructed that you should convict the defendant of assault with an intent to commit robbery if you believe from the evidence beyond a reasonable doubt that at the time in question he committed an assault, or aided or advised the assault upon the prosecuting witness for the purpose of robbery, and that in making the assault he intended to use whatever force might be necessary to overcome the prosecuting witness and accomplish his purpose,—that of robbery."—Approved: State v. Fenton, 30 Wash. 325, 70 Pac. 741.

§ 5373. Assault with Intent to Rob—Joint Participants—Common Purpose.

"Bearing in mind what I have said, you are to consider the case of the defendants separately. In order to convict either defendant,

however, of the charge made against him in this information, there should be evidence against such defendant which convinces you, beyond a reasonable doubt, of the guilt of that particular defendant. While these defendants are tried together and are charged with a joint offense, it is necessary that evidence should be given against each one of them, and it is within the power of the jury, and it is the duty of the jury, to consider the case of each defendant separately, as though he were on trial here alone; and if the evidence is not sufficient to convict him, no matter whether it is sufficient to convict the other or not, then you should consider the case of each one just the same as if he were on trial alone, and you can render a verdict with regard to one which may be one way, and with regard to the other which may be the other way. * * * Now, if you find from the testimony in this case, beyond a reasonable doubt, that both of the men who are accused in this case, that is, McL— and B—, had hold of the peddler with the intention of robbing him, and that McL— did not take anything from the person, and that B— did, you can find both guilty of robbery. If you find from the testimony in the case that they were not engaged in this common purpose, but that McL— intended to rob, without having any knowledge or taking any part in B—'s acts and intentions, and was prevented from doing so, you can find him guilty of assault with intent to rob. In either case, as I said, you must be satisfied, beyond a reasonable doubt, that they are guilty, or else it is your duty to acquit them."—Approved: People v. Blanchard, 136 Mich. 146, 98 N. W. 983.

§ 5374. Retaking One's Own Property by Putting Possessor in Fear. "Although you might believe from the evidence that M— had taken the property from defendant, or from defendant and W—, and had the same in his possession at the time of the alleged robbery, such fact would not justify the defendant and the said W—, or either of them, in assaulting and putting M— in fear of life or bodily injury, and thereby fraudulently taking from his person and possession the money described in the indictment; but their act in so doing would be robbery, and you should find the defendant guilty, provided you believe from the evidence, beyond a reasonable doubt, that defendant, acting alone, or in connection with the said W—, in such manner as to make him a principal offender, took said money from the said M— under such circumstances as to make him guilty of robbery, as explained to you in another part of this charge."—Approved: Beard v. State, 44 Tex. Cr. App. 402, 71 S. W. 960.

CHAPTER CXLV.

FALSE PRETENSES.

A. False Pretenses.
B. Forgery.
C. Perjury.

A. False Pretenses.

§ 5375. Representation Calculated to Deceive—Intelligence of Party to Whom Made.
5376. Property Must Have Been Obtained Thereby.
5377. Obtaining Public Funds on False Certificate.
5378. Obtaining Cattle on Statement of Financial Condition.
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5380. Other Pretenses to Show Intent.
5381. Intent Inferred from Circumstances.
5382. Joint Indictment Against Those in Concert.
5383. Making False Statement for Allowance by City for Street Work.

§ 5375. Representation Calculated to Deceive—Intelligence of Party to Whom Made.

"It is not every representation that is false that will amount to a false pretense within the statute, and sustain a charge of obtaining a signature to an instrument by false pretenses. It must be one calculated to deceive and induce action on the part of the one to whom it is made. A representation as to an existing fact or thing so evidently and plainly false that no one would be deceived, that no one should believe or can be induced to act upon it, cannot sustain a charge of false pretense. Formerly it was held that, to sustain a charge of false pretense with intent to deceive and cheat or defraud, the pretense must be one that is calculated to deceive and induce action on the part of a person of ordinary prudence, capacity, and intelligence; but, as I understand, that is not now the rule, and whether the representation is calculated to deceive and induce certain action may depend upon the capacity, intelligence, and learning of the person or persons to whom the statement or representation is made. And in this case, you may, in judging of this question, take in consideration the education, business ability, experience, and learning of the F—, as shown by the evidence, and if you find that the representation charged in this count, if made, was, in view of their capacity and ability, calculated to de-

ceive them as to the character of the paper, and did induce them to sign it, even though you should be of the opinion that a person of ordinary prudence, capacity, and intelligence ought not to be deceived by it, you may still find that the representation was calculated to and did induce them to sign the paper. It is for you to determine whether it was calculated to and did induce their signing from all the circumstances shown."—Approved: People v. Summers, 115 Mich. 537, 73 N. W. 818.

§ 5376. Property Must have been Obtained Thereby.

"If the defendant, at the time such representations were made, obtained any of the property charged in the indictment from said B— by reason of the alleged false pretenses, the indictment might be sustained."—Approved: Commonwealth v. Lee, 149 Mass. 179, 21 N. E. 299.

§ 5377. Obtaining Public Funds on False Certificate.

"It may well be asked at the outset, what are the facts necessary to be established, to prove the crime of obtaining money by a false pretense? These facts must be proved: There must have been a false pretense; that is, a fraudulent representation of some fact. That is a false pretense. This representation must have been made with a knowledge of its falsity. The purpose of it must be to cheat or defraud. And, being calculated to do this, it must be shown that it did actually deceive and defraud, causing the defrauded person to part with his money because of the false representation. Now, applying this description of the offense to this case, it is here charged, and, in order to justify a verdict of guilty at your hands, it must be proved to your satisfaction beyond every reasonable doubt, first, that Josephine S— was not a stranger not belonging to this state; second, that at the time he certified to his bill and presented it to the Auditor General the defendant knew that she was not a stranger not belonging to this state; third, that he intended to defraud the state out of the sum claimed by him in that bill; and, finally, fourth, that in reliance upon the representation made by him as to that in his certificate the state paid him the amount of his bill. The element that Mrs. S— was not a stranger not belonging to this state is not disputed. This, however, does not establish that the defendant had knowledge of that fact. Nor, of course, does it establish either of the remaining elements. To justify a verdict of guilty, all four elements must be proved. If any of them is not proved, or if you have any reasonable doubt as to any of them, you should acquit the defendant. If all are proved, you should convict him."—Approved: People v. Hoffman, 142 Mich. 530, 105 N. W. 838.

§ 5378. Obtaining Cattle on Statement of Financial Condition.

"If you find that the said Albert H— had heard that defendant was largely in debt before the defendant obtained the cattle from the said H—, and that thereafter, and for the purpose of obtaining said cattle fraudulently, the defendant told the said Albert H— that he

was not in debt, and that the said Albert H— believed the statement of said defendant at said time that the defendant was not in debt, and that said Albert H— believed said statements of said defendant at the time, and relied upon the same, and so relying upon them was induced to part with said cattle to the defendant, and that the said statement of said defendant that he was out of debt was false, and known to him to be false at the time made, and was made by defendant with intent and design to defraud the said Albert H—, then you are told that the fact that Albert H— had heard, prior to the time said statement was made by defendant that he was out of debt (if defendant made said statement), that said defendant was in debt, would not preclude a conviction in this case."—Approved: State v. Jackson, 128 Iowa, 543, 105 N. W. 51.

§ 5379. Financial Standing of Corporation—Reliance on Representation.

"If you believe and find from the evidence, under these instructions, that at the City of St. Louis and State of Missouri, on or about the 9th day of July, 1904, or at any time within three years next before the filing of the information herein, the defendant, Thomas P. K—, with intent to cheat and defraud one William P—, knowingly, designedly and falsely, did state, pretend, and represent to the said William P— that a certain corporation known and named The St. Louis Cement Brick Manufacturing Company, and incorporated and existing under the laws of the State of Missouri, then and there had a capital stock of $50,000 fully paid up; that said corporation was then and there in good and solvent condition and circumstances and doing a good business; that said corporation, The St. Louis Cement Brick Manufacturing Company, had a Brick Manufacturing Plant, at which plant said corporation was then and there manufacturing fifty-thousand brick per day by steam power; that the said Thomas P. K— was then and there the owner of twenty shares of the capital stock of said corporation, and that the said twenty shares of stock were then and there of the value of Two Thousand Dollars, or either one or all of said representations; and you further find from the evidence that such false statements, pretenses, and representations, or either of them, so made by the defendant aforesaid, were relied on and believed to be true by the said William P—, and he was deceived thereby, and then and there and thereby unlawfully and fraudulently induced to pay, deliver, and transfer to the said Thomas P. K— two certificates of deposit, dated June 21, 1904, issued to the said William P— by the Orion State Bank of Orion, Michigan, for the sum of $500 each, and of the value of $1,000, and one certain promissory note made by the said William P—, dated at St. Louis on the 9th of July, 1904, payable four months after date, for the sum of $500, and of the value of $500 as and for part purchase price of said shares of stock of the said St. Louis Cement Brick Manufacturing Company, and that the said money so paid over and delivered to the defendant was of the value of $30 or more, and was the money and property of the said William P—; and you further find from the evidence that the defendant, by means of

said false statements, pretenses, and representations so made as aforesaid, or any one of them, and with the unlawful and fraudulent intent to cheat and defraud the said Willim P—, and for that purpose, did then and there obtain said money and note, or any part thereof, of the value of $30 or more; and you further find from the evidence that said statements, pretenses, and representations, or any one of them, were untrue, and so known by the defendant at the time to be untrue and false, and that the said St. Louis Cement Brick Manufacturing Company then and there did not have a capital stock of $50,000 fully paid up, and that said corporation was not then and there in good and solvent condition and circumstances and doing a good business, and that said corporation, the St. Louis Cement Brick Manufacturing Company, did not have a brick manufacturing plant at which plant said corporation was then and there manufacturing 50,000 brick per day by steam power, or that the said Thomas P. K— was not then and there the owner of twenty shares of the capital stock of said corporation, or that the said twenty shares of stock were not then and there of the value of Two Thousand Dollars, as stated in the information herein, and that defendant unlawfully and fraudulently made said false statements, pretenses and representations, or any one of them, for the purpose and with the intent unlawfully and fraudulently to cheat and defraud the said William P—, then you should find the defendant guilty as charged in the information; and, unless you so find the facts, you should acquit the defendant."—Approved: State v. Keyes, 196 Mo. 136, 93 S. W. 801.

§ 5380. Other Pretenses to Show Intent.

"The court instructs you that the defendant is on trial for obtaining money by false pretenses from William P—, and for that offense alone, and that the testimony of transactions between defendant and other persons than William P— was offered by the State and admitted by the court for the sole purpose of assisting you in determining the intent of the defendant and his good faith or honesty of purpose in any transaction he had with said William P—, and you should consider it for that purpose, and that alone, and, although you may believe that the defendant behaved dishonestly with such other persons, you cannot convict him in this case, unless you should also further believe and find from the evidence that he obtained money or property from said William P— in a manner such as to make him guilty as defined in instruction number one."—Approved: State v. Keyes, 196 Mo. 136, 93 S. W. 801.

§ 5381. Intent Inferred from Circumstances.

"The question of intent to cheat and defraud is one of fact for you to determine from all the evidence in the case. This intent need not be proven by direct and positive evidence, but it may be lawfully and properly inferred by you from all the facts and circumstances in evidence having reference to and bearing upon and tending to prove such intent, provided such evidence is sufficient to satisfy you of such intent

beyond a reasonable doubt."—Approved: State v. Keyes, 196 Mo. 136, 93 S. W. 801.

§ 5382. Joint Indictment Against those in Concert.

"If you find from the evidence that the defendant and D—, acting in concert, designedly made the representations substantially as set out in the indictment; that such representations were false and untrue; that they were made with the intent to defraud F—, and that by said false representations he obtained from said F— the sum of $18, and that said false representations were made in Wapello county, Iowa; and you further find that all said matters have been established by the evidence beyond a reasonable doubt,—then you should convict the defendant; but if you are not so satisfied beyond a reasonable doubt, then you should acquit the defendant."—Approved: State of Iowa v. Montgomery, 56 Iowa, 195, 9 N. W. 120.

§ 5383. Making False Statements for Allowance by City for Street Work.

"If you should find from the evidence beyond a reasonable doubt that the defendant procured the possession of certain books in which the official inspectors for the city of Indianapolis entered the dimensions of the patches of repair asphalt work being done by the Western Construction Company under a contract with said city; that while the defendant had such books in his possession he purposely and intentionally and lawfully changed the figures showing the dimensions of said repair patches or caused or produced the same to be changed, so as to increase the size and cost thereof in excess of the size and cost of the work actually done; that after making such changes, if he did make them, the defendant either copied or caused to be copied said changed dimensions into the books of the said Western Construction Company, he at the time knowing that the Western Construction Company would use said copied dimensions as the basis for stating and making out a claim against said city, and at the time he made said changes and copied or caused the same to be copied into the books of the said Western Construction Company, if he did so make said changes and copies, he intended that the same should be used by said company as the basis of a claim to be made and presented against said city; and that afterwards the said Western Construction Company, through and by its proper officer, innocently and without knowledge of any wrong in the matter, did use said changed and copied dimensions as the basis of a claim against the city as charged in the indictment, and which claim was made, presented to, and allowed and paid by the said city to the said Western Construction Company; and if you should also find from the evidence beyond a reasonable doubt that, after said claim was paid to the Western Construction Company by said city, the said company paid to the defendant a portion of the proceeds of said claim as his share thereof—then you would be warranted in finding that the said claim so based and made on said changed dimensions was made and presented by the defendant, al-

though he may not have been personally present when the same was done, and although the claim may have been actually written and carried to and delivered to the board of public works of said city by an officer, clerk, or cashier of said Western Construction Company."—Approved: Brunaugh v. State (Ind.), 90 N. E. 1019.

B. Forgery.

§ 5384. Signed Without Authority with Intent to Defraud.
5385. Mistaking Initials of Name Intended to be Forged.
5386. Alteration of Amount in Check.
5387. Authority to Sign.
5388. Utter and Publish—Defined.
5389. Uttering with Knowledge of False Signature.
5390. Having in Possession with Intent to Utter.
5391. Utter and Publish with Intent to Defraud.
5392. Possession as Evidence of Forgery.
5393. Expert Testimony on Handwriting.
5394. Bogus Telegram Not Intended to Deceive.

§ 5384. Signed Without Authority with Intent to Defraud.

"Before you can convict the defendant under either the fourth or fifth counts in said indictment upon which you have been charged, you must believe from the evidence, beyond a reasonable doubt, that the defendant added the name of J. F. W— to said note without lawful authority, and with the intent to injure and defraud, as hereinbefore explained to you, and that no other person added or placed the name of J. F. W— thereto, and, if you believe from the evidence that George A— or any other person added the name of J. F. W— thereto, you will acquit the defendant."—Approved: Baird v. State, 51 Tex. Cr. R. 322, 101 S. W. 991.

§ 5385. Mistaking Initials of Name Intended to be Forged.

"If the instrument was made by some person who had no authority to sign the name of R. W. S—, with the intent to sign his (R. W. S—'s) real name, but who by mistake as to R. W. S—'s initials wrote 'C. W. S—,' instead of 'R. W. S—,' without any authority to use the name 'C. W. S—,' and if said instrument was so made and signed with intent to defraud, then the instrument was a forgery."—Approved: Hall v. State, 55 Tex. Cr. R. 267, 116 S. W. 808.

§ 5386. Alteration of Check.

"If you believe from the evidence that the figures and characters '$7.70' were inserted in the check after the same left the defendant's hands, or in other way changed after, then said check was not the instrument of the defendant, and cannot be considered as evidence against him, and you should acquit him."—Approved: Goss v. State, 74 Ark. 33, 84 S. W. 1035.

§ 5387. Note—Authority to Sign.

"Although you may believe from the evidence beyond a reasonable doubt that the defendant, Walter R. D—, signed the name of Floyd D— to the note in question, yet if you shall further believe from the evidence that the defendant, Walter R. D—, was authorized by Floyd D— to sign and use his name in connection with the business of N. B. Day & Co., then you will find the defendant 'not guilty.' "—Approved: Day v. Commonwealth (Ky.), 110 S. W. 417 (not reported in state reports).

§ 5388. Utter and Publish—Meaning of Terms.

"To utter and publish an instrument is to declare or assert, directly or indirectly, by words or actions, that such instrument is true and genuine, and it is immaterial whether the same be accepted or not."—Approved: Leslie v. State (Wyo.), 65 Pac. 849 (not reported in state reports).

§ 5389. Uttering with Knowledge of False Signature.

"If you believe from the evidence in this case beyond a reasonable doubt that the defendant, Walter R. D—, in Perry county, at any time before the finding of the indictment herein, presented to the Hazard Bank a note for $3,120, dated March 15, 1904, and due six months thereafter, for discount, intending the bank to discount it as having on it the genuine signature of Floyd D—, when in fact he knew that Floyd D— had not signed said note, and had not authorized any one to sign his name for him to said note, and that he did this for the purpose of obtaining money from said bank, and that he received from said bank the sum of $3,120, or any other sum of money on said note, then you will find the defendant guilty as charged in the indictment." —Approved: Day v Commonwealth (Ky.), 110 S. W. 417 (not reported in state reports).

§ 5390. Having in Possession—With Intent to Utter.

"Defendant is indicted for forgery. Bill contains two counts. In order to convict under either count, the state must satisfy you from the evidence beyond a reasonable doubt of defendant's guilt. Now, what does it take to constitute the crime of forgery or the uttering and publishing of such? (Here the court reads the statutes.) You will observe that in either case—that of forgery or that of uttering or publishing the instrument—the guilty intent to injure or defraud must appear. It is not necessary, in order to constitute the crime, that the person committing the forgery should be the gainer thereby, but it is sufficient if there is a fraudulent intent to deceive by a forged paper; and the fact that no one is defrauded is immaterial, the other elements of the crime being established. That where one is found in possession of a forged instrument, and is endeavoring to obtain money or advances upon it, this raises a presumption that the defendant either forged or consented to forging such instrument, and, nothing else appearing, the person would be presumed to be guilty. Therefore,

if you are satisfied beyond a reasonable doubt that the paper (in this case the note) was a forgery, and that defendant had it in his possession, and tried to obtain money from C— or S— or the bank upon it, then this raises a presumption of guilt, and, unless he has rebutted it, you will return a verdict of guilty. If, upon the whole evidence, any reasonable doubt remains as to the innocence of the defendant, you will give him the benefit of it, and return a verdict of not guilty."—Approved: State v. Peterson, 129 N. C. 556, 40 S. E. 9.

§ 5391. Utter and Publish with Intent to Defraud.

"1. Before you can find the defendant guilty in this case as charged in the indictment, you must find from the evidence beyond a reasonable doubt: that he knowingly or intentionally uttered or published the check set out in the indictment. To utter a check is to pass or deliver it to any other person; to publish it is to make it known or exhibit or deliver it to another. If you shall find from the evidence in this case beyond a reasonable doubt that the defendant in this case did at the time and place mentioned in the indictment knowingly and intentionally deliver the said check to Frank J—, and procured the said J— to accept the same, and that J—, relying upon the check, presented it to the bank for payment, then you should find that he knowingly uttered and published it.

"2. If you shall find from the evidence beyond reasonable doubt that the defendant did knowingly utter and publish the check set out in the indictment, then before you can find him guilty you must further find from the evidence beyond a reasonable doubt that he published the same as true and genuine; that is to say, that it was the check of the person whose name is signed thereto as drawer. If you shall find from the evidence beyond a reasonable doubt that he so knowingly uttered and published the check, that it was signed in the name of Cabell W—, that he gave it to another person with the intent to deceive him and obtain money on it, and that he did not inform the person to whom he passed it that it was false and forged, but allowed him to believe it was the check of the drawer, and that the person taking it relied upon it, and presented it to the bank for payment, then you should find that he so uttered and published it as true and genuine.

"3. If you shall find from the evidence in the case beyond a reasonable doubt that the defendant did knowingly utter and publish the check set forth in the indictment as true and genuine, still, before you can convict him, you must further find that he so uttered and published it with the intent to injure and defraud another. And in this respect you may consider whether he had an intent to injure or defraud either the party to whom he gave the check or Cabell W—. And if you shall find from the evidence beyond a reasonable doubt that he uttered and passed the check upon J— with intent to deceive him, and did obtain money on it, and that J—, relying upon the check, presented it to the bank for payment, then you may infer from that act an intention to injure the said J— or W—; and if you shall find from

all the evidence in the case beyond a reasonable doubt that the check was so uttered with the intent to obtain money upon it, you should find that he did utter and publish the said check with an intent to injure or defraud."—Approved: Stockslager v. United States, 116 Fed. 590.

§ 5392. Possession as Evidence of Forgery.

"The court instructs the jury that in order to find the defendant guilty under the indictment, it is not necessary for the state to prove by direct evidence, that is, it is not necessary for witnesses who saw the act done, that the defendant signed the names of R. W. B— and S. H. H—, to the note in controversy, but the same may be inferred from the proof of other facts and circumstances in the case. Therefore, if the jury find and believe from the evidence that the said note was in the possession of the defendant, in the county of Harrison, recently after the same is dated and purports to have been executed, and if they further believe that the defendant sold and delivered said note as a genuine note to the witness W—, then these facts, if proven, unless satisfactorily explained by the defendant, will warrant you in finding that the names of R. W. B— and S. H. H— were actually written and signed by the defendant, and you will find the defendant guilty as defined in other instructions."—Approved: State v. Milligan, 170 Mo. 215, 70 S. W. 473.

§ 5393. Expert Testimony on Handwriting.

"Our statute provides that evidence respecting handwriting may be given by experts by comparison, or by comparison by the jury with writings of the same person which are proved to be genuine. Evidence of this character has been introduced upon this trial, and it is for you to say how much weight shall be given to such testimony, taking into consideration the amount of skill possessed by the witness. But while it is proper to consider such evidence, and to give it such weight as you think it justly entitled to, yet it is proper to remark that it is of the lowest order of evidence, or evidence of the most unsatisfactory character, but it is most useful in cases of conflict between witnesses as corroborating testimony. However, upon this question you will notice that the section of the statute above quoted provides that you may compare the signature in dispute with the writings of the defendant which are proved to be genuine, and in considering this question, and doing this, you may and should use your own judgment from comparison of such admitted signatures with the one in controversy in determining whether or not the defendant actually signed the note sued on, and it is your duty and privilege to give your own comparison, and knowledge gained from such comparison, such weight as you think it entitled to in connection with the other evidence introduced upon the trial upon this question."—Approved: Paton v. Lund, 114 Iowa, 201, 86 N. W. 296.

§ 5394. Bogus Telegram Not Intended to Deceive.

"If you find from the evidence that at the time of the sending of said telegram there was a preconceived arrangement between the de-

fendant and Norine S— that such a telegram should be sent by the defendant without the consent, authority, or knowledge of Marie S—, and that at the time of the sending of the telegram the defendant did not intend to defraud, deceive, or injure Norine S— by the sending of the said telegram, and if the said Norine S— knew when said telegram was received that it was sent without the authority of her mother, then your verdict must be: 'We, the jury, find the defendant not guilty.' "—Approved: People v. Chadwick, 143 Cal. 116, 76 Pac. 884.

C. Perjury.

§ 5395. Elements of—Substance of Testimony Shown.
5396. Prosecution Must Show Defendant was Sworn as a Witness.
5397. Materiality of Testimony—Knowledge of its Falsity.
5399. Falsity in Testifying Must have been Willful.
5401. Strength of Evidence to Convict.
5402. Willfulness in False Affidavit to Procure Warrant.

§ 5395. Elements of Offense—Substance of Testimony Shown.

"In order to convict the defendant, the jury must be satisfied beyond a reasonable doubt; First. That the action was pending in this court wherein the state of Washington was prosecuting A. P. V— upon an issue joined therein on the charge of murder in the first degree. Second. That this defendant upon the trial of said cause was sworn as a witness in said cause before Samuel W—, who was then and there deputy clerk of said superior court, that the evidence which he, the said Manuel D—, would give to the court and jury in the issue joined in said cause between the state of Washington and said A. P. V— should be the truth, the whole truth, and nothing but the truth, and that he, the said Samuel W—, as such deputy clerk as aforesaid, then and there had authority and power to administer the said oath to said Manuel D—, and that the oath was taken by said Manuel D— before giving his alleged testimony, if you find he did so testify in said cause. Third. That, after having been first sworn as a witness in said cause, he did testify to the statements or testimony contained in the information. It is not necessary, however, that they should be proved in the precise words alleged in the information. It is sufficient if they are substantially proven in language and effect as therein alleged. Fourth. That the statements so testified to by the said Manuel D— if you find he did so testify, were false and untrue, and that the defendant, Manuel D—, at the time he gave such testimony, willfully gave the same, knowing the same to be false and untrue."—Approved: State v. Douette, 31 Wash. 23, 71 Pac. 562.

§ 5396. Prosecution Must Show Defendant was Sworn as a Witness.

"That to authorize a conviction in this case it must appear, among other things, that the defendant was sworn, as a witness, before giving his alleged testimony; and this must be proved, beyond a reasonable doubt; and if the jury entertain any reasonable doubt as to whether

the defendant was affirmed instead of being sworn, in the usual manner before testifying, the jury should find the defendant not guilty."—Approved: Hitesman v. State, 48 Ind. 473.

§ 5397. Materiality of Testimony—Knowledge of its Falsity.

"The jury are instructed that if you believe from the evidence that at any time within three years before the 11th day of March, 1904, the defendant, George G—, in the county of St. Francois and State of Missouri, was sworn as a witness in a trial in the circuit court of St. Francois county, Missouri, in which the State of Missouri was plaintiff and O. P. McC— was defendant, in which said defendant, O. P. McC—, was then and there being tried under an indictment charging him with murder in the first degree for the killing of one Harry L— on the 14th day of November, 1903, at said county of St. Francois, aforesaid, and that this defendant, George G—, then and there willfully, corruptly, and falsely testified before the court and jury, in substance and to the effect that he, the said George G—, together with one Jesse B—, was in the city of Farmington on the 14th day of November, 1903, and in company with said Jesse B— was standing in front of Bentley & Ryan's saloon, and that he, the said George G—, together with Jesse B—, stood and looked in through the front window of said saloon just before the fatal shot was fired by which O. P. McC— killed Harry L—, and saw Leo L— then and there attempt to hand or slip a revolver to Harry L—, then and in that event said testimony was material and pertinent to the issues in said cause, and if the jury believe from the evidence that said testimony was false and that said defendant, George G—, did not at said time stand and look through the front window of said Bentley & Ryan's saloon and did not then and there see Leo L— attempt to hand or slip a revolver to Harry L—, and that said defendant, George G—, willfully and corruptly, that is to say, knowingly and intentionally, testified falsely to said facts, you will find him guilty and assess his punishment at imprisonment in the penitentiary for a term of not less than seven years."—Approved: State v. Gordon, 196 Mo. 185, 95 S. W. 420.

§ 5399. Falsity in Testifying Must have been Willful.

"Before you can convict the defendant in this case, you must find from the evidence that he willfully and corruptly swore falsely as alleged in the information, and if you find that in giving the testimony complained of, if he gave any such testimony, he honestly testified to the facts as he remembered them, without any intention to swear falsely, you cannot convict the defendant even though you find from the evidence his testimony was false."—Approved: State v. Hoel. 77 Kan. 334, 94 Pac. 267.

§ 5401. Strength of Evidence to Convict.

(a) "The evidence of one witness as to the falsity of the evidence upon which perjury is assigned is not sufficient to warrant conviction. If there is but one witness testifying directly to the falsity of the evidence of one charged with perjury, there must be evidence of circumstances corroborating such falsifying testimony. There is no rule by which

the exact weight of the corroborating circumstances requisite to warrant a conviction can be determined; and it must be for the jury to determine whether such corroborating circumstances are sufficient to justify a verdict of guilty. It is frequently stated that such corroborating circumstances must be equivalent to the positive or direct testimony of a witness. But such is not the rule of law. If it were the rule, it would be a rule without sense, furnishing no guidance to the jury; for the weight which attaches to the direct testimony of a witness can scarcely be said to be exactly equal in any two individual cases; and consequently there could be no rule for arriving at the weight of the direct testimony of one witness."—Approved: Galloway v. State, 29 Ind. 442.

(b) "The court instructs the jury that you ought not to convict the defendant unless you believe beyond a reasonable doubt that the falsity of the statements made, upon which, by the information filed by the prosecuting attorney, under these instructions, the charge against him is based, has been to your satisfaction fully established, either by the testimony of more than one credible witness, and you are the sole judges of such credibility, or by that of one such witness corroborated by other evidence in the case, which convinces your minds of the truth of the testimony of such single witness to the fact, and of such falsity of the statements of the defendant, and not then unless you further find from the evidence beyond a reasonable doubt the existance of all the other elements of the offense, and of the facts necessary to authorize the conviction of the defendant, as defined in the instructions given you."—Approved: State v. Gordon, 196 Mo. 185, 95 S. W. 420.

§ 5402. Willfulness in False Affidavit to Procure Warrant.

"You look to the indictment and see the charge in its entirety. It is charged in the indictment, in substance, that the defendant willfully, knowingly, and absolutely swore falsely, in swearing out this warrant upon which this man B— was arrested. That is the issue upon which you are to pass, as to whether this defendant was guilty or not guilty, as to the falsity of that affidavit."—Approved: Davis v. State, 7 Ga. App. 680, 67 S. E. 839.

CHAPTER CXLVI.

HOMICIDE.

A. Homicide.
B. Excusable Homicide.

A. Homicide.

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§ 5403. Meaning of Terms.

(a) "The words 'willful' and 'willfully,' as used in these instructions, mean intentional; not accidental or voluntary. The word 'feloniously,'

as used in these instructions, means proceeding from an evil heart or purpose; done with the deliberate intention of committing a crime. The phrase 'with malice aforethought,' as used in these instructions, means a predetermination to do the act of killing without legal excuse; and it is immaterial at what time before the killing such a determination was formed. A criminal conspiracy, within the meaning of the word 'conspired' as used in these instructions, is a corrupt combination of two or more persons to do an unlawful act or to do a lawful act by unlawful means. You are to take and receive all the evidence which the court permitted you to hear about the alleged shooting of Green G— by Garrett G— for the purpose only, and in so far only, as it may in your judgment tend to show motive for the acts and conduct of the parties to the difficulty in which John G— was killed, if in your judgment it does so show or tend to show motive. The word 'motive,' as used in these instructions by the court, means inducement, reason, cause, or incentive to do the acts and things charged in the indictment herein, if they or any of them were done."—Approved: Gambrell v. Commonwealth, 130 Ky. 513, 113 S. W. 476.

(b) "The words 'willful' and willfully,' as used in these instructions, and in the indictment herein, mean intentionally; not accidental or involuntary. The word 'feloniously,' as used in these instructions, and in the indictment herein, means proceeding from an evil heart or purpose; done with the deliberate intention of committing a crime. The phrase 'with malice aforethought,' as used in these instructions and in the indictment herein, means a predetermination to do the act of killing without legal excuse; and it is immaterial at what time before the killing such a determination was formed. The court has heretofore said to the jury, from time to time, that certain evidence was admitted for the purpose, and so far only as it might tend to show motive, if it did so tend. The word 'motive' as used by the court in these instructions, means reason, cause, inducement, and incentive to do the acts and things charged in the indictment herein."—Approved: Ball v. Commonwealth, 125 Ky. 601, 101 S. W. 956.

(c) "As used in the indictment and these instructions, 'feloniously' means wrongfully and wickedly and also refers to the punishment imposed by law.

" 'Willfully' means intentionally and not done by accident.

" 'Premeditatedly' means thought of beforehand, for any length of time, however short.

" 'Deliberately' means done in a cool state of the blood, not in sudden passion, engendered by lawful or some just cause of provocation.

"And the court instructs the jury that in this case there is no evidence tending to show the existence of any such passion or provocation.

" 'Malice' means that condition of the mind which prompts one to do a wrongful act intentionally, and to take the life of another without legal justification or excuse.

"It does not mean mere spite, hatred, or ill-will, but it signifies the state of disposition which shows a heart regardless of social duty, and

fatally bent on mischief, and 'malice aforethought' means that the act was done with malice and premeditation.

" 'Malice,' as used here, may be presumed from the intentional use of a deadly weapon in a manner likely to produce death."—Approved: State v. Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

(d) "The word 'purposely' defines itself. It simply means an act done with the purpose or intent of doing that act. The word 'deliberate' means the mental state or condition of the mind in considering, weighing, and deliberating upon the motive which prompts or induces a certain act or line of action. 'Premeditation' is the mental operation of thinking over an act or line of action already decided in the mind, before carrying the act or line of action into execution. 'Malice' is not confined to ill will towards an individual, but it is also intended to denote an action flowing from any wicked and corrupt motive. A thing done with a wicked mind, and attended with such circumstances as plainly indicate a heart regardless of social duties and fully bent on mischief, indicates malice, within the meaning of the law. Malice may be either expressed or implied. Express malice may appear from all the evidence and circumstances of the alleged killing. Implied malice may appear where there is no just cause or excuse of the alleged killing."—Approved: State v. Lindgrind, 33 Wash. 440, 74 Pac. 565.

(e) "In order to constitute murder in the first degree, the killing must not only be done with malice aforethought, expressed or implied, but it must be done with willful premeditation and deliberation, and all this must be shown beyond a reasonable doubt. Without willful premeditation and deliberation being thus shown, it cannot be murder in the first degree. The word 'willful,' when used in a statute creating an offense, implies the doing of the act purposely and deliberately in violation of law. The meaning of the word 'premeditation' is a prior determination to do the act in question. It is not essential that this intention should exist for any considerable period of time before it is carried out. If the determination is formed deliberately and upon due reflection, it makes no difference how soon afterwards the fatal resolve is carried out. An act is done deliberately when done in cold blood and after a fixed design to do the act. No particular time is necessary to constitute premeditation and deliberation, and, if the purpose to kill has been deliberately formed, the interval which elapses before its execution is immaterial."—Approved: State v. Banks, 143 N. C. 652, 57 S. E. 174.

§ 5404. Malice Defined.

(a) "The court further instructs the jury that murder is the killing of any person with malice aforethought either express or implied. Malice in this definition is used in a technical sense, and includes not only anger, hatred, and revenge, but every unlawful and unjustifiable motive. It is not confined to ill-will to any one or more individual persons, but is intended to denote an action flowing from any wicked or corrupt motive and thing done with an evil mind and purpose and wrongful intention, where the act has been attended with such cir-

cumstances as to carry in them the plain indication of a heart regardless of social duty and fatally bent on mischief, and therefore malice is implied from any deliberate or cruel act against another, however sudden."—Approved: Wright v. Commonwealth, 109 Va. 847, 65 S. E. 19.

(b) "Implied malice means that which may be referred from the acts and facts shown. Thus, when a wanton, wicked, cruel, or revengeful act is shown, the inference or implication may be drawn that the person who did such an act was actuated by malice. And when one person assaults another with a deadly weapon—that is, a weapon that will likely produce death—the law presumes malice from that fact alone, in the absence of proof, either direct or implied, to the contrary. The selection and use of a weapon, such as a revolver, in a deadly manner, without legal excuse, raises a presumption and is evidence of malice."—Approved: State v. Hayden, 131 Iowa, 1, 107 N. W. 929.

(c) "Malice aforethought is the voluntary and intentional doing of an unlawful act, with the purpose, means, and ability to accomplish the reasonable and probable consequences of it, done in a manner showing a heart regardless of social duty and fatally bent on mischief, by one of sound mind and discretion, the evidence of which is inferred from acts committed or words spoken."—Approved: Barr v. State, 56 Tex. Cr. R. 372, 120 S. W. 422.

(d) "Malice, in its legal sense, differs from the meaning which it bears in common speech. In common acceptation it signifies ill-will, hatred, or revenge toward a particular individual. Such a condition of mind would, of course, constitute malice in the eye of the law, but such is not necessarily its legal sense. Malice, in its legal sense, denotes that condition of mind which is manifested by the intentionally doing of a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind."—Approved: Housh v. State, 43 Neb. 163, 61 N. W. 571.

(e) "Malice is not confined to ill-will towards an individual, but it is intended to denote an action flowing from any wicked and corrupt motive. A thing done with a wicked mind, and attended with such circumstances as plainly indicate a heart regardless of social duty, and fully bent on mischief, indicates malice within the meaning of the law; hence malice may be found from any deliberate and cool act against another, however sudden, which shows an abandoned and malignant heart."—Approved: Downing v. State, 11 Wyo. 86, 70 Pac. 833.

(f) "The court instructs the jury that malice, within the meaning of the law, includes not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive; that the term 'malice' has in law a twofold signification. There is what is known as 'malice in fact' and 'malice in law,' or 'implied malice,' in the legal sense. Malice signifies a wrongful act intentionally done without justification or legal excuse. Express malice is that deliberate intention unlawfully of taking away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice may be found when no considerable provocation appears, and when all the circumstances of

the assault show an abandoned and malignant heart."—Approved: Downing v. State, 11 Wyo. 86, 70 Pac. 833.

(g) "The phrase 'malice aforethought' means a thing done with a wicked and corrupt motive. It is not confined to anger, hatred, and revenge by one against another, although it evidences a thing done through anger, hatred, or revenge. It also evidences any other unjustifiable motive with which the act is done. Hence, malice is not confined to ill-will with which one individual holds towards another, but it is intended to denote any action flowing from a wicked and corrupt motive. A thing done with a wicked mind, when the act has been attended with such circumstances as evince plain indications of a heart which regards not its social duty, and which is fatally bent on mischief, is done with malice."—Approved: State v. Wetter, 11 Idaho, 433, 83 Pac. 341.

(h) "The jury are instructed that malice includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. Malice is not confined to ill-will toward an individual, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done with a wicked mind, where the fact has been attended with such circumstances as evince plain indications of a heart regardless of social duty, and fatally bent on mischief; hence malice is implied from any deliberate or cruel act against another, however sudden, which shows an abandoned and malignant heart."—Approved: Parsons v. People, 218 Ill. 386, 75 N. E. 993.

§ 5405. Malice Express and Implied Distinguished.

(a) " 'Express malice' is where one, with a sedate and deliberate mind and formed design, unlawfully kills another, which formed design is evidence by external circumstances discovering that inward intention, as laying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm, or any other circumstances showing such sedate and deliberate mind and formed design unlawfully to kill another, or to inflict serious bodily harm, which might probably end in the death of the person upon whom the same was inflicted. 'Implied malice' is that which the law infers or imputes to certain acts. Thus, when the fact of an unlawful killing is established, and there are no circumstances in evidence which tend to establish the existence of express malice, nor which tend to mitigate, excuse, or justify the act, then the law implies malice,"—Approved: Martinez v. State, 30 Tex. App. 129, 16 S. W. 767.

(b) "Implied malice is constructive malice, and not a fact to be proved specifically. It is an inference or conclusion founded upon the facts and circumstances of the case as they are ascertained to exist, thus: When the proof shows an unlawful killing, and no evidence has been adduced establishing the existence of express malice on the one hand, or which tends to establish any justification, excuse, or mitigation on the other, the law implies malice, and the murder is of the second degree. But in this connection you are charged that where an indictment charges murder on implied malice alone, and the evidence

establishes or tends to establish express malice as a fact, it is not to be understood that such proof would, on the one hand, be incompetent, nor, on the other, that it would create a variance from the allegation in the indictment; but such evidence, notwithstanding it shows express malice, would in such case be sufficient to warrant a conviction for murder in the second degree, since express malice comprises and embraces implied malice, just as murder of the first degree embraces murder of the second degree."—Approved: Wilson v. State, 49 Tex. Cr. R. 50, 90 S. W. 312.

§ 5406. Implied Malice Defined.

"Implied malice is constructive malice, and not a fact to be proved specifically. It is an inference or conclusion founded upon the facts and circumstances of the case as they are ascertained to exist. Thus, when the proof shows an unlawful killing, and no evidence has been adduced establishing the existence of express malice on the one hand, or which tends to establish any justification, excuse, or mitigation on the other, the law implies malice, and the murder is of the second degree."—Approved: Cravens v. State (Tex. Cr. R.), 103 S. W. 921 (not reported in state reports).

§ 5407. Malice Presumed from Use of Deadly Weapon.

(a) "Malice, which is a necessary element of murder in the first and second degrees, means killing without legal excuse, and is presumed from killing with a deadly weapon."—Approved: State v. Roberson, 150 N. C. 837, 64 S. E. 182.

(b) "In cases of homicide, the law presumes malice from the use of a deadly weapon, and casts on the defendant the onus of repelling the presumption, unless the evidence of the killing shows also that it was perpetrated without malice; and whenever malice is shown, and is unrebutted by the circumstances of the killing, or by other facts in evidence, there can be no conviction for any degree of homicide less than murder."—Approved: Watson v. State, 155 Ala. 9, 46 South. 232.

(c) "In case of homicide, the law presumes malice from the unlawful use of a deadly weapon upon a vital part; and when the fact of unlawful killing or shooting, causing death, is proved, and no evidence tends to show express malice, on the one hand, or any justification, mitigation, or excuse, on the other, the law implies malice, and the offense is then murder in the second degree. You are instructed that in law a loaded gun is a deadly weapon, and if you believe from the evidence, beyond a reasonable doubt, that defendant, August K—, wantonly and cruelly, and without justification or excuse, shot and caused the death of Daniel T— with a deadly weapon, then the law presumes such shooting was done maliciously, unless you believe from the evidence it was done without malice."—Approved: Kastner v. State, 58 Neb. 767, 79 N. W. 713.

(d) "When the killing is done with a deadly weapon, or a weapon calculated to produce death, malice may be legitimately inferred, in the absence of proof that the act was done in necessary self-defense

or upon sufficient provocation or cause; and the presumption in such case will be that the act was voluntarily committed with malice aforethought."—Approved: State v. Dull, 67 Kan. 793, 74 Pac. 235.

§ 5408. Intent—Presumed from Deadly Weapon.

(a) "In some instances proof of the intent is furnished by the manner of the killing itself; as, when the murder is shown to have been committed with a deadly weapon or a dangerous weapon, in such a manner that an inquiring mind can come to no other conclusion than that the death of the victim was intended. Thus, if one man shoot another through the head with a musket or pistol ball, or if he is stabbed in a vital part with a saber, or if he cleave his skull with an axe, or the like, it is almost impossible for a reflecting or intelligent mind to come to any other conclusion than that the perpetrator of such an act of deadly violence intended to kill. In such cases the law presumes every person to intend the usual consequences which accompany the use of the means employed in the manner employed, and casts upon the accused the burden of showing that the intention in using the weapon was harmless, or not murderous."—Approved: People v. Wolf, 95 Mich. 625, 55 N. W. 357.

(b) "If you should find in this case that the defendant used a weapon, a shotgun, and that was a weapon in its nature likely to produce death, and that he, in shooting that gun, shot and killed the party alleged in the bill of indictment, intending to shoot her, that if there were no circumstances which would justify or mitigate the shooting, he would none the less be guilty of murder, although at the time he shot he might not have intended to take the life of the party whom he shot."—Approved: Scott v. State, 132 Ga. 357, 64 S. E. 272.

(e) "You are further instructed that he who willfully, that is, intentionally, uses upon another at some vital point a deadly weapon, must, in the absence of qualifying facts, be presumed to know that the effect is likely to produce death, and knowing this, must be presumed to intend death, which is the probable consequence of such an act, and if such deadly weapon is used without just cause or provocation, he must be presumed to do it wickedly and from a bad heart, and if the jury believe from the evidence that the defendant, O. P. McC—, shot and killed Harry L—, as charged, and that at the time or before the shot was fired, the defendant had formed in his mind the willful, premeditated and deliberate design or purpose to take the life of the deceased, and that the shot was fired in furtherance of that design or purpose and without any justifiable cause or legal excuse therefor as explained in these instructions, then the jury should find the defendant guilty of murder in the first degree."—Approved: State v. McCarver, 194 Mo. 717, 92 S. W. 684.

§ 5409. Intent Inferred from Circumstances.

(a) "If the jury should find and believe from the evidence that the deceased was killed while engaged in a fight with the defendant, by the defendant striking with his fists and kicking with his foot the said

deceased, and that the means used was not likely to produce death, then the jury are instructed that it cannot be presumed that death was designed or intended by the defendant from the mere fact that deceased was killed, unless, from the manner in which defendant hit and kicked said deceased, such intentions evidently appeared. If you should find and believe from the evidence that the means or instrument used by the defendant, G—, in the difficulty, was not likely to produce death, then in that event, before you can find the defendant guilty of any grade of felonious homicide, you are required to find that from the manner of the use of said means it was the evident intention of the defendant to take the life of H—, and you are instructed that, in case of a reasonable doubt as to any fact, you will give the benefit of the doubt to the defendant."—Approved: Grant v. State, 56 Tex. Cr. R. 411, 120 S. W. 481.

(b) "A design to effect death sufficient to constitute murder is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed, and such design may be formed instantly before committing the act by which it is carried into execution. Homicide committed with the design to effect death is not the less murder because the perpetrator may have been in a state of anger or excitement at the time."—Approved: Vance v. Territory, 3 Okl. Cr. App. 208, 105 Pac. 307.

(c) "On the question of design or intention, you are instructed that the law presumes that a reasonable person intends all the natural, probable, and usual consequences of his act; that when one person assaults another violently with a dangerous weapon likely to kill, not in self-defense and not in sudden heat of passion caused by provocation apparently sufficient to make passion irresistible or involuntary, and the life of the party thus assaulted is actually taken in consequence of such assault, then the legal and natural presumption is that death or great bodily harm was intended, and in such case the law implies malice, and such killing would be murder."—Approved: Anderson v. State (Wis.), 114 N. W. 112.

§ 5410. Degrees—Stated and Distinguished.

"From these definitions the jury will see that any unlawful killing of a human being, with malice aforethought, is murder; but if nothing further characterizes the offense it is murder of the second degree. To constitute the higher offense there must be superadded, to the general definition above given, willfulness, deliberation, and premeditation. By willfulness is meant that it was of purpose, with the intent that, by the given act, the life of the party should be taken. It must be deliberate and premeditated. By this it is not meant that the killing must have been conceived or intended for any particular length of time. It is sufficient if it was done with reflection and conceived beforehand. And in this view, as I have said before, the deliberate purpose to kill and the killing may follow each other as rapidly as successive impulses or thoughts of the mind. It is enough that the party deliberate before the act—premeditate—the purpose to slay before he

gave the fatal blow. But while the purpose, the intent, and its execution may follow thus rapidly upon each other, it is proper for the jury to take into consideration the shortness of such interval in considering whether such sudden and speedy execution may not be attributed to sudden passion and anger, rather than to deliberation and premeditation, which must characterize the higher offense. From what I have said you will see that the distinction between the two grades of offense is that, in murder of the first degree (unless it is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem), the killing must be deliberate and premeditated, whilst in murder of the second degree the killing is not deliberate or premeditated.

"In the one case there is deliberate, premeditated, preconceived design, though it may have been formed in the mind immediately before the mortal blow was given, to take life. In the other case there is no deliberation, premeditation, or preconceived design to kill. In both, however, the killing must have been unlawful and accompanied with malice."—Approved: State v. Shuff, 9 Idaho, 115, 72 Pac. 664.

§ 5411. Resisting Trespass—Use of Deadly Weapon.

"If the defendant was in charge and had control of the saloon in which the deceased lost his life, and during the time he had such control the deceased and any other person or persons became engaged in an altercation, disturbance, or fight, the defendant had the right to demand peace in his place of business, and to use any lawful means to quiet such disturbance and to prevent the fight; but, in exercising his lawful right, he was not authorized to resort to the use of a deadly weapon to enforce his authority. If he was unable to preserve the peace in his place of business without resorting to the use of deadly weapons, then it was his duty to call upon the officers of the law to protect his rights and to take the combatants into custody. Or, when two or more persons are engaged in a fist fight, or combat, no third person has the right to kill one of such combatants to save the other from punishment or even death. A man is permitted, under proper conditions, to take human life in his own necessary self-defense, or in the defense of a member of his family, his parent, or servant; but he is not allowed such right in defense of a stranger, or one not related to him. One may also take the life of another in attempt to prevent a forcible invasion of his dwelling house; but, if he is keeping a business place where the public have the right to go to patronize his business, he has no right to take human life in such a place except to preserve his own life or to prevent a felony being committed against his property in said place of business."—Approved: Vance v. Territory, 3 Okl. Cr. App. 208, 105 Pac. 307.

§ 5412. Resisting Arrest—Killing Officer.

"If you find a larceny has been committed, and that B— had reasonable ground to believe that the accused was guilty of the offense, he would have authority to arrest the accused until a warrant could be

obtained, if within a reasonable time; and if you find the prisoner, in such condition, purposely killed the deceased, to prevent or escape arrest, you must find him guilty of some degree of homicide."—Approved: Nelson v. State, 33 Neb. 528, 50 N. W. 679.

§ 5413. Seeking Difficulty—Armed with Weapon.

"The court charges the jury, if a party dangerously armed provokes a hostile demonstration with an undue advantage, he is guilty of murder, if he slays his adversary pursuant to a previously formed design to use his weapon in an emergency. Previous preparation for a rencounter evinces deliberation and premeditation, and, unexplained, is evidence of express malice."—Approved: Watson v. State, 155 Ala. 9, 46 South. 232.

§ 5414. Provoking Deceased Into Making an Attack.

"If you believe from the evidence in this case that the defendant provoked a difficulty with the deceased, as above explained to you, but you believe from the evidence that such difficulty was provoked (if any such was provoked) without any intention to kill or inflict serious bodily injury upon deceased, or if you have a reasonable doubt as to defendant's intention to kill or inflict serious bodily injury upon deceased, and you believe from the evidence that defendant by his acts or language or both did provoke a difficulty with deceased, which caused deceased to attack defendant, and the defendant, under the influence of sudden passion which rendered the mind of the defendant incapable of cool reflection, did shoot with a pistol and thereby kill the deceased, you are instructed that such killing would be unlawful, and, if you find the facts so to be, your verdict should be rendered accordingly."—Approved: Gray v. Phillips, 54 Tex. Civ. App. 148, 117 S. W. 870.

§ 5415. Motive—Presence or Absence a Circumstance.

"If you believe and find from the evidence that it fails to show any motive on the part of the defendant to commit the crime charged against him, then this is a circumstance in favor of his innocence which you ought to consider in connection with all the other evidence in making up your verdict. And in order to ascertain a motive you should take into consideration all the evidence in reference to the associations and relations between the said James P. McC— and the defendant, and their deportment toward each other, together with their surroundings and all other evidence in the case. But if, upon consideration of all the evidence, you believe and find that the defendant has committed the crime charged, then you should find him guilty, no matter whether any motive for the deed be apparent or not."—Approved: State v. Barrington, 198 Mo. 23, 95 S. W. 235.

§ 5416. Mutual Combat—Deadly Weapon Obtained During Struggle.

"If it appears from the evidence in this case that the defendant and the deceased entered into a mutual combat, and at the commencement of the fight attacked each other on equal terms, and on a sudden,

without previous intention to kill the deceased, the defendant, in the course of the fight, and in the heat of passion, snatched up a deadly weapon, and killed the deceased, it is only manslaughter; but if you believe from the testimony beyond a reasonable doubt that the defendant, in the course of the fight, snatched up the deadly weapons, and purposely, and of his deliberate and premeditated malice, killed the deceased, then he would be guilty of murder in the first degree; or if from the evidence you are satisfied beyond a reasonable doubt that in the course of the fight the defendant snatched up the deadly weapon, and purposely and maliciously, but without deliberation and premeditation, killed the deceased, then he would be guilty of murder in the second degree."—Approved: State v. Vance, 29 Wash. 435, 70 Pac. 34.

§ 5417. Involuntary in Pursuit of Lawful or Unlawful Purpose.

"In general, where an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasions it. If it be in the prosecution of a felonious intent, or in consequence of an act naturally tending to bloodshed, it will be murder. If no more was intended than a mere civil trespass, it is manslaughter."—Approved: State v. Shelledy, 8 Iowa, 494.

§ 5418. Doubt as to Degree.

(a) "Although you may believe from the evidence beyond a reasonable doubt that the defendant Sarah S— has been proven guilty, yet, if you entertain a doubt as to the degree of her guilt, you should give her the benefit of the doubt, and find her guilty of voluntary manslaughter, as defined in instruction No. 2."—Approved: Steely v. Commonwealth, 129 Ky. 524, 112 S. W. 655.

(b) "If the jury should believe and find from the evidence beyond a reasonable doubt that the defendant is guilty either under the first or second instruction, but have a reasonable doubt of the degree of the offense the defendant has committed, they will find him guilty of the lower degree, that of voluntary manslaughter, and fix his punishment as defined in the second instruction."—Approved: Williamson v. Commonwealth (Ky.), 101 S. W. 370 (not reported in state reports).

(c) "If you shall have a reasonable doubt from the evidence of the defendant having been proven guilty, then you ought to find him not guilty; or if you shall believe from the evidence, beyond a reasonable doubt, that the defendant has been proven guilty, but shall have a reasonable doubt from the evidence as to whether his crime be willful murder as defined herein, or of the lower offense, voluntary manslaughter, as defined in these instructions, then you ought to find him guilty of voluntary manslaughter, and fix his punishment as provided therefor in instruction No. 4."—Approved: Gambrell v. Commonwealth, 130 Ky. 513, 113 S. W. 476.

(d) "The law presumes the defendant innocent until he is proven guilty beyond a reasonable doubt. Proof, beyond a reasonable doubt

of guilt, is such evidence as establishes beyond a reasonable doubt every fact necessary to constitute guilt, and, unless the defendant has been so proved guilty, the jury should find him not guilty. If the defendant has been proved guilty beyond a reasonable doubt, but the jury entertains a reasonable doubt whether he has been so proved guilty of murder or of voluntary manslaughter, they should find him guilty of voluntary manslaughter, the lower degree of the crime charged."—Approved: Hocker v. Commonwealth (Ky.), 111 S. W. 676 (not reported in state reports).

(e) "If you find beyond a reasonable doubt that the defendant is guilty of murder, but you have a reasonable doubt as to whether he is guilty of murder in the first or murder in the second degree, you will give him the benefit of such doubt, and convict him of no higher offense than murder in the second degree, or if you find that beyond a reasonable doubt that the defendant is guilty of murder in the second degree or manslaughter, but you have a reasonable doubt as to whether he is guilty of one or the other of these offenses, you will give him the benefit of the doubt and convict him of no higher offense than manslaughter."—Approved: Thomas v. State, 53 Tex. Cr. R. 272, 109 S. W. 155.

§ 5419. Intoxication as Affecting Intent and Degree.

(a) "It is a general principle of law that intoxication is no excuse for crime, but this general principle has this important qualification or modification, so far as it relates to murder in the first degree: A particular or specific intent is absolutely essential in the commission of this crime, and if the mind of the person doing the killing is unable, because of intoxication, at the time of the killing, to form this particular or specific intent, there can be no murder in the first degree, unless the person doing the killing became voluntarily intoxicated for the purpose of killing while intoxicated."—Approved: Cook v. State, 46 Fla. 20, 35 South. 665.

(b) "You are instructed that in order to find the defendants or either of them guilty of murder in the first degree you must find from the evidence beyond all reasonable doubt that the murder was perpetrated by means of poison, or lying in wait, or torture, or by any other willful, deliberate, and premeditated killing, or in the perpetration or attempt to perpetrate robbery. This ingredient of deliberate premeditated killing must be clearly shown and proven beyond all reasonable doubt. It is not sufficient that you think that the killing was deliberate and premeditated, the evidence must convince you of that fact to an abiding certainty and beyond all reasonable doubt. The evidence of deliberation and premeditation must be such as to convince you that the deliberate premeditated design and purpose to murder was knowingly and intentionally formed and considered in the mind of each defendant and meditated upon before the fatal blow was struck; and, in considering whether such a design was formed in the minds of each of the defendants, you should consider the evidence, if any, of drunkenness. If the defendants were drunk at the time, and were too much

intoxicated to form such a deliberate and premeditated purpose, they cannot be found guilty of murder in the first degree. It is true that drunkenness is no excuse for the commission of an offense, but nevertheless the jury must consider the evidence of drunkenness and determine whether it was sufficient to so cloud the minds of the defendants as to interfere with the formation of deliberate and premeditated purpose to kill. If the drunkenness was sufficient to create a reasonable doubt in your minds as to the existence of such a deliberate premeditated purpose you cannot find the defendants guilty of murder in the first degree."—Approved: State v. Johnny, 29 Nev. 203, 87 Pac. 3.

(c) "Where a statute establishes degrees of the crime of murder, and provides that all willful, deliberate, and premeditated killing shall be murder in the first degree, the evidence given on the trial tending to prove that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether the accused was in such a condition of mind as to be capable of deliberation and premeditation."—Approved: State v. Hertzog, 55 W. Va. 74, 46 S. E. 792.

(d) "If defendant went to the house of deceased, and willfully, maliciously, deliberately, premeditatedly, and with malice aforethought shot and killed deceased, when he was neither in danger from her of his life, or of great bodily harm, nor in fear of the same, nor believed himself so, and upon reasonable grounds, then and in that event defendant, by the killing of deceased in manner and form aforesaid, committed murder in the first degree; but if defendant went to the house of deceased drunk, and to such a degree that his intoxication incapacitated him from forming a deliberate and premeditated design to kill, then the defendant would not be guilty of murder in the first degree, and his crime would be murder in the second degree."—Approved: Atkins v. State, 119 Tenn. 458, 105 S. W. 353.

(e) "Drunkenness neither excuses the offense nor avoids the punishment which the law inflicts, when the character of the offense is ascertained and determined; but evidence of drunkenness is admissible solely with reference to the question of premeditation, or where there is evidence tending to show that a murder has been committed in the perpetration or attempt to perpetrate a robbery, as to the question of the existence of the felonious intent to steal which is an essential element of robbery. In cases of premeditated murder, the fact of drunkenness is immaterial. A man who is drunk may act with premeditation as well as a sober one, and is equally responsible for the consequences of his act. In murder of the first degree, it is necessary to prove the killing was premeditated or was committed in the perpetration or attempt to perpetrate robbery or one of the other felonies already enumerated, which involves, of course, an inquiry into the state of mind under which the party committed it, and in prosecution of such an inquiry, his condition as drunk or sober is proper to be considered. The weight to be given it is a matter for the jury to determine, and it should be received with great caution and carefully examined in connection with all the circumstances and evidence in the case. You

should discriminate between the conditions of mind merely excited by intoxicating drink and yet capable of forming a specific and deliberate intent to take life, and such a prostration of the faculties as renders a man incapable of forming the intent, or of deliberation or premeditation. If an intoxicated person has the capacity to form the intent to take life, and conceives and executes such intent, it is no ground for reducing the degree of his crime that he was induced to conceive it, or to conceive it more suddenly by reason of his intoxication."—Approved: State v. Johnny, 29 Nev. 203, 87 Pac. 3.

§ 5420. Aiding and Abetting Perpetration of Homicide.

(a) "If you believe from the evidence, beyond a reasonable doubt, that W. R. P— unlawfully shot and thereby killed said Harry N— with a pistol, and that he was not justified in so doing on the grounds of self-defense, as that law is given you in this charge hereafter, then you will find the defendant Chas. H. P— not guilty, unless you find from the evidence, beyond a reasonable doubt, that the defendant was present and knew the unlawful intent of W. R. P—, and acted together with him in the commission of said offense, and aided him by acts or encouraged him by words or gestures in the commission of said offense, and that W. R. P— committed said offense in pursuance of a common intent, and in pursuance of a previously formed design, in which the minds of both united and concurred."—Approved: Proctor v. State, 54 Tex. Cr. R. 254, 112 S. W. 770.

(b) "But if you do not believe from the evidence, beyond a reasonable doubt, that the state of facts as set out in instruction No. 2 existed, yet do believe from the evidence beyond a reasonable doubt that the defendant, Allen G—, in this county, and before the finding of the indictment herein, willfully and feloniously shot and killed John G—, not in his necessary or apparently necessary self-defense and not in the necessary or apparently necessary defense of Nelson G—, Silas G—, Rice G—, or Thomas G—, or you believe from the evidence, beyond a reasonable doubt, that Nelson G—, Silas G—, Rice G—, or Thomas G—, or any one or more of them, in this county, and before the finding of the indictment herein, willfully and feloniously shot and killed John G—, not in their necessary or apparently necessary self-defense, or in the necessary or apparently necessary defense of one of them or of Allen G—, and that the defendant Allen G— was present at the time and near enough so to do, and did, willfully and feloniously, aid, encourage, advise, or command the person or persons, who did shoot the said John G—, so to do, not in his necessary or apparently necessary self-defense, and not in the necessary or apparently necessary defense of the other defendants, or some one or more of them, then you ought to find him guilty; guilty of willful murder if you shall believe from the evidence beyond a reasonable doubt that such shooting and killing of John G—, or such aiding and assisting, was done with malice aforethought; or guilty of voluntary manslaughter, if you shall believe from the evidence beyond a reasonable doubt that such shooting and killing of John G—, or such aiding and assisting, was done

in sudden heat and passion or in sudden affray and without previous malice."—Approved: Gambrell v. Commonwealth, 130 Ky. 513, 113 S. W. 476.

(c) "The court instructs the jury that if they find and believe from the evidence that James F— was present aiding and abetting Edgar G. B— in the act of homicide in evidence in this case, he is in law equally guilty with him who fired the shot. When two or more persons are engaged in the same illegal purpose, any act done by one of the party in pursuance of that purpose, and with reference to it, is, in contempation of law, the act of all; and proof of such act is evidence against any or either of the others who were engaged in the combination."—Approved: State v. Forsha, 190 Mo. 296, 88 S. W. 746.

(d) "If you believe from the evidence that Addison S— shot and killed deceased, but you further believe, or if you have a reasonable doubt, that such shooting was upon an independent impulse of his own, not in pursuance of an agreement with T. E. S— (appellant), then you will acquit the defendant and so say by your verdict."—Approved: Smith v. State, 52 Tex. Cr. R. 27, 105 S. W. 182.

(e) "All persons are principals who are guilty of acting together in the commission of an offense. When an offense is actually committed by one or more persons, but others are present, and, knowing the unlawful intent, aid by acts or encourage by words or gestures those actually engaged in the commission of the unlawful act, such persons so aiding or encouraging are principal offenders, and may be prosecuted and convicted as such."—Approved: Pierce v. State, 17 Tex. App. 232, 239.

§ 5421. Presence without Knowledge or Participation.

(a) "If you should, however, find that this defendant, although present, did not know of the unlawful intent, if any, of Dave S— and D. D. C— in shooting, if they did shoot under circumstance amounting to an assault with intent to murder, under the law given you in charge, and that he, so knowing, did not act together with or aid by acts said Dave S— and D. D. C—, or if you have a reasonable doubt as to whether he knew of the unlawful intent of D. D. C— and Dave S—, or if you find that he knew thereof, but you find that he did not, or if you have a reasonable doubt as to whether he, so knowing of the unlawful intent of Dave S— and D. D. C—, acted together with and aided by acts said S— and D. D. C—, in so shooting, if you find they did shoot, you cannot convict this defendant as a principal, and you will acquit him, unless you find beyond a reasonable doubt that he is guilty under subdivision No. 3 of this charge."—Approved: Choice v. State, 54 Tex. Cr. App. 517, 114 S. W. 132.

§ 5422. Suicide—Aiding and Abetting.

(a) "The court further instructs the jury that if they believe from the evidence that the deceased, Lizzie L—, came to her death by suicide or self-murder, and that the defendant, Jacob L—, was deliberately present aiding and abetting, counseling, advising and assisting in the commission of self-murder, they will find the defendant guilty

of manslaughter in the first degree, and assess his punishment at imprisonment in the penitentiary for a term not less than five years."—Approved: State v. Ludwig, 70 Mo. 412.

(b) "If you believe from the testimony in the case that the deceased, Miss Pearl B—, took and swallowed carbolic acid resulting in her death, and that when she swallowed it she knew that it was carbolic acid and would result in her death, then she committed suicide, and you will return a verdict of not guilty against the defendant in this case, even though you might believe from the testimony that the defendant was present at the time the deceased swallowed the acid, and urged her to swallow it, and even promised to take carbolic acid himself if she would take it."—Approved: Sanders v. State, 54 Tex. Cr. R. 101, 112 S. W. 68.

§ 5423. Same—Abandoning Agreement to Commit.

"If the jury believe from the evidence that the defendant procured a pistol with which he and the deceased intended to commit suicide, and afterwards changed his mind and tried to escape from the consequences of such an agreement, but deceased refused to permit him to escape therefrom, and on account of physical weakness he could not by force leave her, and that she did the shooting, then defendant did not deliberately assist her to commit self-murder, and is not guilty of manslaughter in the first degree."—Approved: State v. Webb, 216 Mo. 378, 115 S. W. 998.

§ 5424. Killing Another than the Person Intended.

"If you find from the evidence that the defendant deliberately and premeditatedly intended to willfully, unlawfully, an with malice aforethought kill and murder one Charley A—, or any other human being, and that in making such unlawful attempt to take the life of Charley A—, or any other person, the defendant intentionally killed Henry R. F—, the defendant is, under such circumstances, just as guilty of the crime of murder, and of the same grade of offense, as if he had unlawfully, deliberately and premeditatedly and with malice aforethought killed Charley A—, or the person whom he intended to kill, instead of Henry R. F—. Under such circumstances, the crime is as complete as though the person against whom the intent to kill was directed had been in fact killed."—Approved: People v. Suesser, 142 Cal. 354, 75 Pac. 1093.

§ 5425. Apprehension of One Provoking Difficulty.

"If defendant raised the difficulty and shot deceased because or on account of previous ill will, or merely because he was afraid L— would some time attack or harm him, then, in such case, the killing would not be reduced below murder, no matter how much excited, angry, or alarmed defendant may have been at the time of the killing."—Approved: Arnwine v. State, 54 Tex. Cr. R. 213, 114 S. W. 796.

§ 5426. Premeditation—How Shown.

"By 'premeditation' and 'deliberation' is meant that the reason and judgment is exercised, that the fact of the killing is weighed and con-

sidered, and that as a result there is in the mind the fixed purpose to kill. The fixed purpose to kill must precede the act of killing, although the length of time between the time it is formed and carried into effect is not material. This premeditation and deliberation, like any other fact, may be shown by circumstances, and in determining there was such, the jury may consider evidence of absence of provocation, absence of a quarrel at the time of the killing, and threats, if there is such evidence. Not that you are compelled to find premeditation and deliberation from such evidence, but that, if there is such evidence, you may consider it in determining whether there was such premeditation and deliberation as I have indicated."—Approved: State v. Roberson, 150 N. C. 837, 64 S. E. 182.

§ 5427. Premeditation Never Presumed.

"The law presumes a sober man to intend what he does, but the law does not presume a killing with a premeditated design. This, like every other element of murder in the first degree, is to be inferred by the jury from the facts proved beyond a reasonable doubt"—Approved: Cook v. State, 46 Fla. 20, 35 South. 665.

§ 5428. Premeditation Length of Time Before Killing.

(a) "Premeditation means thought of beforehand for any length of time, no matter how short. There need be no appreciable space of time between the intention of killing and the act. They may be as instantaneous as the successive thoughts of the mind."—Approved: State v. Prolow, 98 Minn. 459, 108 N. W. 873.

(b) "The court instructs the jury that to constitute a willful, deliberate, and premeditated killing it is not necessary that the intention to kill should exist for any particular length of time before the killing. It is only necessary that such intention should come into existence for the first time at the time of the killing, or at any time previous."—Approved: Wright v. Commonwealth, 109 Va. 847, 65 S. E. 19.

(c) "If you find from the evidence beyond a reasonable doubt that the defendant, at any time, moment, or instant before the firing of the fatal shot, intended to shoot and kill Z—, that is sufficient evidence of premeditation. The length of time it takes to form a man's opinion of what he will do in a situation like that is something that cannot be measured by minutes or seconds."—Approved: State v. Prolow, 98 Minn. 459, 108 N. W. 873.

§ 5429. Death Must Ensue Within a Year and a Day.

(a) "If you believe and find from the evidence in this cause, that the defendant, Arthur D—, at the city of St. Louis, and State of Missouri, on or about the thirteenth day of February, 1894, did feloniously, willfully, deliberately, premeditatedly and of his malice aforethought, make an assault upon Albertine D— with a certain loaded pistol, and then and there with said pistol feloniously, willfully, deliberately, premeditatedly and of his malice aforethought did kill the said Albertine D—, by shooting her upon her head and body, and thereby inflicting upon her a mortal wound, of which said wound she, within a year and a day thereafter, died at the said city of St. Louis, during

the month of February, 1894, and was thus killed by the shooting aforesaid, as charged in the indictment, then you will find the defendant guilty of murder in the first degree, and will so state in your verdict."—Approved: State v. Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

(b) "If you shall find and believe from the evidence that at the county of Jackson, State of Missouri, at any time prior to the 31st day of May, 1883, the day on which the indictment in this cause was filed, the defendant John V—, in the manner and by the means specified in the indictment, willfully, with deliberation, premeditation and malice aforethought, assaulted and wounded the deceased, Porter A—, and that within one year and a day thereafter, and before the filing of said indictment, the said Porter A—, at the county and state aforesaid, died from the effects of the wound so inflicted upon him by the defendant, the verdict should be that defendant is guilty of murder in the first degree."—Approved: State v. Vansant, 80 Mo. 67.

§ 5430. Threats Without Overt Acts no Justification for Homicide.

"You are instructed that the only purpose for which proof of threats is permitted is to throw light on defendant's acts at the time he fired the shot; and if you believe from the evidence as explained in these instructions that deceased was not making an attempt to shoot defendant, or to do him great bodily harm, as viewed from his (defendant's) standpoint, then, and in that event, you will not consider threats, if proved for any purpose and in this connection the court instructs you that no threats, however violent, however great, are any provocation whatever."—Approved: Brooks v. State, 85 Ark. 376, 108 S. W. 205.

§ 5431. Nor Abuse or Words However Insulting.

"You are instructed that mere words, however irritating, are no excuse for a felonious assault; and although you may believe from the evidence that insulting and opprobrious epithets were used by the deceased, Amberry B—, to the defendant, James T. W—, yet if said defendant, W—, immediately revenged himself by using a revolver and shooting and killing the said Amberry B—, then the defendant is guilty, and you should so find from your verdict."—Approved: Willis v. State, 43 Neb. 102, 61 N. W. 254.

§ 5432. Nor will Slander Reduce Killing to Manslaughter.

"If you believe from the evidence beyond a reasonable doubt that before the homicide the defendant had had sexual intercourse with the witness Kittie C—, and was the father of the child subsequently born to the said Kittie C—, then and in such an event the homicide would not be reduced to manslaughter, although the defendant had heard that the deceased had stated that the said Kittie C— was in a family way and six months gone, and that the defendant was the daddy of the child, or even though the deceased had repeated said statement or admitted that he had so stated in the presence of the defendant at the time of the killing."—Approved: Redman v. State, 52 Tex. Cr. R. 591, 108 S. W. 365.

B. Excusable Homicide.

§ 5433. Struggle Brought on by Deceased—Pistol Accidentally Discharged.
5434. Preventing Escape of Prisoner.
5435. Shooting Thief in Act of Stealing Horse.
5436. Burden on Defendant to Show Justifiable Killing.

§ 5433. Struggle Brought on by Deceased—Pistol Accidentally Discharged.

"If the jury find from the evidence, that the deceased and defendant were riding the same horse along the road, the defendant having a pistol in his hand, and that the deceased seized hold of the pistol in the hand of defendant and attempted to take the pistol from defendant by force, and in the scuffle which ensued the pistol was accidentally discharged and produced the death of the deceased by accident, and without the fault or culpable negligence of the defendant, and without the defendant commencing or bringing on the difficulty with the deceased, the jury will find the defendant not guilty."—Approved: State v. Wisdom, 84 Mo. 177, 190.

§ 5434. Preventing Escape of Prisoner.

"The court instructs the jury that, if they believe from the evidence deceased was drunk and disorderly in the presence of appellant, the latter, as marshal of the town of McHenry, had the right to arrest him without a warrant, and to hold him in custody until the presence of the police judge could be secured to make some disposition of the case, and, if they further believe from the evidence that, after the arrest of deceased, and while appellant had him in custody, deceased attempted by force or violence to effect his release from appellant's custody as an officer, appellant had the right to use such force as was necessary or reasonably appeared to him to be necessary, but no more, to overcome the forcible resistance of deceased, and if, under these circumstances, he shot and killed deceased, the killing was excusable, if appellant could not otherwise overcome the forcible resistance of deceased, or it reasonably appeared to him that he could not do so."—Approved: Stevens v. Commonwealth (Ky.), 98 S. W. 284 (not reported in state reports).

§ 5435. Shooting Thief in Act of Stealing Horse.

"If it reasonably appeared by the acts or words, coupled with the acts, that it was his purpose and intent to steal the horse of said W—, and that such killing took place while the said G— was in the act of committing said theft in the night-time, or while the said G— was still at the place where said theft had been committed, or within reach of gunshot from such place, then you will find the defendant not guilty."—Approved: Whitten v. State, 29 Tex. App. 504, 16 S. W. 296.

§ 5436. Burden on Defendant to Show Justifiable Killing.

"In this case, if the killing by the defendant be proven, as I have before stated to you, the burden of proving that it was justifiable or

excusable devolves upon the defendant, unless the facts proven tend to show that the crime only amounts to manslaughter, or that the defendant was justifiable or excusable. The homicide being proven, if you should believe at the time of the alleged assault the circumstances surrounding the defendant were such as would justify or induce in his mind an honest belief that he was in danger of receiving from the deceased some great bodily harm, and that in doing what he did he was acting from an instinct of self-preservation, if you should find this, and believe this, from the testimony, then the defendant would not be guilty of the crime charged."—Approved: State v. Yokum, 11 S. D. 544, 79 N. W. 835.

CHAPTER CXLVII.

MURDER IN DIFFERENT DEGREES.

A. Murder in First Degree.
B. Murder in Second Degree.
C. Manslaughter.

A. Murder in First Degree.

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§ 5437. After Premeditation and Deliberation.

"The jury are instructed that if they find from the evidence in this case, beyond a reasonable doubt, that the defendant, Charlie B—, in the El Dorado district of Union county, Ark., unlawfully, willfully, feloniously, with malice aforethought and after premeditation and deliberation, killed Susan B— by shooting her with a gun, as alleged in the indictment, you will find the defendant guilty of murder in the first degree."—Approved: Beene v. State, 79 Ark. 460, 96 S. W. 151.

§ 5438. Deliberation Required.

"You are instructed by the court that unless it appear to your satisfaction, from the evidence, beyond a reasonable doubt, that the act of killing deceased was not the result of a sudden, rash, and inconsiderate impulse or passion, you cannot find that defendant is guilty of murder in the first degree."—Approved: Cordono v. State, 56 Tex. Cr. R. 447, 120 S. W. 471.

§ 5439. Feloniously and of his Malice Aforethought.

"If you believe from the evidence beyond a reasonable doubt that the defendant, Scott K—, in this county, before the finding of the indictment in this case, did unlawfully, willfully feloniously, and of his malice aforethought kill and murder Wright Y—, by shooting and wounding him with a gun or pistol loaded with powder and leaden balls, or with other hard and explosive substances, from which shooting and wounding the said Wright Y— did then and there die, you will find the defendant guilty of willful murder as charged in the indictment, and fix his punishment at death or confinement in the state penitentiary for life, in the discretion of the jury."—Approved: Keeton v. Commonwealth (Ky.), 108 S. W. 315 (not reported in state reports).

§ 5440. Determined on Beforehand.

"The court charges the jury that if they believe beyond a reasonable doubt from the evidence in the case that the defendant in Wilcox county, Alabama, and before the finding of this indictment, purposely killed Will M— by shooting him with a pistol, with a wickedness or depravity of heart toward said deceased, and the killing was determined on beforehand, and after reflection (for however short a time before the shooting was done, is immaterial) then the defendant is guilty of murder in the first degree."—Approved: Stewart v. State, 137 Ala. 33, 34 South. 18.

§ 5441. Express Malice Required.

"You are instructed by the court that unless the facts and circumstances in evidence before you prove to your satisfaction, beyond a reasonable doubt, that the killing of deceased by defendant was of express malice (as already in the main charge defined to you), you will not find defendant guilty of murder in the first degree."—Approved: Cordono v. State, 56 Tex. Cr. R. 447, 120 S. W. 471.

§ 5442. Premeditated Design to Effect Death.

"If you find from the evidence in this case, beyond a reasonable doubt, that in the county of Canadian, state of Oklahoma, on or about the 19th day of October, 1908, the defendant, David A—, shot and killed Ruel A— with a shot-gun, and that he fired the shot which killed A— without authority of law and with a premeditated design to effect the death of the said A—, you will then find him guilty of murder as charged in the indictment, and fix his punishment at death or imprisonment at hard labor in the penitentiary for life, in

your discretion. (Objected to because the instruction ignores the last phrase of the statute defining manslaughter in the first degree and excludes the same from the consideration of the jury under the facts presented by evidence submitted.)"—Approved: Atchison v. State, 3 Okl. Cr. App. 295, 105 Pac. 387.

§ 5443. Premeditation Need Exist Only a Moment.

(a) "If defendant, in this county, and before the finding of this indictment, killed Charles E— by shooting him with a pistol, with malice aforethought, he is guilty of murder; and if said killing was willful, deliberate, malicious, and premeditated, and the deliberation and premeditation existed for only a moment before the fatal shot was fired, the defendant is guilty of murder in the first degree."—Approved: Watson v. State, 155 Ala. 9, 46 South. 232.

(b) "The jury are instructed that in order to constitute the killing of a human being murder in the first degree, there must be a specific intent to take life formed in the mind of the slayer before the act of killing was done. It is not necessary, however, that this intention be conceived for any particular length of time before the killing. It may be formed deliberately and executed in a very brief space of time. If it was the conception of a moment, but the result of premeditation and deliberation, reason being on its throne, it would be sufficient. The law fixes no time in which such specific intent to take life must be formed, but leaves its existence to be determined by the jury from the evidence."—Approved: Beene v. State, 79 Ark. 460, 96 S. W. 151.

(c) "If the defendant, in this county, and before the finding of the indictment, purposely killed E— by shooting him with a pistol, with a wickedness or depravity of heart towards said deceased, and the killing was determined on beforehand, and after reflection for however short a time before the fatal shot was fired is immaterial, and defendant is guilty of murder in the first degree."—Approved: Watson v. State, 155 Ala. 9, 46 South. 232.

§ 5444. Intention Must be Formed in the Mind.

(a) "You are instructed that while the law requires, in order to constitute murder of the first degree, that the killing must be willful, deliberate, and premeditated, still it does no require that the willful intent, premeditation, or deliberation, shall exist for any length of time before the crime is committed; it is sufficient that there was a design and determination to kill distinctly formed in the mind at any moment before or at the time the Winchester rifle gun was fired; and in this case if you believe from the evidence, beyond a reasonable doubt, that the defendant feloniously shot and killed the deceased, as charged in the information, and that before or at the time the shot was fired, the defendant had formed in his mind a willful, deliberate, and premeditated design or purpose to take the life of the deceased, and that the shot was fired or that the fatal blow was given in furtherance of that design or purpose, and without any justifiable cause or legal excuse therefor, as explained in these instructions, they should

find the defendant guilty of murder in the first degree."—Approved: State v. Houk, 34 Mont. 418, 87 Pac. 175.

(b) "In this degree of felonious homicide, there must be the elements of purpose, malice and premeditation. If either of these elements be absent, there can be no conviction of this grade of felonious homicide. A premeditated design or purpose is one resulting from thought and reflection. A design conceived and afterwards so deliberately considered as to become resolved and fixed, is regarded by the law as premeditated. When the design to take human life is formed after deliberation, and where there is adequate time and opportunity for deliberate thought, then, no matter how soon the felonious killing may follow the formation of the settled purpose, it is murder in the first degree. There need be no appreciable space of time between the formation of the intention to kill and the killing; they may be as instantaneous as successive thoughts. It is only necessary that the act of killing be preceded by the concurrence of will, deliberation and premeditation on the part of the slayer; but when there is no time and opportunity for deliberate thought, then the unlawful killing cannot be murder in the first degree."—Approved: Koerner v. State, 98 Ind. 8.

§ 5445. Killing in Pursuance to a Formed Design.

(a) "If a person has actually formed the purpose maliciously to kill, and has deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the time of forming the purpose and the time of its execution. It is not the length of time intervening between the time of the formation of the purpose and the time of the actual killing which constitutes the distinctive difference between murder in the first and in the second degree. An unlawful killing, done purposely and with deliberate and premeditated malice, constitutes the crime of murder in the first degree; while murder in the second degree consists in an unlawful killing, done purposely and maliciously, but without deliberation and premeditation. To constitute murder in the first degree, it matters not how short the time may be between the time of the formation of the purpose to kill and its execution, if the party has turned it over in his mind,—that is, weighed and deliberated upon it."—Approved: Carleton v. State, 43 Neb. 373, 61 N. W. 699.

(b) "In order for you to find murder in the first degree you must find from all the evidence, beyond a reasonable doubt, a deliberate intention to take the life of the deceased, T—. While the law requires, in order to constitute murder in the first degree, that the killing shall be willful, deliberate, and premeditated, still it does not require that the willful intent, premeditation, and deliberation shall exist for any particular length of time before the crime is committed. It is sufficient if there was a malicious design and determination to kill, distinctly and deliberately formed in the mind any time before and continuing at the time the blow was struck. If a person has

actually formed a purpose maliciously and willfully to kill, and has deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the purpose and its execution. It is not time that constitutes the distinctive difference between murder of the first and second degree. An unlawful killing with malice aforethought, willfully, with premeditation and deliberation, constitute the crime of murder in the first degree; but the term 'deliberate' is not applicable to any act done on a sudden impulse. You cannot find the respondent guilty of murder in the first degree unless you find from all the evidence beyond a reasonable doubt that he did, on the 10th day of August, 1889, kill Frank E. T—, and that such killing was with malice prepense or aforethought, and also find beyond a reasonable doubt that such killing was willful, deliberate, and with a design to take the life of said deceased. In order for you to convict the respondent of murder in the first degree, the specific intent, as well as all the other elements of the offense which I have enumerated, must be affirmatively proved beyond a reasonable doubt; that Charles T. W— did shoot and kill the said Frank E. T— at the time and place specified, and that such killing was not excusable or justifiable under the instructions which I have already given you, that such killing was with malice, pretense or aforethought."—Approved: People v. Wright, 89 Mich. 70, 50 N. W. 792.

§ 5446. Intention Distinguished from Premeditation.

"There may, in contemplation of law, be an intention to kill a human being, which may not amount to a premeditated design to kill. Shooting a man intentionally and killing him is not necessarily the same as doing so with a premeditated design to kill him. There may be an intention to kill without its having been premeditated. In order to convict the defendant M. C. C— of murder in the first degree, you must be satisfied from the evidence, beyond a reasonable doubt, that the defendant M. C. C— not only had an intention to kill the deceased, but that he actually had a premeditated design to kill him."—Approved: Cook v. State, 46 Fla. 20, 35 South. 665.

§ 5447. Premeditation Presumed from Use of Bludgeon and Razor.

"The court instructs the jury that if you find and believe from the evidence that at the county of Jackson and State of Missouri, at any time before the 25th of July, 1904, defendant, Frank H—, either alone or acting in concert with another or others willfully, deliberately, premeditatedly, and of his malice aforethought did, with a certain club or bludgeon, and a certain razor and a certain pair of scissors and that the same or either of them was a dangerous and deadly weapon, beat, bruise, cut and stab one Clarence M—, inflict upon him mortal wounds, from which mortal wounds the said Clarence M—, within one year thereafter at the county of Jackson and the State of Missouri, dred, then you will find the defendant guilty of murder in the first degree and so say in your verdict. In that event you have nothing to

do with the punishment; that is fixed by law."—Approved: State v. Hottman, 196 Mo. 110, 94 S. W. 237.

§ 5448. So Also from Forcibly Drowning One.

"If you believe and find from the evidence that the defendant, Frederick Seymour B—, at the county of St. Louis and State of Missouri, on or about the 18th day of June, 1903, at a time prior to the second day of October, 1903 (being the date of the filing of the indictment herein), feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought forcibly and violently made an assault with his hands and arms upon the said James P. McC— and then and there feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought with his said hands and arms pushed, threw and cast the said James P. McC— into a pond there situated, in which there was a great quantity of water, and by means of such casting, throwing and pushing the said James P. McC— into said pond of water the said defendant, Frederick Seymour B—, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought then and there caused said James P. McC— to be choked, suffocated and strangled and drowned, and that by reason of the said choking, suffocating, strangling and drowning the said James P. McC— then and there prior to the said 2nd day of October, 1903, died, then you will find the defendant guilty of murder in the first degree, and so state in your verdict."—Approved: State v. Barrington, 198 Mo. 23, 95 S. W. 235.

§ 5449. So Also from Provoking Quarrel and Disarming and Killing.

"The court further instructs the jury that if they believe from the evidence in this case beyond a reasonable doubt that the defendant, Elijah W—, said in the hearing of William S— that 'Bill S— has been trying to agg up a racket all day,' and that the said William S— said to him that 'You are a liar,' and that the said defendant replied that 'You are another,' and immediately began to advance on the deceased with a knife in his hand, and that the deceased told him to stop, and shot in the ground near the defendant for the purpose of preventing the defendant from making an assault upon him with said knife, and that the said defendant thereupon forcibly disarmed the deceased, and after he had so disarmed him then and there willfully, maliciously, deliberately, and premeditatedly shot and killed the said William S— as is charged in the indictment, he is guilty of murder in the first degree, and the jury should so find."—Approved: Wright v. Commonwealth, 109 Va. 847, 65 S. E. 19.

§ 5450. And Provoking Quarrel for the Purpose of Killing.

"If you believe, from the evidence, beyond a reasonable doubt, that the defendant, without provocation sought and provoked a quarrel with Richard M— for the purpose of killing him, and in the quarrel did kill him, with malicious intention of taking the life of Richard M—, you will find him guilty of murder."—Approved: Kyle v. People, 215 Ill. 250, 74 N. E. 146.

§ 5451. By Poison Excludes Lower Degree.

"But if you find that the defendant, Charles T—, unlawfully, with bad intention, caused poison to be taken by Mabel S— which caused the death of the said Mabel S—, you should find the defendant, Charles T—, guilty of murder in the first degree; but, if you fail to so find, your verdict should be not guilty."—Approved: State v. Thomas, 135 Iowa, 717, 109 N. W. 900.

§ 5452. And by Lying in Wait.

"In this case the court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that the defendant, Ralph W—, on the night of October 9, 1901, in the county of Noble, territory of Oklahoma, left the residence of one Lyons with a loaded rifle, and went to the place or near the place where James M. P— then resided, and laid in waiting around said premises for the purpose of taking the life of the deceased, James M. P—, and that the said defendant shot the deceased while returning to his home, and while riding in the highway in a buggy, and that at the time he shot the deceased he had no reasonable and well-founded belief that his life was in danger, or that he would suffer some great bodily injury at the hands of the deceased, then, in that event, the defendant is guilty of murder as charged in the indictment, and the jury should so find."—Approved: Wells v. Territory, 14 Okl. 436, 78 Pac. 124.

§ 5453. Premeditated Design to Kill Any Trespasser.

"If you find from the evidence beyond a reasonable doubt that the defendant, believing that persons were in his melon patch, or were about to visit it, for the purpose of stealing his melons, started from Liberty Center, armed with a loaded revolver, to go to the place where his melon patch was located, and where the shooting occurred, with a willful, deliberate, and premeditated intention and formed purpose and design, with malice aforethought, to kill any person who might be found in or who might visit said melon patch for the purpose of stealing his melons, and you further find that William J. H. S— was found in said melon patch by the defendant, and that the defendant with such intent, deliberation, premeditation, purpose, design, and malice shot with said revolver the said William J. H. S—, and inflicted upon him a wound or wounds from which he thereafter died, then the defendant is guilty of murder in the first degree, and you should so return your verdict."—Approved: State v. Edgerton, 100 Iowa, 63, 69 N. W. 280.

§ 5454. Counseling One Combatant to Kill the Other.

"If you believe from the evidence beyond a reasonable doubt that Granville S—, in Whitley county, Ky., before the finding of the indictment herein, willfully, feloniously and with malice aforethought, and not in the necessary, or to him apparently necessary, defense of himself or his mother, with a knife or dirk, a deadly weapon, cut, stabbed, and wounded one Martin B. S—, from the effects of which cutting,

stabbing, and wounding the said S— then and there presently died, and if you further believe from the evidence beyond a reasonable doubt that at the time he did so the defendant Sarah S— was then and there present, willfully, feloniously, and with malice aforethought, and not in her necessary or to her apparently necessary, self-defense, counseling and advising the said Granville S— to do said cutting, stabbing, and wounding, or aiding or assisting the said Granville S— in doing said cutting, stabbing, and wounding, then, in that event, you should find the said Sarah S— guilty, as charged in the indictment, and fix her punishment at confinement in the state penitentiary for life, or at death, in your discretion."—Approved: Steely v. Commonwealth, 129 Ky. 524, 112 S. W. 655.

§ 5455. Mutual Combat Prearranged.

"If you believe from the evidence that the defendant B. F. D— was informed and believed that the deceased and one Tom K— had taken possession of a certain stock field the day previous to the killing, which stock field was also claimed by the defendant, and the defendant was informed and believed that the said K— and the deceased, or either of them, would be at the field in question on the morning of the killing, and that the man K— or the deceased had made threats against the life of this defendant, and that the defendant believed that K— and the deceased and others would be at the field in question, having in their possession deadly weapons, as mentioned heretofore, and you further believe that the defendant, knowing all these things, voluntarily organized or assisted in organizing a company of men, arming himself and such men with deadly weapons, guns, and revolvers loaded, and that such preparation was for the purpose of meeting the said K— and the said deceased in deadly conflict, and that the defendant proceeded to the place of the killing with said company and with said arms, and that at such time and place a conflict ensued with deadly weapons, and the deceased was killed, and the defendant participated in the shooting, then such conflict would be what is known in law as a 'mutual combat.' And if in such combat a party is killed, all parties, who knowingly and intentionally engaged in the conflict, are guilty of murder."—Approved: Driggers v. United States, 1 Okl. Cr. App. 167, 95 Pac. 612.

§ 5456. Conspiracy to Overthrow Government.

"If the jury believe, from the evidence, beyond a reasonable doubt, that there was in existence in this county and state a conspiracy to overthrow the existing order of society, and to bring about social revolution by force, or to destroy the legal authorities of this city, county, or state by force, and that the defendants, or any of them, were parties to such conspiracy, and that D— was killed in the manner described in the indictment, that he was killed by a bomb, and that the bomb was thrown by a party to the conspiracy, and in furtherance of the objects of the conspiracy then any of the defendants who were members of such conspiracy at that time are in this case guilty of

murder,—and that, too, although the jury may further believe, from the evidence, that the time and place for the bringing about of such revolution, or the destruction of such authorities, had not been definitely agreed upon by the conspirators, but was left to them and the exigencies of time, or to the judgment of any of the co-conspirators.

"If these defendants, or any two or more of them, conspired together with or not with any other person or persons to excite the people or classes of the people of this city to sedition, tumult, and riot, to use deadly weapons against and take the lives of other persons, as a means to carry their designs and purposes into effect, and in pursuance of such conspiracy, and in furtherance of its objects, any of the persons so conspiring, publicly, by print or speech, advised or encouraged the commission of murder without designating time, place, or occasion at which it should be done, and in pursuance of, and induced by such advice or encouragement, murder was committed, then all of such conspirators are guilty of such murder, whether the person who perpetrated such murder can be identified or not, if such murder was committed in pursuance of such advice or encouragement, and was induced thereby. It does not matter what change, if any, in the order or condition of society, or what, if any, advantage to themselves or others, the conspirators proposed as the result of their conspiracy, nor does it matter whether such advice and encouragement had been frequent and long continued or not, except in determining whether the perpetrator was or was not acting in pursuance of such advice or encouragement, and was or was not induced thereby to commit the murder. If there was such conspiracy as in this instruction is recited, such advice or encouragement was given, and murder committed, in pursuance of and induced thereby, then all such conspirators are guilty of murder. Nor does it matter, if there was such a conspiracy, how impracticable or impossible of success its end and aims were, nor how foolish nor ill-arranged were the plans for its execution, except as bearing upon the question whether there was or was not such conspiracy."—Approved: Spies v. People, 122 Ill. 1, 12 N. E. 865; 17 N. E. 898.

§ 5457. Conspiracy to Murder Deceased.

"You are further instructed that if you believe from the evidence, beyond a reasonable doubt, that Allen G— was a party to a conspiracy formed for the purpose of taking the life of John G—, and that in pursuance of such conspiracy, and while it existed, Allen G— and any one or more of the other conspirators went to the place where they knew or believed John G— would be, for the purpose of killing him, and did then and there willfully kill him in execution of such conspiracy, or that Allen G—, or any one or more of the conspirators, first commenced the difficulty by shooting or making a demonstration to shoot John G—, you should not acquit Allen G— on the ground of self-defense or apparent necessity, but should find him guilty of willful murder under instruction No. 2."—Approved: Gambrell v. Commonwealth, 130 Ky. 513, 113 S. W. 476.

§ 5458. Conspirators Equally Guilty.

"If you shall believe from the evidence, beyond a reasonable doubt, that the defendants Nelson G—, Silas G—, Rice G—, Thomas G—, Allen G—, or any two or more of them, including the defendant Allen G—, conspired and agreed to and with each other to kill and murder John G—, and that in pursuance and furtherance of such conspiracy, and in execution thereof, and while the same existed, any one or more of the defendants above named within such conspiracy as included the defendant, Allen G—, did willfully shoot and kill the said John G—, in this county, and before the finding of the indictment herein, then you ought to find the defendant, Allen G—, guilty of willful murder as charged in the indictment herein, and fix his punishment at death or at confinement in the state penitentiary for life, in your discretion, according to the proof."—Approved: Gambrell v. Commonwealth, 130 Ky. 513, 113 S. W. 476.

§ 5458a. Series of Instructions Excluding Lower Degrees than Murder in First Degree—Circumstantial Evidence.

"1. Under the laws of this State every murder which shall be committed by means of poison or any other kind of willful, deliberate, and premeditated killing of a human being with malice aforethought is murder in the first degree.

"2. As used in these instructions and in the indictment, the word willfully means intentionally and not by accident.

"Deliberately means done in a cool state of blood. If one kills another while the slayer is in a violent passion suddenly aroused by what the law recognizes as a just or lawful cause of provocation, it will not be murder in the first degree; but the court instructs you that in this case there is not any evidence of any such provocation or passion.

"Premeditatedly means thought of beforehand for any length of time, however short.

"The term malice, in its legal sense, does not mean mere spite, ill-will, hatred or dislike, as it is ordinarily understood, but it means that condition of mind which prompts one person to take the life of another without just cause or excuse, and signifies a state of disposition which shows a heart regardless of social duty and fatally bent on mischief.

"Malice aforethought means that the act was done with malice and premeditation.

"3. If you believe and find from the evidence in the cause, that the defendant T—, at the city of ———, and during the month of ———, did willfully, deliberately, premeditatedly and of his malice aforethought, give and administer, or cause to be given and administered to C—, a large quantity of a certain deadly poison called strychnine, which was there and then mixed and mingled with a certain quantity of cheese, and that he, the said T—, then and there knew that the said strychnine was then and there mingled and mixed with said cheese and that he further then and there knew that it, the said strychnine, was a deadly poison, and was likely to kill the said C— if swallowed into his body, and that the defendant did then and there willfully, deliberately, premeditatedly and of his malice aforethought design and intend that the

said C— should eat of said cheese and strychnine so mixed and mingled as aforesaid and should die from the effects thereof; and if you furthermore find that the said C— did not then and there know there was any strychnine mixed with the said cheese, and did then and there eat a large quantity of said strychnine so mixed as aforesaid with said cheese, and did then and there swallow the same down into his body, and that the said C— then and there from the effects of said strychnine became mortally sick and did then and there instantly die from the effects thereof, you will, if you so find, convict the defendant of murder in the first degree, as charged in the indictment; and unless you so believe and find you will acquit him.

"4. You are further instructed that if you believe and find from the evidence, that the said C— took and swallowed, into his body, cheese mixed with strychnine, and that said cheese so mixed, had been brought, together with other food, by said defendant or by some one at his request, to ——— church and left there for the said C—, with the purpose and intent that he should eat the same and be poisoned thereby and die thereof, then you are justified and warranted in finding that the same was given and administered to the said C— by said defendant, and in this event it is not necessary that you find that the defendant was present at the time when said cheese was so eaten.

"5. Before a conviction can be had on circumstantial evidence alone, the circumstances proven must be consistent with one another, and must, taken together, point so conclusively to defendant's guilt as to exclude every reasonable hypothesis of his innocence.

"In determining whether defendant is guilty or not you should take into consideration all the facts and circumstances in evidence, his acts and conduct, and any motive he may have had for doing or not doing the act charged, as shown by the evidence, and if you find and believe from all the facts and circumstances in evidence that there is no other reasonable conclusion from them than that he is guilty, you will find him guilty.

"6. Defendant has interposed what is known as an alibi in his defense; that is to say that at the time when the alleged offense is said to have been committed he was at another and different place and therefore could not have committed the same.

"Now if the evidence raises in your minds a reasonable doubt as to his presence on ——— at the place where the offense is alleged to have been committed, or if the evidence raises such a doubt as to whether he or some one at his request and in his stead was there at that time and place for the purpose of delivering to the deceased C— the cheese and strychnine with the intent and in the manner referred to in former instructions herein, if you have such a reasonable doubt, you will acquit the defendant.

"7. The good character of the defendant, if proved to your satisfaction, should be considered by the jury in passing upon the question of his guilt or innocence; for the law presumes that a person of good character is less likely to commit crime than one whose character is not good; but if all the evidence, together with that touching charac-

ter, proves him to be guilty, then good character affords no excuse or pollation of the offense and you should convict.

"8. The jury are the sole and exclusive judges of the credibility of the witnesses and of the weight of their testimony, and in determining said weight and credibility, you may consider the character of the witness, his or her manner while on the witness stand, and interest in or feeling toward the defendant or other person connected with the cause or any interest in the result of the trial and the probability or improbability of the witness' statement when considered with reference to all the other testimony in the cause; and in this connection the court instructs that if you believe and find that any witness has knowingly and willfully sworn falsely to any material fact in the cause, you may in your discretion, reject the whole or any portion of said witness's testimony.

"And in this connection the court further instructs that the testimony of experts in this case is simply the opinions of said experts to aid the jury in determining the truth of the facts, and that the jury should examine said testimony in connection with all the other evidence in the cause, subject to the same rules of credit and disbelief as the testimony of other witnesses.

"9. The defendant is a competent witness in his own behalf, but the fact that he is the person on trial and the interest he has in the result of the cause may be considered in passing upon the credibility of his testimony.

"10. The defendant is presumed to be innocent, and this presumption continues until it has been overcome by the evidence which establishes his guilt to your satisfaction and beyond a reasonable doubt; and the burden of proving his guilt rests upon the state. If his guilt has thus been made clearly to appear, your duty is to convict, and if not thus made to appear, your duty is to acquit; but to justify an acquittal on the ground of doubt alone it should be a reasonable and substantial doubt arising out of the evidence, and not a mere guess or possibility of innocence."—Approved: St. v. Thompson, 141 Mo. 408, 42 S. W. 949, 171 U. S. 380. (Copied from original files.)

§ 5458b. Another Series of Instructions—Circumstantial Evidence.

The court instructs the jury:

a. "The killing of a human being with malice aforethought is murder; that, on a charge of murder, malice is presumed from the fact of the killing; and when the killing is proven, unattended with circumstances of palliation, the burden of disproving malice is thrown upon the accused.

b. "Any wilful, deliberate and premeditated killing is murder in the first degree; but to constitute such killing, it is not necessary that the intention to kill should exist any particular length of time prior to the killing, and it is sufficient if such intent comes into existence for the first time at the time of killing, or any time previously.

c. "Every malicious homicide is presumed to be murder in the second degree; to raise the offense to murder in the first degree, the burden of proof is upon the Commonwealth; and to reduce the offense to manslaughter, the burden of proof is upon the prisoner.

d. "If you believe beyond a reasonable doubt that all the facts and circumstances proven in this case, as to the time, place, motive and opportunity for committing the crime charged in the indictment, and as to the conduct of the accused, combine and concur in pointing out the accused as the perpetrator of that crime, then you shall find him guilty.

e. "But the burden is upon the Commonwealth to prove beyond a reasonable doubt that the deceased was killed by the accused in the manner and by the means charged in the indictment.

f. "And the law presumes every person charged with crime to be innocent until his guilt is established by the Commonwealth beyond a reasonable doubt, and this presumption of innocence goes with the accused through the entire case, and applies at every stage thereof; and if, after having heard all of the evidence in this case, the jury have a reasonable doubt of the guilt of the accused upon the whole case, or as to any fact essential to prove the charge made against him in the indictment, it is their duty to give the prisoner the benefit of the doubt, and find him not guilty.

g. "A reasonable doubt, in the meaning of the law, is such a doubt as would cause a reasonable and prudent man in the graver and more important affairs of life to pause and hesitate before acting upon the truth of the matter charged or alleged. It must be serious and substantial and attach to facts and circumstances material to the case, and not to those that are immaterial and unessential.

h. "Upon the trial of this case, if a reasonable doubt of any fact necessary to establish the guilt of the accused as charged in the indictment be raised by the evidence or lack of evidence, such doubt is decisive, and the jury must acquit the accused (since a verdict of "not guilty" means no more than that the guilt of the accused has not been established in the precise, specific and narrow form prescribed by law).

i. "If upon the whole evidence in the case there is any reasonable hypothesis consistent with the innocence of the accused, the jury must find him not guilty.

j. "Circumstantial evidence, if it be of such weight and character as to exclude every hypothesis other than that the accused is guilty, is entitled to the same credit as direct and positive testimony. But it must always be scanned with great caution, and can never justify a verdict of guilty, especially in a case where the penalty may be death, unless the circumstances proved are so numerous and so weighty as to force a fair and unprejudiced mind to a moral conviction of the guilt of the accused beyond a reasonable doubt. And unless the jury believe that each and every circumstance essential to convict has been made out and established beyond a reasonable doubt, such evidence is not sufficient to support a verdict of conviction.

k. "Where a conviction for a criminal offense is to rest upon circumstantial evidence alone, the Commonwealth must not only show by a preponderance of evidence that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely incompatible upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the accused.

"And in such case it is not enough that all the circumstances proved are consistent with and point to the defendant's guilt. To authorize a conviction, the circumstances essential to conviction must not only all be in harmony with the guilt of the accused, but they must be of such a character that they cannot reasonably be true in the ordinary nature of things, and the defendant be innocent.

"The circumstances should not only be consistent with the prisoner's guilt, but they must be inconsistent with any other rational conclusion, or reasonable hypothesis of innocence, and such as to leave no reasonable doubt in the minds of the jury of the defendant's guilt.

l. "Where the proof of guilt rests upon circumstantial evidence alone for a conviction, the jury must be satisfied beyond a reasonable doubt that the crime has been committed by some one in manner and form as charged in the indictment, and then they must not only be satisfied that all the circumstances proved are consistent with the defendant's having committed the acts, but they must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that the defendant is the guilty person.

"If there is any one single material fact proved to the satisfaction of the jury by a preponderance of evidence, which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit the defendant.

"In order to justify the inference of legal guilt, from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused upon any rational theory, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

m. "To warrant the conviction of a person accused of crime, every fact necessary to establish his guilt must be proved beyond a reasonable doubt, and especially is this so if a conviction is to rest upon circumstantial evidence alone. It is not sufficient, therefore, that the evidence creates a suspicion or probability of guilt, no matter how strong. The accused is in such a case entitled to an acquittal, unless the fact of guilt is proved to the actual exclusion of every reasonable hypothesis of his innocence.

n. "The failure of the evidence to disclose any other criminal agent than the accused is not a circumstance which may be considered by the jury in determining whether or not he is guilty of the crime wherewith he is charged. The prisoner is presumed to be innocent until his guilt is established, and he is not to be prejudiced by the inability of the Commonwealth to point to any other criminal agent, nor is he called upon to vindicate his own innocence by naming the guilty person.

o. "While it is proper for the Commonwealth to show motive for the commission of the murder, it is not an indispensable element of the crime, and it is not bound to be proven. But in this case where the evidence is wholly circumstantial (with the exception of the testimony of Paul Beattie as to the alleged confession of the accused), the absence of evidence of an inducive cause or motive to commit the offense charged, if such evidence be lacking, is of itself a strong presumption of innocence.

"When the evidence fails to show any motive to commit the crime charged on the part of the accused, this is a circumstance in favor of his

innocence. And, in this case, if the jury find, upon careful examination of all the evidence, that it fails to show any motive on the part of the accused to commit the crime charged against him, then this is a circumstance which the jury ought to consider in connection with all the other evidence in the case in making up their verdict.

p. "The confessions of a prisoner out of Court are a doubtful species of evidence, and should be acted upon by the jury with great caution; and if the witness testifying to the confession has a motive for testifying thereto, or, if the fact brought out in the alleged confessions are favorable or advantageous to the witness detailing the confession, then the jury ought not to convict upon such confession alone, unless after a careful examination of the same and all the circumstances under which it was alleged to have been made, they are satisfied beyond a reasonable doubt of its truth, and that they may safely rely on it.

q. "Evidence of good character should be considered by the jury in determining the question of malice, premeditation and deliberation, and may be of itself sufficient to raise a reasonable doubt of the existence of these necessary elements of murder in the first degree; and where such reasonable doubt is raised by evidence of good character, it is conclusive in favor of the prisoner, and in that case you should find him not guilty.

r. "Evidence of good character, so far as it relates to the peaceable, amiable disposition of the accused, should be considered by the jury in determining the question of whether he committed the crime of violence and cruelty and brutality charged against him in the indictment, and it may be of itself sufficient to raise a reasonable doubt of the existence of malice and premeditation, necessary elements of the crime charged; and where such reasonable doubt is raised by such evidence, it is conclusive in favor of the prisoner.

s. "Before the jury can convict the defendant in this case, it must appear from the evidence, beyond a reasonable doubt, that the defendant, and not somebody else, committed the offense charged in the indictment. It is not sufficient that the evidence shows that the defendant or somebody else committed the crime, nor that the probabilities are that the defendant and not somebody else committed the crime, unless those probabilities are so strong as to remove all reasonable doubt as to whether the defendant or some one else is the guilty party.

"If from a consideration of all the evidence in this case, the jury entertain a reasonable doubt as to whether the offense charged was committed by the defendant or by some other person the jury should acquit.

t. "The jury have no right to disregard the testimony of the defendant on the ground alone that he is a defendant, and stands charged with the commission of a crime. The law allows him to testify in his own behalf, and the jury should fairly and impartially consider his testimony, together with all the other evidence in the case.

u. "Upon the trial of a criminal case by a jury, the law contemplates the concurrence of twelve minds in the conclusion of guilt, before a conviction can be had. Each individual juror must be satisfied beyond a reasonable doubt, of the defendant's guilt before he can under his oath consent to a verdict of guilty. Each juror should feel the responsibility resting upon him as a member of the jury, and should realize that his own mind must

be convinced, beyond a reasonable doubt, of defendant's guilt before he can consent to a verdict of guilty. Therefore, if any individual member of the jury, after having duly considered all the evidence in this case, and after consultation with his fellow jurors, should entertain such reasonable doubt of the defendant's guilt as is set forth in the other instructions in this case, it is his duty not to surrender his own convictions, simply because the balance of the jury entertain different convictions.

v. "In determining the weight to be given, the testimony of different witnesses in this case, the jury may consider the relationship to the parties, if it exist; their interest, if any, in the result of the case; their temper, feeling or bias, if any has been shown; their demeanor while testifying; their apparent intelligence; their means of information, and give such credit to the testimony of the witnesses as may be reasonable and just."—Approved: Commonwealth v. Beattie, Jr., Supreme Court of Va. Oct., 1911. (Not yet reported in official Reports—Copied from original files. The decision of the lower court was affirmed Nov. 13, 1911.)

B. Murder in Second Degree.

§ 5459. Willful Killing Without Premeditation or Deliberation.
5460. Implied Malice Defined.
5461. Killing While in Transport of Passion.
5462. Presumed from Unlawful Killing.
5463. Burden on State and Accused.
5464. Killing Bystander.
5465. Contributory Cause of Death.
5466. Pointing Gun—Accidentally Discharged in Attempting Unlawful Arrest.

§ 5459. Willful Killing Without Premeditation or Deliberation.

(a) "Deliberation and premeditation are not elements of the crime of murder in the second degree, but malice is an essential ingredient of such a crime. To constitute murder in the second degree, there must have been a willful killing, done purposely and maliciously, but without deliberation and premeditation; but if the evidence establishes the fact that the killing was unlawful, and was done with deliberate and premeditated malice, then the offense is murder in the first degree, if the evidence further shows that the killing was intentionally, purposely, and unlawfully done."—Approved: Davis v. State, 51 Neb. 301, 70 N. W. 984.

(b) "If you find from the evidence, beyond a reasonable doubt, that the prisoner, Will B—, with malice aforethought, intentionally fired a pistol at the deceased, Frank McM—, and killed him, and you failed to find beyond a reasonable doubt that the killing was done with premeditation and deliberation then it is your duty to return a verdict of guilty of murder in the second degree."—Approved: State v. Banks, 143 N. C. 652, 57 S. E. 174.

(c) "If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, in the month of May, 1904, at Vernon county, Missouri, with a pistol, shot and killed Robert T. W—, and that

such shooting and killing were done willfully, premeditatedly, and of malice aforethought, but without deliberation, you should find the defendant guilty of murder in the second degree. Unless you do so believe, you should not find him guilty of murder in the second degree."—Approved: State v. Todd, 194 Mo. 377, 92 S. W. 674.

(d) "The court instructs the jury that if they find from the evidence in the cause, beyond a reasonable doubt, that at Monroe county, in the state of Missouri, on the 24th day of October, 1906, the defendant did willfully, premeditatedly, on purpose, and of his malice aforethought, but without deliberation, shoot B. S— with a loaded pistol, thereby, then and there, inflicting upon said S— a mortal wound, from which mortal wound, if any, the said S— thereafter, and on said 24th day of October, 1906, at and in the county and state aforesaid, died, then you will find the defendant guilty of murder in the second degree."—Approved: State v. Sebastian, 215 Mo. 58, 114 S. W. 522.

§ 5460. Implied Malice Defined.

"The next lower grade of culpable homicide than murder in the first degree is murder in the second degree. Malice is also a necessary ingredient of the offense of murder in the second degree. The distinguishing feature, however, so far as the element of malice is concerned, is that in murder in the first degree malice must be proved to the satisfaction of the jury beyond a reasonable doubt as an existing fact, while in murder in the second degree malice will be implied from the fact of an unlawful killing. Implied malice is that which the law infers from or imputes to certain acts, however suddenly done. Thus, when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse, or justify the act, then the law implies malice, and the murder is in the second degree; and the law does not further define murder in the second degree than if the killing is shown to be unlawful, and there is nothing in evidence on the one hand showing express malice, and on the other hand there is nothing that will reduce the killing below the grade of murder, then the law implies malice, and the homicide is murder in the second degree."—Approved: Dobbs v. State, 54 Tex. Cr. R. 550, 113 S. W. 923.

§ 5461. Killing While in Transport of Passion.

(a) "If you believe from the evidence, beyond a reasonable doubt, that the defendant, with a deadly weapon, or instrument reasonably calculated and likely to produce death by the mode and manner of its use, in a sudden transport of passion, without adequate cause, and not in defense of himself against an unlawful attack, reasonably producing a rational fear or expectation of death or serious bodily injury, with the intent to kill, did with a pistol, within the county of Parker and state of Texas, on or about the 4th day of February, 1908, shoot and thereby kill Homer W—, as charged in the indictment, you will find him guilty of murder in the second degree, and so say in your verdict, and assess his punishment at confinement in the state penitentiary for any period that the jury may determine and state in their verdict, provided

that it be for not less han five years."—Approved: Clark v. State, 56 Tex. Cr. R. 293, 120 S. W. 179.

(b) "If you believe from the evidence beyond a reasonable doubt that the defendant, with his implied malice as that is hereinbefore explained, and with a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use, in a passion aroused without adequate cause, and not in defense of himself against an unlawful attack or demonstration reasonably producing a rational fear or expectation of death or serious bodily injury, with the intent to kill, did in Red River county, Texas, at any time prior to 28th day of November, 1907, unlawfully shoot and thereby kill John A—, as charged in the indictment, you will find him guilty of murder in the second degree."—Approved: Young v. State, 54 Tex. Cr. R. 417, 113 S. W. 276.

(c) "If you shall believe from the evidence, that the defendant shot and killed M— while he, the defendant, was in a violent passion, suddenly aroused by opprobrious epithets or abusive words spoken by M— to defendant, then such shooting and killing was not done with deliberation, and was not murder in the first degree. On the other hand, although the defendant shot and killed M— while the defendant was in a violent passion, suddenly aroused by opprobrious epithets or abusive words spoken to him by M—,—yet if such shooting and killing was done willfully, premeditatedly and of his malice aforethought, as heretofore explained, then defendant was guilty of murder in the second degree."—Approved: State v. Gee, 85 Mo. 647, 649.

(d) "Every person is permitted by law to defend himself against any unlawful attack, real or apparent, reasonably threatening, or reasonably appearing to him to threaten, injury to his person, and is justified in using all the necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary. Homicide is justified by law when committed in defense of one's person against any unlawful and violent attack, real or apparent, made or appearing to him to be made, in such a manner as to produce a reasonable expectation or fear of death or some serious bodly injury. If you believe from the evidence, beyond a reasonable doubt, that the defendant, with a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use, in a sudden transport of passion, aroused without adequate cause, and not in defense of himself against an unlawful attack, real or apparent, reasonably producing a rational fear or expectation of death or serious bodily injury, with the intent to kill, did shoot and thereby kill Minos L—, as charged in the indictment, you will find him guilty of murder in the second degree."—Approved: Puryear v. State, 56 Tex. Cr. R. 231, 118 S. W. 1042.

§ 5462. Presumed from Unlawful Killing.

"The court instructs the jury that where a homicide is proved the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, she must establish the characteristics of that crime, and if the prisoner would reduce it to

manslaughter, the burden is on him."—Approved: State v. Cain, 20 W. Va. 679, 709.

§ 5463. Burden on State and Accused.

"The court instructs you that, where a homicide is proved beyond a reasonable doubt, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, it must establish the characteristics of that crime, and if the prisoner would reduce it to manslaughter the burden is on him."—Approved: State v. Melvern, 32 Wash. 7, 72 Pac. 489.

§ 5464. Killing Bystander.

"If you believe from the evidence beyond a reasonable doubt that the defendant, Hardee T—, did in Camp county, Texas, on or about July 17, 1907, with express malice aforethought as hereinbefore defined, with a pistol, being a deadly weapon, and with a sedate and deliberate mind and formed design to kill William J—, did unlawfully shoot at William J—, and that in his effort to so shoot William J—, if you find he did, he accidentally and unintentionally shot and killed Mary I—, you will find him guilty of murder of the second degree and assess the proper punishment therefor. Or if you shall believe from the evidence that defendant shot at William J— with a pistol, same being a weapon reasonably calculated to inflict death or some serious bodily injury from the mode and manner of its use, and that he intended thereby to kill said J—, and that in his attempt to so shoot William J—, if he did, he unintentionally and accidentally shot and killed Mary I—, then if you shall find beyond a reasonable doubt that when he shot at J— he was not acting in his self-defense, under the law of justifiable homicide hereinafter charged, and if you further so find that when he so shot at J—, if he did, his mind was not by some adequate cause aroused to such a degree of anger, rage, sudden resentment, or terror rendering it incapable of cool reflection, hereinafter explained under the charge upon manslaughter, then you will find him guilty of murder in the second degree, and assess the proper punishment therefor."—Approved: Thomas v. State, 53 Tex. Cr. R. 272, 109 S. W. 155.

§ 5465. Contributory Cause of Death.

"The law is this: If one, with malice aforethought, either express or implied, inflict an injury upon or to the person of another, which causes death, and which death would not then have occurred but for such injury so inflicted, the person inflicting such injury is guilty of murder in the second degree; and in such case it is no defense if another cause or other causes may also have contributed to such death. And in this case, if defendant inflicted any of the injuries as charged upon the body or person of the deceased, and if, but for the same, she would not have then died, then he is guilty of murder in the second degree; and this would be so even if at the time she was affected with heart disease, or afflicted with intoxication, and they contributed also to her death,"—State v. Smith, 73 Iowa, 32, 34 N. W. 597.

§ 5466. Pointing Gun Accidentally Discharged in Attempting Unlawful Arrest.

"The defendants in this case do not deny the killing, but claim that it was accidental. They insist that they had a warrant in their hands, issued by some justice of the peace of Fulton county, Ky., authorizing the arrest of the deceased upon a charge of larceny, and that in pursuance of that authority, in attempting to make the arrest of the deceased, he was unintentionally killed. The warrant, as produced in evidence, gave no authority to these defendants to attempt arrests in this state. It is confined to the state of Kentucky, and only authorizes officers in that state to make the arrest in that state, and by its terms would be no authority to these defendants, even in the state of Kentucky, to arrest the deceased, and an attempt to make an arrest in this state under the authority produced, that is, the warrant read, was wholly unauthorized and illegal, and conferred no more authority than if they had no warrant whatever. If you find, therefore, from the proof, that these defendants armed themselves with shotguns, and went in search of the deceased in Lake county, Tenn., and when they met him they presented their loaded guns, pointed at him, and ready to fire, and the gun was accidentally discharged, the defendants would be guilty of murder in the second degree. The doctrine is clear that all acts done intentionally, and without legal excuse, whereby the life of a human being is directly put in jeopardy, subjects the wrong-doer to the charge of murder, if life flows away unintended."—Approved: Tarver v. State, 90 Tenn. 485, 16 S. W. 1041.

C. Manslaughter.

§ 5467. Elements of Manslaughter.
5468. Passion Excited by Adequate Cause.
5469. Provocation Calculated to Excite Passion.
5470. Sudden Heat of Passion Without Previous Malice.
5471. Question for Jury Whether Acts are Adequate Cause for Passion.
5472. Facts Stated as Adequate Cause for Passion.
5473. Arising Out of Attempt to Commit Misdemeanor.
5474. Involuntary Manslaughter by Criminal Negligence.
5475. The Same by Careless Use of Pistol.
5476. The Same Caused by Mere Assault and Battery.

§ 5467. Elements of Manslaughter.

(a) "The court instructs the jury that the crime of murder requires the mind to have acted from deliberation and intelligence, and when it is clouded by a passion, apparently irresistible in a reasonable person, the killing is only manslaughter. The passion which in law rebuts the imputation of malice, so as to reduce the killing to manslaughter, need not be so overpowering as for the time to shut out knowledge and destroy volition, but that heated condition of the mind that would render a reasonable man deaf to the voice of reason, so that although the act done was likely to produce death, it was not the result of malignity of heart, but imputable to human infirmity. There is no necessity that the reason should be dethroned, or that the slayer should act in a whirlwind of passion, but there must be a sudden passion upon reasonable provocation, apparently sufficient to make the passion irresistible."—Approved: May v. People, 8 Colo. 210, 224.

(b) "Manslaughter is voluntary homicide committed under the immediate influence of sudden passion, arising from an adequate cause, but neither justified nor excused by law. By the expression 'under the immediate influence of sudden passion' is meant: 1. That the provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation. 2. That the act must be directly caused by the passion arising out of the provocation. It is not enough that the mind be merely agitated by passion arising from some other provocation, or provocation given by some person other than the person killed. 3. The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment or terror, rendering it incapable of cool reflection. By the expression 'adequate cause' is meant such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. * * * In order to reduce a voluntary homicide to the grade of manslaughter, it is necessary not only that adequate cause exist to produce a degree of anger, rage, sudden resentment or terror, sufficient to render the mind incapable of cool reflection, but also that such state of mind did actually exist at the time of the commission of the offense. * * * Thus, gentle-

men, when a voluntary homicide takes place under the immediate influence of sudden passion, as explained above, and no cause exists which will in law justify or excuse its commission, then to determine whether such homicide is manslauhter or murder in the second degree, the true test is, was there adequate cause to produce such passion? If there was such adequate cause, the homicide will be manslaughter; if there was not such adequate cause, the homicide will be murder of the second degree."—Approved: Kemp v. State, 13 Tex. App. 561, 563.

(c) "The court instructs the jury that the true nature of manslaughter is that it is a homicide mitigated out of tenderness to the frailty of human nature. Every man, when assailed with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection. If, during that period, he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood and violence of anger, and not through malice. The same rule applies to a homicide in mutual combat, which is attributed to sudden and violent anger occasioned by the combat, and not to malice. Where two meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up, in which blows are given on both sides, it is a mutual combat, without much regard to who is the assailant; and if no unfair advantage be taken in the outset, and an occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is regarded as homicide in the heat of blood, and under our statute is manslaughter in the first degree."—Approved: Robinson v. Territory, 16 Okl. 241, 85 Pac. 451.

(d) "This court instructs this jury that under this information you can, and the court instructs you that it is your duty to, find this defendant guilty of manslaughter; if you believe from the evidence before you, beyond a reasonable doubt, that the fatal blow was struck unlawfully, but without malice, and while the defendant was under the influence of passion and in the heat of blood, produced by an adequate and reasonable provocation, and before a reasonable time had elapsed for the blood to cool and reason to control. But if, on the other hand, you have any reasonable doubt of the guilt of this defendant, it is your duty to find him not guilty."—Approved: Savary v. State, 62 Neb. 166, 87 N. W. 34.

(e) "Manslaughter is voluntary homicide committed under the immediate influence of sudden passion, arising from an adequate cause, but neither justified nor excused by law. By the expression under the immediate influence of sudden passion is meant: That the provocation must arise at the same time of the commission of the offense, and that the passion is not the result of a former provocation. That the act must be directly caused by the passion arising out of the provocation. It is not enough that the mind is merely agitated by passion arising from some other provocation. The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment, or terror, rendering it incapable of cool reflection."—Approved: Sue v. State, 52 Tex. Cr. R. 122, 105 S. W. 804.

§ 5468. Passion Excited by Adequate Cause.

"If you believe from the evidence beyond a reasonable doubt that the defendant, with a deadly weapon or instrument reasonably calculated and likely to produce death, by the mode and manner of its use, in a sudden transport of passion aroused by adequate cause as the same is herein explained, and not in defense of himself against an unlawful attack, reasonably producing a rational fear or expectation of death or serious bodily injury, did shoot with a pistol and thereby kill Henry M—, as charged in the indictment, you will find the defendant guilty of manslaughter and assess his punishment in the state penitentiary for any term of years not less than two nor more than five."—Approved: Sartin v. State, 51 Tex. Cr. R. 571, 103 S. W. 875.

§ 5469. Provocation Calculated to Excite Passion.

"If the jury believe from the evidence beyond a reasonable doubt that the defendant, Green W—, in Breathitt county, Ky., and before the finding of the indictment, did kill Lee M— by shooting him with a pistol, loaded with leaden ball, or other hard substances, when it was not necessary, and it did not reasonably appear to defendant to be necessary to protect himself, Clay W—, Sam W—, or Elliott C— from danger, real or apparent, of death or great bodily harm at the hands of Lee M—, or those, if any, acting in concert with and aiding him, they should find defendant guilty—that is, guilty of murder—if they believe from the evidence beyond a reasonable doubt that said killing was done unlawfully, willfully, feloniously, and with malice aforethought; but guilty of voluntary manslaughter if the jury believe from the evidence such killing was without previous malice, and should further believe from the evidence beyond a reasonable doubt that it was unlawfully, willfully, and feloniously done in a sudden affray, or in sudden heat and passion, upon provocation which was reasonably calculated to excite defendant's passion beyond the power of control. If the jury find the defendant guilty of murder, they will fix his punishment at death or confinement in the penitentiary for life. But if they find him guilty of voluntary manslaughter, they should fix his punishment at confinement in the penitentiary not less than two nor more than twenty-one years, in their discretion."—Approved: Watkins v. Commonwealth, 123 Ky. 817, 97 S. W. 740.

§ 5470. Sudden Heat of Passion Without Previous Malice.

(a) "If you believe from the evidence in this case beyond a reasonable doubt that Granville S—, in Whitley county, Ky., and before the finding of the indictment herein, did unlawfully, willfully, feloniously in sudden affray, or in sudden heat of passion, without previous malice, and not in the necessary, or to him apparently necessary, defense of himself or his mother, cut, stabbed, and wounded Martin B. S— with a dirk or knife, a deadly weapon, from which cutting, stabbing, and wounding the said S— then and there presently died, and if you shall further believe from the evidence beyond a reasonable doubt that at the time the said Granville S— so cut, stabbed, and wounded the said Martin B. S— the said Sarah S— was then and there present, unlaw-

fully, willfully, feloniously in sudden affray, or in sudden heat of passion, and not in her necessary, or to her apparently necessary, self-defense, counseling and advising the said Granville S— to do the said cutting, stabbing, and wounding, or aiding or assisting the said Granville S— in doing said cutting, stabbing, and wounding, then you should find the said Sarah S— guilty of voluntary manslaughter, and fix her punishment at confinement in the state penitentiary for any length of time not less than two years nor more than twenty-one years, in your discretion."—Approved: Steely v. Commonwealth, 129 Ky. 524, 112 S. W. 655. See also Keaton v. Com. (Ky.), 108 S. W. 315 (not reported in state reports).

(b) "If the killing of Ruel A— was not justifiable as defined in these instructions, and you entertain a reasonable doubt as to whether the shooting of the said A— was done with a premeditated design to effect his death, and you do believe from the evidence beyond a reaonable doubt that the defendant fired the fatal shot while in the heat of passion, and with no premeditated design to kill the said A—, you will then find him guilty of manslaughter in the first degree."—Approved: Atchison v. State, 3 Okl. Cr. App. 295, 105 Pac. 387.

§ 5471. Question for Jury Whether Acts are Adequate Cause for Passion.

"If you believe from the evidence beyond a reasonable doubt that the defendant, with the intent to kill, struck the said Dennis O— with a piece of wood, and thereby killed him, but at the time of so doing the said Dennis O— had made an attack on him, but you find that the said defendant was not justified in so doing on the grounds of self-defense as that law is given to you in this charge, but you believe that such attack of said O— on defendant under all the facts and circumstances in evidence in this case would commonly have produced a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the defendant incapable of cool reflection, then such attack would be adequate cause to reduce the killing to the grade of manslaughter."—Approved: Green v. State, 52 Tex. Cr. R. 44, 105 S. W. 205.

§ 5472. Facts Stated as Adequate Cause for Passion.

(a) "The court instructs the jury that if they find from the evidence in the cause that on the twenty-first day of December, 1901, at the county of Monroe, in the state of Missouri, in the difficulty between defendant and Bob S— in which said S— was killed, if so the jury find, the said S— was the aggressor and struck defendant, or approached defendant in a threatening manner, and while within striking distance of defendant raised his hand or arm as though about to strike defendant, and that such conduct, if any, on the part of said S—, provoked in defendant a sudden violent passion and that in said heat of passion, if any, the defendant then and there with a loaded pistol shot and killed S—, but not under such circumstances as to justify the defendant on the ground of self-defense, as defined in other instructions, then you will find the defendant guilty of manslaughter in the fourth degree."—Approved: State v. Sharp, 183 Mo. 715, 82 S. W. 134.

(b) "If you find and believe from the evidence that the deceased struck the defendant with his fist with force and violence, or assaulted the defendant in any other manner before the defendant shot the deceased, then such violence or such assault would constitute in law just cause or provocation which would reduce the crime below the degree of murder, and, if you find that the defendant was assaulted by the deceased or received personal violence at the hands of the deceased before the defendant discharged his pistol at the deceased, and, thereupon, while in the heat of passion, caused by such assault or by such personal violence, he, the defendant, shot and killed the deceased, then, and in that event, you should convict the defendant of manslaughter in the fourth degree, unless, under other instructions given you, you acquit the defendant on the grounds of self-defense."—Approved: State v. Gieseke, 209 Mo. 331, 108 S. W. 525.

(c) "The court instructs the jury that if they find from the evidence in the cause that at Monroe county, in the state of Missouri on the 24th day of October, 1905, Benjamin S—, if such is the fact, with a corn-knife, approached the defendant in a threatening manner, and within striking distance, either struck at or struck defendant with said corn-knife, but not under such circumstances as to justify the defendant in shooting in self-defense, as defined in other instructions, and that such assault or striking, if any, by said S— provoked on the part of defendant a sudden heat of passion, and that in such heat of passion, if any, the defendant shot said S—, from which said shooting, if any, the said S— thereafter, on said 24th day of October, 1906, at the county and state aforesaid, died, then you will find the defendant guilty of manslaughter."—Approved: State v. Sebastion, 215 Mo. 58, 114 S. W. 522.

(d) "Although the jury may believe from the evidence beyond a doubt that the defendant shot and killed deceased with a gun, loaded as in instruction No. 1 described, if they believe from the evidence that he committed the act without previous malice, but shall believe from the evidence beyond a reasonable doubt that such shooting and killing was unlawfully and willfully done by defendant in a sudden affray or in sudden heat and passion and with the felonious intent to kill deceased, or shall believe from the evidence beyond a reasonable doubt that the shooting and killing of deceased, if done by defendant, was the direct and natural, though unintentional, result of a reckless, wanton, or grossly careless use or handling, if any, of said gun by defendant in struggling with deceased for its possession, when he knew it was dangerous to life if so handled by him, they should find him guilty of voluntary manslaughter."—Approved: Smith v. Commonwealth, 133 Ky. 532, 118 S. W. 368.

§ 5473. Arising Out of Attempt to Commit Misdemeanor.

(a) "If you acquit the defendant of the crime of murder in the second degree, you will then inquire whether or not he is guilty of manslaughter in the first degree, and in this connection you are instructed that, if you find and believe beyond a reasonable doubt, from all the evidence submitted to you, that the defendant, T. J. B—, did

on or about the 14th day of September, 1907, at and within the county of Finney and state of Kansas, without a design to effect death, by his act, procurement, or culpable negligence, while engaged in the perpetration or attempt to perpetrate any crime or misdemeanor, not amounting to a felony, in such manner and under such circumstances as would constitute murder at the common law, as I have hereinbefore defined the same to you, shoot and kill, or encourage, aid, or assist another in shooting and killing, the said William H. B—, in the manner as charged in the information, and that such killing was neither justifiable nor excusable under the rules of law hereinbefore given you, it will be your duty to find the defendant guilty of manslaughter in the first degree, but if you do not so find and believe, it will be your duty to acquit him thereof."—Approved: State v. Bassnett, 80 Kan. 392, 102 Pac. 461.

(b) "You are further instructed that if you find from the evidence in the case that the deceased came to his death by the mutual mistake of the deceased and the defendant in the honest endeavor to avoid a collision both on the part of the deceased and the defendant, then in that event such killing would be accidental and not criminal, and your verdict should be not guilty. In connection with that instruction, gentlemen of the jury, I instruct you that if the defendant was at the time alleged in this information engaged in an unlawful act, to wit, the act of driving horses and a wagon upon the public highway in such a manner as to endanger the lives and persons of others, and such unlawful act resulted in the killing of the person named in the information mentioned, it would then be immaterial whether the killing was accidental or intentional; the defendant would be guilty."—Approved: State v. Stentz, 33 Wash. 444, 74 Pac. 588.

§ 5474. Involuntary Manslaughter by Criminal Negligence.

"The fact of the explosion, and even the possibility of guarding against it, do not necessarily make out a case of culpable negligence. Very few acts in life are done with such care as to prevent accidents, or would have been possible. The law only requires of any one that degree of care and prudence which persons who are reasonably careful ordinarily observe. To require more would be to put every one under restraints in the management of his business and in his dealings with others, which would be more hurtful in the embarrassments they would cause than beneficial in the protection they would give against injuries. Whether the absence of the defendant from the boiler room at the time of the explosion was negligent depends upon circumstances. If we find that the defendant, from his past experience, from his knowledge of the boiler, and the flow of oil, and of the burner, had reason to believe, and in fact did believe, that it was consistent with safety to be absent from the boiler, as he was at the time of the explosion, then he was not, in law, guilty of criminal negligence by reason of such absence."—Approved: People v. Thompson, 122 Mich. 411, 81 N. W. 344.

§ 5475. The Same by Careless use of Pistol.

"If the jury believe from the evidence that the accused had reasonable grounds to believe and did believe there was no danger in handling

the pistol as he did, and that it was done without any purpose of harm upon his part, and further believe from the evidence, to the exclusion of a reasonable doubt, that the killing resulted from the careless use of the weapon, they should find him guilty of involuntary manslaughter, and fix his punishment at a fine or imprisonment in the county jail, either or both, in your discretion; but if they believe the killing was accidental, and without carelessness, he should be acquitted."—Approved: Blanton v. Commonwealth (Ky.), 112 S. W. 594 (not reported in state reports).

§ 5476. The Same Caused by Mere Assault and Battery.

"If you are convinced beyond a reasonable doubt by the evidence, that the defendant, Henry J—, unlawfully committed an assault and battery upon the person of James C—, in Porter county, Indiana, on the 16th day of August, 1884, without any intention or purpose to kill him, the said James C—, but thereby inflicted a wound upon his person, by reason of which the said C— died in said county, on the 24th day of August, 1884, the defendant is guilty of involuntary manslaughter. Assault and battery, as used in this instruction, may be defined as any unlawful touching, striking, biting, beating or wounding of one person by another, in a rude, insolent and angry manner."—Approved: State v. Johnson, 102 Ind. 247.

CHAPTER CXLVIII.

SELF DEFENSE.

A. Self Defense.
B. Dying Declarations.

A. Self Defense.

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§ 5477. Nature of the Law of Self-defense.

(a) "The court instructs the jury that the law of self-defense is emphatically the law of necessity, to which the party may have recourse under certain circumstances to prevent any reasonably apprehended great injury which he may have reasonable grounds to believe is about to fall upon him."—Approved: State v. Maupin, 196 Mo. 164, 93 S. W. 379.

(b) "The right of self-defense rests on certain well-defined principles, and they are not numerous. Where a person is without fault in bringing about the difficulty, where they are in danger of losing their lives or of sustaining serious bodily harm, and where there are no other probable means of escape save to kill the assailant, then the law says they have a right to kill; and that is self-defense. If the testimony satisfies you that the defendants were without fault in bringing about the difficulty, that they were in danger of losing their lives or of sustaining serious bodily harm, and that there was no other means of escape but to kill, then that makes out a case of self-defense, provided that a person of ordinary reason and firmness would have done the same, and provided that the same impressions would have been created in the mind of a person of ordinary firmness and reason; that is, that they were in serious danger, and that there was no probable means of escape. If they establish that plea, then they are entitled to a verdict of not guilty. If any of the facts necessary to make out their plea, is not established, then their plea is not established, and cannot avail. Each and every one of the facts necessary to the plea must be established."—Approved: State v. Franklin, 80 S. C. 332, 60 S. E. 953.

§ 5478. Honest Belief in the Existence of Imminent Danger.

(a) "Although you may believe from all of the evidence in this case beyond a reasonable doubt that the accused shot and killed Sampson B—, yet if you shall further believe from the evidence that at the time he did so he had reasonable grounds to believe, and did in good faith believe, that he was then in danger of losing his life or suffering great bodily harm at the hands of Sampson B—, and there appeared to the accused, in the exercise of a reasonable judgment, no other safe means of avoiding the then impending, or to him apparently impending, danger, then the accused had the right to shoot in his necessary, or to him apparently necessary, self-defense; and, if the killing occurred under such circumstances, then the jury should acquit the accused on the ground of self-defense and apparent necessity."—Approved: Ayers v. Commonwealth (Ky.), 108 S. W. 320 (not reported in state reports).

(b) "If the defendant did shoot and kill Newton Drummond V—, but at the time defendant shot said V— the defendant was in danger of death, or of suffering some serious bodily harm at the hands of said V—, or if the defendant at the time believed, and had reasonable grounds to believe, that he was in danger of death, or of suffering some serious bodily harm at the hands of said V—, and if it was necessary, or to defendant reasonably appeared to be necessary, to shoot said V— to avert the danger, or what, to the defendant appeared to be such danger, this was a shooting and killing in self-defense. And, if defendant did

shoot and kill N. D. V—, yet the jury should find the defendant not guilty, unless the jury believe from the evidence, beyond a reasonable doubt, that said shooting was not done in self-defense."—Approved: Hocker v. Commonwealth (Ky.), 111 S. W. 676 (not reported in state reports).

(c) "Although you may believe from the evidence beyond a reasonable doubt that the defendant, Robert B—, Jr., did, in Laurel county, Ky., and before the finding of the indictment against him willfully shoot and wound James S—, so as to cause or hasten his death within a year and a day thereafter, yet if you further believe from the evidence that the defendant, in the exercise of a reasonable judgment, believed, and had reasonable grounds to believe, from all the facts and circumstances proven in this case, that said James S—, just preceding the firing of the first shot by the defendant, was about to make an attack upon the defendant, and that by reason thereof the defendant, in the exercise of a reasonable judgment, believed, and had grounds to believe, that he was then and there in danger of suffering loss of life or great bodily harm at the hands of said James S—, and that it was necessary or believed by the defendant, in the exercise of reasonable judgment, to be necessary to so shoot at and kill said James S—, in order to avert that danger, real or to the defendant apparent, then you ought to acquit the defendant upon the grounds of self-defense or apparent necessity therefor."—Approved: Commonwealth v. Boyd (Ky.), 112 S. W. 605 (not reported in state reports.)

(d) If you believe from the evidence that the defendant, Etherage McM—, killed Whit R— on or about the 1st day of October, 1904, in Rockwell county, Tex., and, if you further believe that at the time of or shortly prior thereto the deceased was in the act of making an attack upon defendant, or made some demonstration indicating an immediate intention of inflicting death or serious bodily injury upon the defendant, or if deceased was doing some act or acts which, either alone or together with accompanying words, produced in the mind of the defendant, as viewed from his standpoint, when considered with all the facts and circumstances as known to defendant, or as believed by the defendant to exist, a reasonable apprehension of death or serious bodily injury at the hands of said Whit R—, then the defendant had the right to kill the deceased in self-defense; and if you believe that he did kill deceased by striking him with a stick to protect himself from said danger, or apparent danger, and that in doing so he used no more force than it reasonably appeared to him to be necessary, then such killing was in justifiable self-defense, and you should find the defendant not guilty."—Approved: McCormick v. State, 52 Tex. Cr. R. 493, 108 S. W. 669.

(e) "If you find from the evidence in this case that P— killed the deceased in self-defense, honestly believing his own life to be in jeopardy, or that he was in imminent danger of receiving serious bodily injury at the hands of the deceased, and that he used no more force than was necessary to protect himself, then it would be justifiable homicide; and under such circumstances, of course, the defendant would not be guilty."—Approved: People v. Piper, 112 Mich. 644, 71 N. W. 174.

(f) "Now, gentlemen of the jury, it is for you to say whether this respondent was assaulted in the manner claimed. The law gives to every person the right to protect themselves from unlawful assault. Where an assault is made, the right to resist exists; but the resistance must be in proportion to the danger which is apprehended. It is not every assault that would justify a person in using a deadly weapon. If, however, the person assailed honestly believes his life in danger, or that he may suffer serious bodily harm, he has the right to resist, even to taking the life of his assailant. The person assailed is to be judged by the circumstances and conditions as they honestly appeared to him at the time. The defense of self-defense necessarily assumes an assault. There can be no self-defense by a person until he is assaulted by another It is for you to say, from all the evidence in this cause, whether the respondent honestly believed he was in danger of losing his life, or in danger of great bodily harm, and that it was necessary for him to fire this fatal shot in order to save himself from such apparent and threatened danger."—Approved: People v. Hull, 86 Mich. 449,49 N. W. 288.

(g) And the rule of law on the subject of necessary self-defense is this: Where a man in the lawful pursuit of his business is attacked, and where from the nature of the attack he honestly believes that there is a design to take his life or to do him great bodily injury, then the killing of his assailant under such circumstances would be excusable or justifiable, although it should afterwards appear that no great bodily injury was intended, and no real danger of losing his life, or receiving great bodily injury, existed. And the jury are instructed that if you find from the evidence that at the time the defendant is alleged to have killed the deceased the circumstances surrounding the defendant were such as in sound reason would justify or induce in the defendant's mind an honest belief that he was in danger of receiving from the deceased great bodily harm, or that the defendant was about to lose his life, and that the defendant in doing what he then did was acting from instinct of self-preservation, then he is not guilty."—Approved: Maynard v. State, 81 Neb. 301, 116 N. W. 53.

§ 5479. Such Belief to be on Reasonable Grounds.

(a) "The court instructs the jury that, if they believe from the evidence, at the time defendant shot Henry C— (if you believe from the evidence beyond a reasonable doubt he did shoot him), his life was in danger, or in danger of suffering great bodily harm at the hands of decedent, Henry C—, or that defendant believed, and had reasonable grounds for such belief, that he was in such danger, and you further believe from the evidence that defendant used no more force than was necessary, or that seemed to him in the exercise of a sound discretion to be necessary, to repel such danger to him, real or reasonably apparent, then you will acquit defendant on the ground of self-defense or apparent necessity."—Approved: Commonwealth v. Thomas (Ky.), 104 S. W. 326 (not reported in state reports).

(b) "It is not necessary to this defense that the danger should have been real or actual, or the danger should have been intended and imme-

diately about to fall. If you believe that defendant had reasonable cause to believe these facts and that he shot in self-defense, as herein explained, and to prevent such expected harm, then you should acquit. But before you acquit on the ground of self-defense you ought to believe that defendant's cause of apprehension was reasonable."—Approved: State v. Sebastian, 215 Mo. 58, 114 S. W. 522.

(c) "It is not enough that the party killing another believed himself in danger from the persons killed, unless the facts were such that the jury, in the light of all the facts and circumstances known to the slayer, or believed by him to be true, can say he had reasonable ground for such belief."—Approved: State v. Hazlett, 16 N. D. 426, 113 N. W. 374.

§ 5480. Attack Causing Reasonable Apprehension.

(a) "If from the evidence you believe the defendant killed the said Cabe G—, but further believe that at the time of so doing the deceased had made an attack on him, which, from the manner and character of it, caused him to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, the defendant killed the deceased, then you should acquit him, and, if the deceased was armed at the time he was killed and was making such attack on defendant, and if the weapon used by him and the manner of its use were such as were reasonably calculated to produce death or serious bodily harm, then the law presumes the deceased intended to murder or aimed to inflict serious bodily injury upon the defendant."—Approved: Ringo v. State, 54 Tex. Cr. R. 561, 114 S. W. 119.

(b) "The court instructs the jury that the law is, if a person is assaulted in such a way as to induce in him a reasonable belief that he is in actual danger of losing his life, or of suffering great bodily harm, he will be justified in defending himself, although the danger be not real, but only apparent. Such a person will not be held responsible criminally if he acts in self-defense, from real and honest convictions as to the character of the danger, induced by reasonable evidence, although he may be mistaken as to the extent of the actual danger. A person need not be in actual imminent peril of his life or of great bodily harm before he may slay his assailant. It is sufficient if, in good faith, he has a reasonable belief, from facts as they appear to him at the time, that he is in such imminent peril."—Approved: State v. Yokum, 11 S. D. 544, 79 N. W. 835.

§ 5481. Actual Danger Not Necessary.

(a) "A reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time, and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant. If from the evidence you believe the defendant killed the same Jake M—, but further believe that at the time of so doing the deceased by his acts, if any, or by his

acts coupled with his words, if any, caused him to have a reasonable expectation or fear of death or serious bodily injury, viewing the case from the defendant's own standpoint, and that, acting under such reasonable expectation or fear, the defendant killed the deceased, then you should acquit him."—Approved: Glover v. State (Tex. Cr. R.), 107 S. W. 854 (not reported in state reports).

(b) "It is not necessary to this defense that the danger should have been actual or real, or that the danger should have been impending and immediately about to fall. All that is necessary is that the defendant had reasonable cause to believe, and did believe, these facts. But, before you acquit on the ground of self-defense, you ought to believe that defendant's cause of apprehension was reasonable. Whether the facts constituting such reasonable cause could have been established by the evidence you are to determine; and, unless the facts constituting such reasonable cause have been established by the evidence in the cause, you cannot acquit, in such cause, on the ground of self-defense, even though you may believe that defendant really thought he was in danger."—Approved: State v. Powers, 39 Mont. 259, 102 Pac. 583.

(c) "The jury are instructed that the rule of law on the subject of self-defense is this: Where a man, in the lawful pursuit of his business, is attacked and when, from the nature of the attack, there is reasonable ground to believe there is a design to take his life, or to do him great bodily harm, and the party attacked does so believe, then the killing of the assailant under such circumstances will be excusable or justifiable homicide, although it should afterwards appear that no injury was intended, and no reasonable danger existed. It is enough that there be an apparent danger—such an appearance as would induce a reasonable person in defendant's position to believe that he was in immediate danger of great bodily injury. Upon such appearances a party may act with safety. Nor will he be held accountable though it should afterwards appear that the indications were wholly fallacious, and that he was in no actual peril. The rule in such cases is this: What would a reasonable person,—a person of ordinary caution, judgment, and observation,—in the position of the defendant, seeing what he saw and knowing what he knew, suppose from this situation and these surroundings? If such reasonable person, so placed, would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril, and in acting upon such appearance."—Approved: Carleton v. State, 43 Neb. 373, 61 N. W. 699.

§ 5482. Belief and Fear Must be that of a Reasonable Man.

(a) "Where one without fault is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit a felony, or some great bodily injury upon him, and to afford grounds for reasonable belief that there is imminent danger of the accomplishment of this design, he may, acting under these fears alone, slay his assailant, and be justified by the appearances; and, where the attack is sudden and the danger imminent, he may stand his ground and slay his aggressor, even though it may be proved that he might more easily have gained his safety by flight."—Approved: People v. Cyty, 11 Cal. App. 702, 106 Pac. 257.

§ 5483. Appearances at the Time to be Judged.

(a) "Upon the question of self-defense the court instructs you, when a person is assaulted by another in such a manner as to incite in him a reasonable belief that he is in danger of losing his life or receiving great bodily injury, he may legally resist the attack by employing such reasonable means within his power as are apparently necessary to defend himself. In order to justify self-defense, it is not indispensable that there should exist actual and positive danger. A party who is assaulted in such a way as to infuse in him a well-grounded and reasonable belief that he is in danger of suffering great bodily harm will be justified in defending himself, although the danger be not real, but only apparent. In other words, he is justified in acting upon the facts as they appear to him at that time, and is not to be judged by the facts as they actually are. And in his case, if the jury believe from the evidence that the defendant was assaulted by the deceased in such a way and under such circumstances as to infuse and fix in his mind a sincere conviction that his life was in danger or his body in imminent peril, then he was justified in defending himself, whether the danger was real or only apparent. The law considers that men, when threatened with danger, are obliged to judge from appearances, and determine therefrom as to the actual state of things surrounding them; and in such cases, if persons act from honest conviction, induced by reasonable evidence, they will not be held responsible criminally for a mistake as to the extent of the actual danger."—Approved: Argabright v. State, 62 Neb. 402, 87 N. W. 146.

(b) "I instruct you that the defendant was justified in acting upon the circumstances as they appeared to him at the time. And in determining whether or not the defendant took the life of deceased under circumstances to render the act justifiable, as hereinbefore explained, you will determine whether or not the circumstances as they appeared to him were such as to lead a reasonable man to believe that there was a design to kill him or do immediate bodily harm, coupled with immediate danger of such design being accomplished."—Approved: State v. Appleton, 70 Kan. 217, 78 Pac. 445.

(c) "In order to justify homicide on the ground of self-defense, or defense of another, it is not essential that there should be any actual or real danger to the life or person of the party killing, or to the life or person of the party for whose protection the homicide is committed, if if there be an appearance of danger, caused by the acts or demonstrations of the party killed, or by words coupled with the acts or demonstrations of such party; and if such acts or demonstrations, or such words coupled with acts or demonstrations, produce in the minds of the party slaying a reasonable expectation or fear of death or some serious bodily injury to himself, or to the person in whose behalf he interferes, the party killing will be justified if he acts on such appearance of danger, and under such reasonable expectation or fear, even though it subsequently appear that there was in reality no danger."—Approved: Kemp v. State, 13 Tex. App. 561, 565.

§ 5484. Person of Ordinary Courage Believing Life in Danger.

"If you are satisfied from the evidence in this case, or if the evidence raises in your mind a reasonable doubt that, while the defendant was in the pursuit of his lawful business, the deceased, Maurice D. R—, made an unlawful attack upon the defendant and opened fire upon the defendant with a revolver which the deceased then held in his hand, and if from the nature of the attack a reasonable person, a person of ordinary courage, judgment, and observation in the position of the defendant, and knowing what he knew, and seeing what he saw, would have been justified in believing that there was a design on the part of the deceased to take the life of the defendant, or to do him great bodily harm, then, under such circumstances, the defendant would have been justified in believing himself in danger of his life, or of suffering great bodily injury, and would have had the legal right to kill his assailant, and if under such circumstances the defendant shot and killed the said Maurice D. R—, such killing under such circumstances would be justifiable on the ground of self-defense, and you should acquit the defendant."—Approved: Von Haller v. State, 73 Neb. 161, 107 N. W. 233.

§ 5485. Killing from Mere Cowardice.

"You are further instructed that one is not justified in assaulting another through mere fear, cowardice, or malice, but the law requires that he act with reasonable courage, taking into consideration his age, experience, temperament, and all other matters disclosed upon trial, tending to show as to whether or not, situated as the defendant was, and viewing the transaction from his standpoint and with his knowledge and information, he had reasonable ground for fear of bodily harm. Before one is justified in assaulting another, he must reasonably believe that he is in danger of receiving bodily harm at the hands of his adversary."—Approved: Cavett v. Territory, 1 Okl. Cr. App. 493, 98 Pac. 890. See also Wells v. Territory, 14 Okl. 436, 78 Pac. 124.

§ 5486. Killing as Only Safe Means of Protection.

"Although the jury may believe from the evidence, beyond a reasonable doubt, that the defendant, Green W—, shot and killed Lee M—, if they believe from the evidence that, when he did so, he had reasonable grounds to believe, and did believe, that deceased, or others of his party acting in concert with him, were then about to inflict upon defendant, Clay W—, Sam W—, Elliott C—, or any of them, death or great bodily harm, or it reasonably appeared to him that such was the case, and it further reasonably appeared to him that the only reasonably safe means of protecting himself, or them, against such danger, real or apparent, was to shoot the said Lee M—, or others of his party acting in concert with him, and the shooting and killing of the former was done under these circumstances, the same was excusable on the ground of apparent necessity in the defense of himself or associates named, and the jury should acquit the defendant."—Approved: Watkins v. Commonwealth, 123 Ky. 817, 97 S. W. 740.

§ 5487. Drawing Nice Calculations from Appearances Not Required.

"In determining whether or not the shot was fired without legal excuse or justification, you are instructed that the defendant admits the killing of E. C. K—. And his claim is that in what he did he was acting in self-defense. You are instructed, in relation to this claim of the defendant, that where one is assaulted by another person in such a manner as to induce the person assaulted to reasonably believe that he is at the time in actual danger of losing his life, or of suffering great bodily harm, he is justified in defending himself, although the danger be not real, but only apparent, and he may use such force and means to defend himself as may in good faith appear necessary to him as an ordinarily prudent and courageous man, under all the circumstances at the time surrounding him. And he is not bound to draw nice calculations from appearances. All that is required of him is that he shall act from reasonable and honest convictions as to his danger, although mistaken as to the extent of said danger. But before one is justified in taking life in self-defense, it must be, or it must reasonably appear to be, the only means of saving one's own life, or of preventing great bodily injury."—Approved: State v. Dyer, 147 Iowa, 220, 124 N. W. 629.

§ 5488. Honest Belief Must be Without Fault or Carelessness.

"If the jury believe from the evidence that at the time the fatal shots were fired that defendant, acting upon the facts as they appeared to him, honestly believed, without fault or carelessness on his part, that the danger was so urgent and pressing that it was necessary to shoot F— in order to save his own life, or prevent his receiving great bodily injury, they will acquit."—Brooks v. State, 85 Ark. 376, 108 S. W. 205.

§ 5489. Unwarranted Apprehension—Avoiding Killing.

(a) "If you believe from the evidence that, at the time of the killing, the defendant could with safety to himself have avoided such killing, and that the defendant knew, or as a reasonable man could have known, that he could with perfect safety to himself and his person have avoided such killing, then, if you find all these facts, the defendant cannot justify such killing on the grounds of self-defense."—Approved: People v. Baldocchi, 10 Cal. App. 42, 101 Pac. 28.

(b) "You are instructed that, although you may believe that the defendant, at the time he shot deceased, believed he was in danger of losing his life or receiving great bodily injury at the hands of the deceased, still, if you should believe, beyond a reasonable doubt, that the defendant was negligent, as explained in these instructions, in coming to such belief, then it would be your duty to find him guilty of manslaughter."—Approved: Brooks v. State, 85 Ark. 376, 108 S. W. 205.

(c) "If you find from the evidence that at the time he shot Owen F. E— the defendant did not, as a reasonable man, believe he was in imminent danger of losnig his life or suffering great bodily injury at the hands of the said Owen F. E—, then the killing was not done in self-defense, but was either murder or manslaughter, no matter who began the affray, and even though the defendant had really and in good faith endeavored to decline any further struggle, and had so informed the

said Owen F. E—."—Approved: State v. Houk, 34 Mont. 418, 87 Pac. 175.

(d) "By the language 'lawful defense of the person' is meant what we sometimes term 'self-defense.' The right of self defense is founded upon the natural right of a man to protect himself against the unlawful assault upon him by another. This defense having been made in this case, the jury should weigh each fact and circumstance that is offered as justifiable grounds in connection with all the other testimony in the case. Mere apprehension that a person designs to kill another or to commit some great bodily harm upon him is not sufficient to justify such other in first making an attack and committing the act complained of in the indictment herein; and to perform such act, when the excuse therefor is mere apprehension, would not be sufficient to justify the act as one having been committed in the lawful defense of the person. In a case where a person attacks another, or attempts to execute a design upon the life of such other, and is in an apparent situation to do so, thereby creating a reasonable belief that such design is about to be accomplished, then the person so threatened may resist and use all necessary force to prevent the accomplishment of such design, even to the extent of taking life, and it is justifiable."—Approved: Robinson v. Territory, 16 Okl. 241, 85 Pac. 451.

(e) "As a matter of law, no one has a right to kill another, even in self-defense, unless such killing is apparently necessary for such defense. Before a person can justify taking the life of a human being on the ground of self-defense, he must, when attacked, employ all reasonable means within his power, consistent with his safety, to avoid the danger and avert the necessity for the killing."—Approved: Smith v. Territory, 11 Okl. 669, 69 Pac. 805.

§ 5490. Where Merely Battery is Intended.

"But the rule of law is different when the attack not felonious. * * * An assault without a weapon of any kind, by a quarrelsome and violent man upon another, when there is no reason for the belief by the person attacked, that his person was in danger of death or great bodily harm, but that an ordinary battery was all that was intended, and all that he had reason to fear from the acts of his assailant, the party assailed has no right to take the life of such assailant."—Approved: State v. Kennedy, 20 Iowa, 571.

§ 5491. Otherwise Where There is Great Disparity in Size and Strength.

"The court instructs the jury that if the evidence shows that the deceased was physically capable of inflicting great and serious bodily harm upon the defendant with his feet or hands, and that the defendant had reason to believe and did believe that he was then and there in danger of such harm at the hands of the deceased, and fired the fatal shot to protect himself from such harm, then it is immaterial, and makes no difference, whether the deceased was armed or not at the time of the killing.

"The court instructs the jury that if the deceased was a much larger and stronger man than the defendant, so much so that the defendant

was wholly and absolutely incapable of coping with him in a physical combat, and was liable to receive serious and great bodily injuries at the hands of the deceased in the event that they became engaged in such a combat, then the defendant was justified in using a deadly weapon to protect himself from an unjustifiable and deadly attack of the deceased, even though the deceased was wholly unarmed, and the defendant was in no danger from the deceased, except such as might be inflicted by the deceased with his hands or feet."—Approved: Hill v. State, 94 Miss. 391, 49 South. 145.

§ 5492. Threats Without Overt Acts.

(a) "The bare fear that a man intends to commit murder or other atrocious felony, however well grounded, unaccompanied by any overt act indicative of any such intention, will not warrant killing the party by way of prevention. There must be some overt act indicative of imminent danger at the time, but the jury will judge whether the conduct and acts of the deceased Henry B—, at the time of the shooting were of such a character as to create in the mind of the prisoner a reasonable fear that the deceased intended to commit murder or other felony, or to do the prisoner great bodily harm. Apprehension of danger, to justify a homicide, ought to be based not alone on surmises; but there ought to be coupled therewith some act on the part of the party from whom danger was apprehended, evidencing an immediate intention to carry into execution his threats or designs; and the jury are to judge of the reasonable grounds for such apprehension on the part of the prisoner from all the facts and circumstances, as they existed at the time of the killing."—Approved: State v. Cain, 20 W. Va. 710.

(b) "The only purpose for which proof of threats is permitted is to throw light on the defendant's acts at the time he fired the shot; and if you believe, from the evidence as explained in these instructions, that deceased was not making an attempt to shoot defendant, as viewed from his standpoint, then, and in that event, you will not consider threats, if proven for any purpose; and in this connection the court instructs you that no threat, however violent, however great, is any provocation whatever."—Approved: Long v. State, 76 Ark. 493, 91 S. W. 26.

(c) "What is or is not an overt action—that is, what act upon the part of the person slain will justify the person taking his life—varies with the circumstances of each particular case. Under some circumstances the slightest movement may justify instant action on the part of the person threatened with danger, upon the ground of reasonable apprehension of danger. Under other circumstaces this might not be true, and it is for the jury, viewing the facts and circumstances in evidence from the defendant's standpoint, to determine how this may be in each case."—Approved: Green v. United States, 2 Okl. Cr. App. 55, 101 Pac. 112. See also Robinson v. Territory, 16 Okl. 241, 85 Pac. 451; Cavett v. Territory, 1 Okl. Cr. App. 493, 98 Pac. 890.

(d) "Now, if, before the defendant made any hostile demonstration with a pistol toward Lester L—, the deceased, such as reasonably indicated an intention by defendant to shoot said deceased, and shortly

thereafter seized, or attempted to seize, or reach for or present a target rifle gun, in such manner and under such circumstances as reasonably induced in defendant the apprehension and belief that it was the purpose and intent of said Lester L— to shoot him, defendant then had the right in his lawful self-defense to shoot and kill said Lester L—, and under these circumstances the defendant would have the right to continue to shoot until, as it reasonably appeared to him, he was freed from the danger thus threatened. If, however, defendant was the aggressor and commenced shooting at Lester L— while and before neither said Lester or Clyde L— had done or attempted any hostile act or demonstration towards him, defendant could claim no justification under the law of self-defense."—Approved: Arnwine v. State, 54 Tex. Cr. R. 213, 114 S. W. 796. See also Jay v. State, 56 Tex. Cr. R. 111, 120 S. W. 449.

§ 5493. Defendant Bringing on Difficulty.

(a) "The jury are instructed that a person who brings on a difficulty for the purpose of killing his adversary or wreaking his vengeance on him, cannot avail himself of the right of self-defense in order to shield himself of the consequences of wounding or injuring his adversary, however imminent the danger in which he may have found himself during the progress of the affray, and if in this case the jury believe from the evidence that the defendant prepared himself with a knife previous to the difficulty with, or the wounding of, the witness, Joe Q—, and sought, brought on, or voluntarily entered into the encounter with Q— in order to wreak his malice on him, then there is no self-defense in the case."—Approved: State v. Harris, 209 Mo. 423, 108 S. W. 28. See also State v. Long, 201 Mo. 664, 100 S. W. 587.

(b) "The court charges the jury that, to make out a case of justifiable self-defense, the evidence must show that the difficulty was not provoked or encouraged by defendant, that he was or appeared to be so menaced at the time as to create reasonable apprehension of danger to his life or of grievous bodily harm, and that there was no other reasonable hope of escape from such present impending peril."—Approved: Watson v. State, 155 Ala. 9, 46 South. 232.

(c) "If you shall believe from the evidence that, at the time the defendant shot at and killed the deceased (if you shall believe from the evidence, beyond a reasonable doubt, that he did do so), he believed and had reasonable grounds to believe that he was then and there in danger of death or the infliction of some great bodily harm at the hands of the deceased, and that it was necessary or was believed by the defendant in the exercise of a reasonable judgment to be necessary to so shoot at and kill the deceased in order to avert that danger, real, or to the defendant apparent, then you ought to find the defendant not guilty on the grounds of self-defense and apparent necessity therefor, unless you shall believe from the evidence beyond a reasonable doubt that the defendant willfully and feloniously sought and brought on the difficulty in which the deceased was killed, and first willfully and feloniously assaulted, or attempted to, the deceased, and continued such difficulty without abandoning the same, and in so doing made the harm

or danger, if any there was, towards the defendant from the deceased, necessary or excusable on the part of the deceased in his own necessary self-defense from the accused, in which event you ought not to excuse the defendant upon the grounds of self-defense and apparent necessity."—Approved: Brandenburgh v. Com., 28 Ky. L. Rep. 1050, 91 S. W. 269.

(d) "The court further instructs the jury that the law of self-defense does not mean or imply the right of attack, nor will it permit of acts done in retaliation or for revenge. And in this case, if you believe from the evidence that the defendant sought out or brought on the difficulty at the time the fatal shot was fired, and for the purpose of wreaking vengeance upon the deceased, James M. P—, on account of the acts of the deceased in reference to the sale of the farm in controversy and to deliver the possession thereto, and that at the time the defendant shot the deceased there was no reasonable apprehension of immediate and pending injury to the defendant, and that the defendant shot the deceased from a spirit of retaliation or revenge, and for the purpose of punishing the deceased for past injuries, then you are charged that the defendant cannot avail himself of the law of self-defense, and that the shooting and killing of the deceased affords no justification or excuse."—Approved: Wells v. Territory, 14 Okl. 436, 78 Pac. 124.

§ 5494. Defendant Using Language Calculated to Bring on Fight.

"I charge you that if a man picks a quarrel with his fellow, and kills his fellow, the law denies him the plea of self-defense. And I charge you, further, that if the defendant, Wash H—, used language towards Elbert C— that a reasonable man would expect to bring on a fight, then the law denies him the plea of self-defense. Put yourselves, gentlemen, by the table in that room with these parties. Take up the transaction in its inception. Did Wash H— say anything that was reasonably calculated to bring on a fight? Did what he said actually contribute to bringing on a fight? If so, the law denies him the shield of self-defense. If he did not do that, the law puts the shield of self-defense in his hand. If he is denied the plea, it falls to the ground, and you consider it no longer. If you sustain the plea, why he goes hence without day, free from the penalties of the law."—Approved: State v. Hunter, 82 S. C. 153, 63 S. E. 685.

§ 5495. Intentionally Putting Oneself Where Difficulty Will Ensue.

(a) "I further instruct you, in relation to the law of self-defense, that one cannot claim its benefits after he has intentionally put himself where he knows or believes he will have to invoke its aid. Circumstances justifying assault, in the law of self-defense, must be such as to render it unavoidable. If you believe from the evidence, and beyond a reasonable doubt, that the defendant could have avoided any conflict between himself and H— without increasing the danger to himself, it was his duty to avoid such conflict and so render a resort to the law of self-defense unnecessary."—Approved: State v. McCann, 43 Or. 155, 72 Pac. 137.

(b) "If Silas T— said to defendant's hired man that defendant was indebted to him, or that he would not sell to defendant, on credit, until such debt was paid, it was proper and lawful for the defendant, when informed of such claims, to go to T—'s shop for the purpose of learning what amount, if any, was owing by him to T—, or to pay it; and, if defendant went to T—'s shop for such purpose or purposes, and not to provoke a difficulty or quarrel with T—, he was in the proper exercise of his lawful rights. But, if you find from the evidence that the defendant went to Silas T—'s shop with a view to provoke a quarrel or bring on a difficulty with T—, he was not acting lawfully in doing so, and, in that case, he cannot avail himself of the plea of self-defense in killing T—, if he killed him in the difficulty so sought by defendant, though such killing may have become necessary to preserve the defendant's life, or his person, from an imminent and enormous injury; but he would be guilty of murder or manslaughter, as you find the facts to be, under the rules given you elsewhere in these instructions."—Approved: State v. Murdy, 81 Iowa, 603, 47 N. W. 867.

(c) "In this connection you are instructed that no man by his own lawless act can create a necessity for acting in self-defense, and thereupon assault and injure or kill the person with whom he seeks the difficulty, and then interpose as a defense the plea of self-defense. The plea of necessity is a shield only for those who are without fault in occasioning it and acting under it."—Approved: Robinson v. Territory, 16 Okl. 241, 85 Pac. 451.

§ 5496. Defendant Slaying After Danger Has Ceased.

"The jury are instructed that while a person has the right, when assaulted by another in such a manner as to excite in him, a reasonable belief that he is in danger of losing his life or receiving great bodily injury, to resist the attack by using such force as is apparently necessary to defend himself, yet, if, after he has secured himself from danger, he takes the life of his assailant in a spirit of revenge, or for some unlawful purpose, he cannot claim exemption from punishment on the ground of self-defense."—Approved: Carleton v. State, 43 Neb. 373, 61 N. W. 699.

§ 5497. Defendant Abandoning Conflict.

(a) "On the other hand, if you believe from the evidence that the defendant commenced the affray by assaulting K—, or by so menacing him as to induce in K— a reasonable belief that he was in immediate danger of physical violence at the hands of the defendant, then the defendant is not entitled to a verdict of acquittal on the ground that he killed K— in self-defense, unless the defendant really and in good faith endeavored to decline any further struggle, and in some way, by words or conduct, notified K— thereof, and thereafter acted only upon a well-grounded fear in him, as a reasonable man, that he was in imminent danger of being killed by, or of receiving great bodily harm from K—. The words used by the defendant did not constitute an assault, nor were they sufficient to excite in K— a reasonable fear that

he was about to be assailed by the defendant."—Approved: State v. Tighe, 27 Mont. 327, 71 Pac. 3.

(b) "Homicide is excusable when it is committed by one or two persons who have mutually and voluntarily engaged in an unlawful combat without any felonious purpose; and after they have mutually so engaged, one of them having become dissatisfied with it, and desirous to withdraw from it, makes that desire manifest by abandoning the combat and retreating from his adversary, who nevertheless pursues him until at last he is compelled, in the necessary defense of himself from great bodily harm or death, to turn and slay his adversary. In such case the law, while it does not regard the slayer as entirely innocent, because he had first voluntarily engaged in the contest, yet inasmuch as he subsequently, and before the fatal blow was given, did all he could to repair his original fault, the law excuses him because of the necessity under which he was placed by the act of the deceased."—Approved: People v. Guidice (Cal.), 15 Pac. 44.

(c) "But, if you believe from the evidence, beyond a reasonable doubt, that the defendant, Allen G—, first began the difficulty by shooting John G— or making a demonstration to shoot him, then you ought not to excuse the defendant on the ground of self-defense or apparent necessity therefor, or the defense of another or apparent necessity therefor, as defined in instruction No. 4. Unless you believe from the evidence that he, or he and those acting with him, if any, abandoned such assault and difficulty in good faith, and then the deceased, seeing or knowing of such abandonment, continued to assault the defendant or either of the defendants, or to so menace them or any of them, or that it was necessary, or was believed by the defendant in the exercise of a reasonable judgment to be necessary to shoot the deceased, or to aid, encourage, advise, or command one of the other defendants to so shoot and kill the deceased in order to avert that danger, real or to the defendant apparent, in which event you ought to acquit the defendant on the ground of self-defense and apparent necessity therefor."—Approved: Gambrell v. Commonwealth, 130 Ky. 513, 113 S. W. 476.

(d) "But, to justify the taking of A—'s life in self-defense, it must appear from the evidence that the defendant not only really and in good faith endeavored to decline any further combat, and to escape from A—, before the fatal blow was given, but it must also appear that the circumstances were such as to excite the fears of a reasonable person that A— intended to take his life, or to inflict on him a great bodily harm; and, further, that the defendant really acted under the influence of these fears, and not in a spirit of revenge."—Approved: State v. Bone, 114 Iowa, 537, 87 N. W. 507.

(e) "Should you believe from the evidence beyond a reasonable doubt that the defendant was the aggressor in the difficulty in the field, but should you believe from the evidence that the said defendant abandoned such difficulty in good faith, then you are instructed that if you believe from the evidence that the said Haywood D— renewed the difficulty at the house the defendant's right of self-defense would revive."—Approved: Davis v. State, 52 Tex. Cr. R. 198, 107 S. W. 851.

(f) "The court instructs the jury that if they find from the evidence in the cause that defendant sought and brought on or provoked the combat with Benjamin S— in order to have a pretext for killing his adversary, or doing him some great bodily harm, and for the purpose of wreaking his, the defendant's, vengeance upon him, and that, actuated by such intent and motive, if such is the fact, the defendant fired the fatal shot for the purpose aforesaid, then the defendant cannot avail himself of the plea of self-defense, however sorely he may have been pressed by his adversary; on the other hand, although the defendant may have brought on or provoked the combat, yet, if thereafter, and before the fatal shot was fired, the defendant with the honest purpose of abandoning further combat with said S—, did abandon the same and withdrew as far as he could or fled, and that said S— still pursued defendant, then the defendant had a right, if in self-defense, as hereafter explained, to slay said S—."—Approved: State v. Sebastian, 215 Mo. 58, 114 S. W. 522.

§ 5498. Right to Stand Ground.

(a) "If the defendant was in a place where he had a right to be, and the deceased was making an effort to draw a revolver for the purpose of shooting or killing the defendant, and the defendant did not bring on the difficulty, and the circumstances surrounding him, in connection with any threats theretofore made against him by the deceased, were such as to induce in the defendant's mind a reasonable belief that the deceased intended to shoot and kill him, and the defendant did in fact so believe, then the defendant was not obliged to retreat, nor consider whether he could safely retreat, but had a right to stand his ground, and meet any attack made upon him with a deadly weapon, in such way and with such force as under all the circumstances he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his own life, or to protect himself from great bodily injury; and if, in such conflict between them, the defendant killed the deceased, the killing was justifiable, and it is your duty to find the defendant not guilty."—Approved: Robinson v. Territory, 16 Okl. 241, 85 Pac. 451.

(b) "If a person is assaulted by another in such a manner as to give him reasonable grounds to believe that there is a design on the part of his assailant to take his life or to do him great bodily injury, and that there is immediate danger that such design will be accomplished, and if he honestly believes that such design on the part of his assailant and such danger to himself actually exist, then he has the right to stand his ground, and to use such force as shall, on reasonable grounds, honestly appear to him to be necessary to repel the attack, even to the extent of killing his antagonist. A person when so assailed will be justified in defending himself, though the danger may not be real, but only apparent. He will not be responsible criminally if he acts in self-defense from real and honest convictions as to the character of the danger induced by reasonable evidence, although he may be mistaken as to the extent of the actual danger."—Approved: State v. Pipes, 65 Kan. 543, 70 Pac. 363.

(c) "A reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time, and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant."—Approved: Cornelius v. State, 54 Tex. Cr. R. 173, 112 S. W. 1050.

(d) "A person attacked at a place where he has a right to remain need not retreat, but may repel force by force in defense of his person, against one who, at the time, is actually, or apparently, intending or endeavoring unlawfully to kill him, or inflict upon him great bodily harm, and in such defense the assailed may lawfully meet the attack made upon him in such a way, and with such force, as under all the circumstances he at the moment honestly believes, and has reasonable grounds to believe, are necessary to save his own life, or to protect himself from great bodily harm, and in such defense the assailed may lawfully kill the assailant, if at the time he is actually or apparently in imminent danger of death or great bodily harm at his assailant's hands, and, if under all the circumstances he honestly believes, and has reasonable grounds to believe, such killing to be necessary to save his own life, or protect him from great bodily harm. But the rule of law is different when the attack is not felonious in character; that is, when from the attack there is no real or reasonably apparent danger of death or great bodily harm to the assailed."—Approved: State v. Churchill, 52 Wash. 210, 100 Pac. 309.

(e) "Where one without fault is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit a felony or some great bodily injury upon him, and to afford grounds for a reasonable belief, as a reasonable man, that there is imminent danger of the accomplishment of the design, he may, acting under these fears alone, slay his assailant and be justified by the appearances. And as, where the attack is sudden, and the danger imminent, he may increase his danger by retreat, so situated he may stand his ground, that becoming his 'wall,' and slay his aggressor, even if it be proved that he might more easily have gained his safety by flight. So, too, under such circumstances he may pursue and slay his adversary; but the pursuit must not be in revenge nor after the necessity for the defense has ceased, but must be prosecuted in good faith for the sole end of winning his safety and securing his life."—Approved: State v. McGreevey, 17 Idaho, 453, 105 Pac. 1047.

(f) "In cases of personal peril, such as this defendant claims he was placed under, the defendant had not only the legal right to defend himself, but the law supposes it to be his duty to defend himself so far as he has personal capacity, and any serious bodily harm apprehended from a felonious attack would not merely excuse, but justify, extreme resistance; and this defendant should not be required, if hard pressed by O'H—, to draw very fine distinctions concerning the extent of the injuries the man O'H— might inflict."—Approved: People v. Macard, 73 Mich. 15, 40 N. W. 784.

§ 5499. Trespasser's Right to Repel Attack.

"You are also instructed that the fact that one is a trespasser upon the premises of another will not justify the other in taking life, and if the one trespassing is violently attacked, and is threatened with serious bodily injury, he may repel that attack by whatever force is necessary, even to the extent of taking his assailant's life."—Approved: People v. Turpin, 10 Cal. App. 526, 102 Pac. 680.

§ 5500. Resistance Extends Only to What is Necessary.

(a) "Every person is permitted by law to defend himself against any unlawful attack, reasonably threatening injury to his person, and is justified in using all necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary."—Approved: Jirou v. State, 53 Tex. Cr. R. 18, 108 S. W. 655.

(b) "If the jury believe that George G— and deceased, acting in concert and with the intention of inflicting great bodily harm upon defendant, attacked him with clubs, the defendant had the right to resist such attack with a weapon of like character, and if, in the necessary defense of his own person and without using any more force, or a more dangerous weapon than was being used against him, he inflicted a blow which he had reason to, and did, believe was necessary for his own protection, but which, unintentionally upon his part, produced death, such act would not be criminal and the jury should acquit."—Approved: State v. Burke, 30 Iowa, 332, 333.

§ 5501. Prior Relations Explanatory of Surrounding Circumstances.

(a) "If in this you are in doubt as to the precise circumstances under which the homicide was committed—that is, are in doubt as to whether the deceased, at the very moment of the killing, was, in fact, about to inflict upon defendant great bodily harm—then the previous relations between the parties and their previous conduct towards each other and defendant's knowledge of the deceased become important for your consideration; and those previous relations and that previous conduct and knowledge embrace every word and every act, in short, every fact and circumstance, bearing upon that point, of which evidence has been received. You are to place yourselves as nearly as possible in the situation of the parties, as respects each other, at the very scene and time of the homicide."—Approved: People v. Gallanar, 3 Cal. App. 431, 86 Pac. 814.

(b) "If you believe that, before the occasion of the alleged killing, L— and defendant had a difficulty, and that ill feeling arose between them and continued up to the alleged homicide, and that since such previous difficulty Lester L—, by words or acts, or by both words and acts, manifested ill will toward defendant and an intention to do him harm, you are instructed that in passing upon the issue of self-defense as to the alleged killing of either or both Clyde and Lester you may consider these last-mentioned circumstances in connection with all the other circumstances and facts in the case in judging of the reasonableness or otherwise of defendant's apprehension of dan-

ger. And if you do not believe the killing of either or both Lester and Clyde was in self-defense, you may nevertheless consider all of said circumstances in passing upon the question whether adequate cause as an element of manslaughter existed or not, and the degree of passion, if any, under which defendant labored at the time."—Approved: Arnwine v. State, 54 Tex. Cr. R. 213, 114 S. W. 796.

(c) "If you find that the assault by O'H— upon the defendant was fierce, violent, and sudden, and was not caused by anything that the defendant had done, and the defendant was justified in repelling it, even to taking the life of O'H—, it will be unnecessary to inquire what ill feeling or malice was entertained by the defendant towards O'H—; for if a person is assailed in a violent, fierce, and sudden, manner, so that the only way left is for him to slay his antagonist, then it is wholly immaterial what ill will or malice he may entertain towards him, if he contributed nothing to the attack, or in any manner caused it, for the malice and ill will, if any existed, are wholly swallowed up in the defense of life and limb."—Approved: People v. Macard, 73 Mich. 15, 40 N. W. 784.

(d) "The court instructs the jury that a man has the right to seek and ask an explanation of one who has made threats about him, and, if in so doing an affray is precipitated, he has the right to defend himself from death or great bodily injury; and the jury are instructed that it is not necessary, in order that the defendant have the right of self-defense, that he be entirely blameless in the matter of bringing on the difficulty which resulted in the homicide. The mere fact that he armed himself for the purpose of defense, if you find from the evidence that the defendant did arm himself for that purpose, nor the fact that upon meeting the deceased he accosted him and asked for an explanation from him of threats alleged to have been previously communicated to him, the defendant, as having been made by the deceased, unless you further find from the evidence that such explanation was asked for the purpose and with the intent on the part of the defendant of bringing on the difficulty or conflict, and in such conflict to take the life of the deceased, and if you do find that such explanation was asked for the purpose and with the intent of bringing on a conflict intending in such conflict to take the life of the deceased, such act on the part of the defendant, if followed by a deadly assault on the part of the defendant, would render his act of aggression unlawful, and you should in such case consider the evidence taken in this case as a whole, together with such acts of aggression, in determining the defendant's guilt or innocence under the charge laid in the indictment."—Approved: Robinson v. Territory, 16 Okl. 241, 85 Pac. 451.

(e) "The jury are instructed that in considering whether the killing was justifiable on the ground that the killing was in self-defense they should consider all the circumstances attending the killing, the character, number, and place of the wounds, the conduct of the parties at the time and immediately prior thereto, and the degree and nature of the force used by the defendant in making what is claimed to be this self-defense, as bearing upon the question

whether the shots, if fired, were actually shot in self-defense, or whether they were shot in carrying out an unlawful purpose; and if the jury believe from the evidence beyond a reasonable doubt that the force used was unreasonable in amount and character, and such as a reasonable mind would have so considered under the circumstances, it is proper for the jury to consider that fact, if it is proven, in determining whether the killing was in self-defense."—Approved: Carleton v. State, 43 Neb. 373, 61 N. W. 699.

§ 5502. Communicated Threats.

(a) "If you believe from the evidence that the deceased, George J—, had made threats against the life of the defendant, or had threatened to do him serious bodily harm, and that said threats had been communicated to the defendant, and at the time of the difficulty and at the time the gunshot was fired by the defendant the said George J— by his acts, or by his words accompanied by his acts, or both, manifested an intent to put the threats so made and communicated to the defendant into execution, and that the defendant believed such threats were about to be put into execution, or if you have a reasonable doubt of same, you will acquit the defendant."—Approved: Harris v. State, 52 Tex. Cr. R. 118, 105 S. W. 801.

(b) "You are further instructed, in connection with the law of self-defense, that where a defendant, accused of murder, seeks to justify himself on the ground of threats against his own life, he is permitted to introduce evidence of the threats made; but the same shall not be regarded as affording a justification for the homicide unless it be shown that at the time of the homicide the person killed, by some act then done, manifested an intention to execute the threat so made. It is not practicable to fix on what the act manifesting the intention of the deceased to execute his threats shall be; but it must be some act reasonably calculated to induce the belief in the mind of the defendant, viewing the case from his standpoint, that the threatened attack has then commenced to be then executed. So, if you believe from the evidence that the deceased, Jake M—, had made a threat against the life of defendant, and that such threat had before the homicide been communicated to the defendant, or, whether the deceased had made such threat or not, if it had been communicated to defendant that such threat had been made against his life, and defendant honestly believed that such information was true, and, further, you find that at the time of the homicide the deceased made some demonstration or did some act manifesting an intention to execute such threat—that is, did some act which reasonably indicated to defendant or induced in his mind the belief that the threatened attack had then commenced to be then executed—viewing the case from defendant's own standpoint, then he was justifiable in shooting the deceased, even unto death; and if you so find you will return a verdict of not guilty."—Approved: Glover v. State (Tex. Cr. R.), 107 S. W. 854 (not reported in state reports).

§ 5503. Known Character of Deceased for Violence.

"You are instructed as a matter of law that when a person is assaulted by another, and from the nature of the attack, viewed in the

light of any previous threat or hostile declaration made by the assailant, and of his known character for violence, the party assaulted has reasonable grounds to believe and does believe that the assailant intends presently to take his life or do him some bodily injury, he will be justified in killing his assailant, providing the circumstances are such that such extreme measure would seem, to the comprehension of a reasonable man, necessary, in such situation, to prevent the threatened injury. Whether the appearances of danger are sufficient to convince a reasonable man in the situation of the accused that death or the infliction of great bodily harm upon the person of the accused was intended by the deceased, is a question of fact for the jury."—Approved: Housh v. State, 43 Neb. 163, 61 N. W. 571.

§ 5504. Defense of Relative or Member of Family.

(a) "If you find from the proofs in the case and have any reasonable doubt in your minds whether or not the respondent shot B— for the reason that he believed at the time he fired the shots that his father, Levi T—, was in danger of death, or great bodily harm at the hands of John B—, and fired the shots in defense of his father, then you should acquit him, and return a verdict of not guilty. The right to defend one's self against danger not of his own seeking is a right which the law guarantees to all men; and the same right which exists to protect one's self exists also for the protection of those dependent upon him such as members of his family. In this case defendant had the same right to protect his father that he would have had to protect himself in a like situation, though the danger was threatened to his father, and not to himself. If at the time the defendant shot the deceased, John B—, he had reasonable cause to apprehend on the part of the deceased a design to do his father, Levi T—, great personal injury, and there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and to avert such apprehended danger he shot, and at the time he did so he had reasonable cause to believe it necessary for him to shoot in the way he did to protect his father from such apprehended danger, then and in that case the shooting was not felonious, but was justifiable, and you ought to acquit him upon the ground of necessary self-defense."—Approved: People v. Tubbs, 147 Mich. 1, 110 N. W. 132.

(b) "If you believe, from the evidence, in the case, that when the defendant appeared on the scene of the killing he found the deceased and his friend B— down on the ground near the defendant's brother, and heard the deceased call the defendant's brother a damned liar, and stated that there must be a settlement then and there, and it reasonably appeared to the defendant from the acts and words and conduct of the deceased and B— that the deceased and B— were then engaged in an unlawful assault upon the defendant's brother, then you are instructed that the defendant had the right to use such force as appeared to him to be necessary to prevent said unlawful attack upon his brother."—Approved: Voight v. State, 53 Tex. Cr. R. 258, 109 S. W. 205.

(c) "If the jury believe from the evidence that the defendant honestly believed, without fault or carelessness on his part, that at the time he struck the blow that killed the deceased, that deceased was in the act of killing the father of defendant or of inflicting upon him great bodily injury, and that the danger appeared to the defendant to be urgent and pressing, then the defendant was justified in assaulting and striking the deceased to prevent his father from being killed or from receiving great bodily injury.

"But the defendant would not be justified in assaulting and striking the deceased, unless it appeared that deceased was in the act of killing defendant's father or inflicting upon him great bodily injury. If deceased was in the act of assaulting and beating defendant's father, with no manifest intention of killing him or inflicting upon him great bodily injury, the defendant would be guilty of some degree of unlawful homicide; and this would be true, although deceased was in the wrong in his assault upon defendant's father."—Approved: Mabry v. State, 80 Ark. 345, 97 S. W. 285.

(d) "If the jury believe from the evidence in this case that when the defendant shot and killed Ruel A— he had reasonable grounds to believe, and did believe in good faith, that his wife was in imminent danger of losing her life or suffering great bodily harm at the hands of the said Ruel A—, and that there were no other apparently safe means of escape by his said wife from the impending danger, then the defendant had the right, and it was lawful for him in the exercise of reasonable judgment, to use such force as was reasonably necessary or apparently necessary to save and protect his wife's life or her person from great bodily harm, even to the taking of the life of said Ruel A—. On such grounds, and under such circumstances, the defendant is justifiable under the law in the defense of his wife. The danger to one's life or great bodily harm to his or her person by which the defendant pleads justification for his acts, as herein indicated, may be real danger or apparent danger; but, before the jury can acquit the defendant on the ground of defense of his wife, three essential elements must occur; First, defendant and defendant's wife must be without fault in bringing on the difficulty, and must not be disregardful of the consequences in this respect or any other wrongful word or act; second, there must have existed at the time either really, or so apparently as to lead a reasonable mind to the belief that there actually existed, a present imperious impending necessity to shoot in order to save himself or his wife from death or great bodily harm; third, there must have been no other reasonable mode of avoiding the necessity of taking the life of the deceased, apparent to the defendant as a person of ordinary prudence and courage (objected to as not correctly stating the law applicable)."—Approved: Atchison v. State, 3 Okl. Cr. App. 295, 105 Pac. 387.

§ 5505. Killing to Prevent Felony Against Another.

"The law makes it the duty of every one, who sees a felony attempted by violence, to prevent it, if possible, and allows him to use the necessary means to make his resistance effectual. One may kill

in defense of another under the same circumstances that he would have the right to kill in defense of himself."—Approved: State v. Hennessy, 29 Nev. 320, 90 Pac. 221.

§ 5506. Mother Counseling Son to Kill Her Assailant.

"Although you may believe from the evidence beyond a reasonable doubt that Granville S— cut, stabbed, and wounded Martin B. S—, from which cutting, stabbing, and wounding he then and there presently died, and that the defendant Sarah S— was then and there present, aiding, advising, and counseling the said Granville S— to cut, stab, and wound the said S—, yet, if you shall further believe from the evidence that at the time the said Granville S— so cut, stabbed, and wounded the said S—, either the defendant, Sarah S—, or her son, Granville S—, had reasonable grounds to believe, and in good faith did believe, that the said S— was then and there about to take her life or inflict upon her some great bodily harm, then the said Granville S— had the right to use any means at his command that were necessary, or to him apparently necessary, to protect the life of defendant Sarah S—, or to ward off the then impending, or to him apparently impending, danger, then the defendant, Sarah S—, under such circumstances, had the right to advise and counsel her son Granville S— to do so, and you should find the defendant Sarah S— 'not guilty' on the ground of self-defense and apparent necessity."—Approved: Steely v. Commonwealth, 129 Ky. 524, 112 S. W. 655.

§ 5507. Defense of Habitation.

(a) "If the jury believe, from the evidence, that, just prior to his death, the deceased attempted, in a violent manner, to enter the dwelling of the defendant, for the purpose of assaulting or offering personal violence to the defendant, being in said dwelling, or any other person dwelling or being therein, and that the defendant, in reasonably resisting such attempt of the deceased, unintentionally and without malice killed the deceased, then the killing was justifiable or excusable, and the jury ought to acquit the defendant. The jury, in considering whether the killing was in defense of habitation, should consider the circumstances attending the killing, and the conduct of the parties at the time, and immediately previous thereto, and the means and force used, as bearing upon the question of whether the killing was in defense of habitation."—Approved: Greschia v. People, 53 Ill. 298, 299.

(b) "Now, a man's house is his castle. He has the right to protect every member occupying it, or there with him, and he may take life, if it is necessary to do so, in order for such protection; but the danger must be imminent, must be immediate. When the danger has passed, one has no right to follow up another who has invaded his home for the purpose of taking his life. He has no right to do that under the law; no such law anywhere making the taking of human life excusable, unless there be a necessity for it. But one when danger is passed, is over, is not allowed, under the law, to follow up another and take his life. The danger must be imminent; it must be immediate."—Approved: State v. Stockman, 82 S. C. 388, 64 S. E. 595.

§ 5508. Officer Making Arrest.

"The court further instructs the jury that the defendant, Scott K—, was a deputy sheriff of Whitley county at the time he shot and killed Wright Y—, and as such had the right, and it was his duty, to preserve the public peace and to prevent any and all breaches of the public peace committed or about to be committed in his presence, and to arrest the offenders, if need be, in order to preserve the peace. If you believe from the evidence that the deceased, Wright Y—, was publicly drunk, and guilty of such boisterous conduct as was calculated to disturb the public peace, in defendant's presence, then it was the duty of defendant to use such means as might be necessary to prevent a continuation of such conduct. He had the right, and it was his duty, to go to the said Y— and use such force as was reasonably necessary to prevent the continuation of said conduct; and if said Y— refused to obey, and so conducted himself in the presence of defendant that defendant had reason to believe, and did believe, that said Y— was then and there about to kill him, or do him some great bodily harm, and defendant believed, and had reasonable grounds to believe, from the conduct of said Y— that to avoid such danger, either real or to him apparent, it was necessary to shoot said Y—, you will find the defendant not guilty on the ground of self-defense and apparent necessity."—Approved: Keeton v. Commonwealth (Ky.), 108 S. W. 315 (not reported in state reports).

§ 5509. One of Posse Making Arrest Protecting Another.

"Neither the warrant of arrest issued by the magistrate B— for the arrest of general W—, nor the indorsement thereon, admitted in evidence, gave authority to defendants or to either of them to arrest said W—, and the evidence as to the issual of said warrant, the indorsement thereon, and all that was done under it may be considered in connection with the other evidence to throw light on, and to illustrate, the situation of the parties and the motive prompting their conduct. But if defendants had reasonable grounds to believe that said W— had committed a felony in Knox county, Ky., and had not been arrested therefor, defendants had the right to arrest him therefor, and to use such force as reasonably appeared to them to be necessary to accomplish the arrest. But in making the arrest it was the duty of the defendants or one of them to first inform W—, if he gave them a reasonable opportunity to do so, of the intention to arrest him and of the offense charged against him, unless he already knew of such intention and charge. If he already knew of said intention to arrest him and the charge against him, it was his duty to peaceably submit to arrest. And if you believe, from the evidence, that defendants went to the house where the said Esrom L— was killed, not intending to kill him or said W—, or to do them or either of them any great bodily harm, but only to arrest the said W—, and at a time when defendants had reasonable grounds to believe that said W— had committed a felony and had not been arrested therefor, and that said W— did not have reasonable grounds to believe that defendants or any one or more of them intended to kill him or to do him some great bodily harm, but that he

then and there first attempted to kill defendants or one of them, or to do them or one of them, some great bodily harm, and defendant W— believed and had reasonable grounds to believe he was or the defendants L— and J— were, or one of them was, then and there, in danger of death or of the infliction of some great bodily harm at the hands of the said W—, or the said Esrom L—, or any person acting at the time with them or with either of them, and that to shoot at and kill W— was necessary, or appeared to the defendant, in the exercise of a reasonable judgment, to be necessary, in order to avert said danger, either real or to the defendant apparent, and in such shooting by defendant W—, if he did shoot he believed in good faith and had reasonable grounds to believe he was shooting at said W— and said L—, was thereby killed, you ought to find the defendant not guilty on the ground of self-defense and apparent necessity, or the defense of another or apparent necessity. On the other hand, if you shall believe from the evidence beyond a reasonable doubt that the defendant W— did not believe and did not have reasonable grounds to believe that his life or person, or the life or person of the defendants L— and J—, or one of them, was in danger at the hands of W— or said L— or any person acting with them or either of them, but that said W— first willfully and feloniously, or that said L— and J—, or one of them, first willfully and feloniously assaulted said W— with a deadly weapon, placing his life in danger, or his person, of some great bodily harm, and that defendant W— willfully and feloniously aided, assisted, advised, abetted, counseled, or encouraged the said L— and J—, or either of them to so willfully and feloniously assault said W— with a deadly weapon, and, in doing so, defendant or the said L— and J— made the harm or danger to himself or themselves, if any there was, necessary or excusable on the part of W— or said L— in his own necessary or reasonably apparent necessary self-defense, you should not in that event excuse defendant on the ground of self-defense."—Approved: Commonwealth v. West (Ky.) 113 S. W. 76.

§ 5510. Overcoming Resistance by Escaping Prisoner.

"The court instructs the jury that, if they believe from the evidence deceased was drunk and disorderly in the presence of appellant, the latter, as marshal of the town of McHenry, had the right to arrest him without a warrant and to hold him in custody until the presence of the police judge could be secured to make some disposition of the case; and if they further believe from the evidence that after the arrest of deceased, and while appellant had him in custody, deceased attempted by force or violence to effect his release from appellant's custody as an officer, appellant had the right to use such force as was necessary, or reasonably appeared to him to be necessary, but no more, to overcome the forcible resistance of deceased; and if, under these circumstances, he shot and killed deceased, the killing was excusable, if appellant could not otherwise overcome the forcible resistance of deceased, or it reasonably appeared to him that he could not do so."—Approved: Ayers v. Commonwealth (Ky.), 108 S. W. 320 (not reported in state reports).

§ 5511. Missing Assailant and Killing Bystander.

"The court instructs the jury that if they believe from the evidence that at the time the defendant shot and killed Irvin A—, if he did shoot and kill him, that defendant was in immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to defendant about to be inflicted on him, by Letcher S—, then the defendant had the right to use such force as reasonably appeared to him to be necessary to protect himself from death or great bodily harm at the hands of said S—, and if the jury believe from the evidence that at a time when defendant was in immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to defendant about to be inflicted on him, by Letcher S—, he (defendant) shot at said S— and missed him, and accidentally and unintentionally shot and killed Irvin A—, then the jury will find the defendant not guilty, upon the grounds of self-defense and apparent necessity; but this instruction is subject to this modification: that if the jury believe from the evidence beyond a reasonable doubt that the defendant began the difficulty in which said A— was killed by assaulting Letcher S— with a deadly weapon, when it did not reasonably appear to him to be necessary to protect himself from immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to defendant about to be inflicted on him, by said S—, then and in that event the jury cannot acquit the defendant upon the grounds of self-defense and apparent necessity."—Approved: Turner v. Commonwealth (Ky.), 89 S. W. 482 (not reported in state reports).

B. Dying Declarations.

§ 5511a. Cautionary Instruction as to Preliminary Ruling on Dying Declarations.
5512. Situation Equal to that Induced by Oath—Jury to Consider Accuracy of Reproduction.
5513. If Faithfully Reported, to be Considered Like Other Testimony, if Declarant Believed Death Impending.
5514. The Same Weight as if Deceased Were Testifying on the Stand.
5515. Statements of Deceased Inconsistent with Dying Declarations Competent Evidence.
5516. Same Consideration as if Under Oath and no Greater.
5517. Jury Should Receive Dying Declarations with Caution.

§ 5511a. Cautionary Instruction as to Preliminary Ruling upon Dying Declarations.

"The jury are instructed that under the law the question as to whether a statement may be admitted as a dying declaration is a matter for the court to pass on in the first instance. When it is admitted it comes in just as all evidence does, as subject to the jury's consideration as to the credibility of the witnesses. Whether the deceased spoke the truth when she declared—assuming that she did declare—that the

defendant had nothing to do with it, that it was her fault, and that he helped her, is for the jury's determination. Whether the witnesses who testified she made such declaration testified truthfully is also for the jury's determination. In other words, gentlemen, when I ruled on that matter, to admit that testimony, I did not undertake to decide, and could not decide, whether these witnesses were telling the truth in what they said. It may be that they were and it may be that they were not. That is for you to say."—Approved: State v. Leo (N. J. L.), 77 Atl. 523, 526.

§ 5512. Situation Equal to that Induced by Oath—Jury to Consider Accuracy of Reproduction.

"You are instructed that in prosecutions for murder or homicide the dying statements or declarations of the person with whose murder the accused stands charged, when material, and made under the sense of impending death, are admissible in evidence. Such declarations are made when the party making them is at the point of death, and when every hope of the world is gone, and when every motive for falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. The situation, in law, is considered as creating an obligation equal to that which is imposed by an oath administered in a court of justice. You are instructed that the declaration of Daniel T— offered in evidence in this case through certain witnesses were admitted under such rule of law. But the truth or falsity of such declarations of Daniel T—, and the degree of accuracy or inaccuracy in the recital thereof by the witnesses, are matters for you to weigh under the same tests as apply to other witnesses, considering all of the circumstances in evidence surrounding each case and each witness."—Approved: Kastner v. State, 58 Neb. 767, 79 N. W. 713.

§ 5513. If Faithfully Reported to be Considered Like Other Testimony if Declarant Believed Death Impending.

"The court has admitted in evidence a statement bearing date July 4, 1900, which it is claimed by the state was made by Clara Wiley C—, and at a time when she was suffering from fatal wounds, inflicted by defendant, and from which it is claimed she afterwards died, and which statement it is claimed by the state should be considered as the dying declaration of said Clara Wiley C—. A person who is suffering from fatal wounds, and who is weak and speechless from said wounds, may make their dying statement by such signs as clearly show that she knows and fully understands what she is doing, and the statement she is making, and is mentally conscious, and which signs clearly and distinctly convey her meaning; and the statement of such person may be reduced to writing, where such person is weak and speechless, by a third party, and, if read over by the declarant, or read over to her by some other person, and clearly and fully understood and assented to by her as her statement, and by her signed, it becomes her statement, if intended as such by her. In order to be considered by the jury as the dying declaration of said Clara Wiley C—, it must clearly and satisfactorily appear, from the evidence and all the circum-

stances in the case, to the jury, that the statement offered in evidence by the state is the statement of Clara Wiley C— regarding the encounter between her and the defendant, and that such statement was made by Clara Wiley C— at a time when she was in extremis, and in the full belief and sense of impending death, and that death was imminent, and in the full belief that she was going to die from the wounds inflicted on her by the defendant, and that death was near, and at a time when the deceased had abandoned all hope of recovery; then, in that case, it is your duty to consider such statement as the dying declaration of said Clara Wiley C—, and to weigh, consider, and measure such statement by the same rules of evidence as the testimony of any other witness in the case; and in determining the weight and credit to be given to such declaration you may take into consideration all the circumstances under which the declaration was made, giving just weight and credit only as you think and believe from the evidence and all the circumstances it is entitled to. You are the sole and exclusive judges as to whether such conditions existed as are herein named, and of the weight and credibility of such statement."—Approved: State v. Morrison, 67 Kan. 144, 72 Pac. 554.

§ 5514. Same Weight as if Deceased Were Testifying on the Stand.

"The court tells the jury that dying declarations, when deliberately made under the solemn sense of impending dissolution, and concerning circumstances in respect of which the deceased was not likely to have been mistaken, are entitled to as great weight, if precisely identified, as if the deceased had been living and sworn in court and had testified the same as said dying declaration."—Approved: Wright v. Commonwealth, 109 Va. 847, 65 S. E. 19.

§ 5515. Statements of Deceased Inconsistent With Dying Declaration Competent Evidence.

"The court instructs the jury that to them alone belongs the function of determining what weight shall be given to the dying declarations of the deceased, if any were made by him. In weighing the declarations, the jury should take into consideration the facts that the defendants in this case were not present in person or by attorney when the statements were made, and that there was no opportunity for cross-examination of the deceased, and that there was no opportunity for the jury to observe the manner of the deceased at the time he made the statement, so as to detect malice or feeling or revenge or other improper motive that may have influenced him, and that the deceased was not subject to prosecution for perjury if he made false statements. And if the jury find from the evidence that the deceased had at other times made statements inconsistent with his dying declarations, these contradictory statements should be considered by the jury in weighing the dying declarations, and especially if such contradictory statements were made at a time when his blood was cool or his mind unaffected by passion or feelings of revenge."—Approved: State v. Hendricks, 172 Mo. 654, 73 S. W. 194.

§ 5516. Same Consideration as if Under Oath and no Greater.

"The dying declarations of Mrs. P— are in evidence in the case, entitled to the same consideration as if given under oath, and no greater."—Approved: State v. Schmidt, 73 Iowa, 469, 35 N. W. 590.

§ 5517. Jury Should Receive Dying Declarations With Caution.

"Dying declarations are admissible from the necessities of the case, but they should be received with caution, for the reason that the declarant has not been administered an oath, and an opportunity for cross-examination has not been afforded the defendant, and that the declarant might be influenced against the defendant. And for the further reason that the physical condition of the declarant might render the statement more or less unreliable. Circumstances surrounding the declaration should be weighed same as those surrounding other evidence."—Approved: State v. Mayo, 42 Wash. 540, 85 Pac. 251.

CHAPTER CXLIX.

INTOXICATING LIQUORS.

§ 5518. Violation of Sunday Law—Merchandise.
5519. Violation of Sunday Law—Liquor.
5520. Saloon Premises Defined.
5521. Sale Without License.
5522. Merchant Defined.
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§ 5518. Violation of Sunday Law—Merchandise.

"In no event can the defendants be convicted unless you are satisfied from the evidence that their place of business was open on Sunday for the purpose of traffic, with their consent or knowledge."—Approved: Whitcomb v. State, 30 Tex. App. 269, 17 S. W. 258.

§ 5519. Same—Liquor.

"It is contended, further, and the main question in the case, that the facts fail to show a violation of the Sunday law. Robert H—, the alleged purchaser, testified that he was a neighbor of appellant, and lived about 12 miles east of Cleburne; that on the 22nd of October, 1905, it being Sunday, he, with a friend, was at the house of appellant and called for some wine. Appellant said, 'all right,' and filled up a quart bottle of wine or cider, and handed it to the witness. He took it away and subsequently drank it. Nothing was said about the payment of it at the time, but a few days later he had a settlement with appellant. Appellant owing the witness for some corn, in this settlement appellant took out 30 cents in payment for the wine or cider that the witness had gotten the preceding Sunday. Appellant lived on a small farm, on which he cultivated berries, grapes, melons, etc., which products he sold. He kept wine, cider and the like at his house to sell, and sold it at his house to whoever desired purchasing and sometimes he peddled his products around at places. There is a sign-board on the road, near appellant's house, telling that he had wine, cider, and fruit to sell. On cross-examination this witness further stated there was nothing said about paying for it at the time he got the wine or cider. Appellant made wine or cider out of grape juice and blackberry juice. The wine that he got was some that he had made there himself. It was in a jug out at the well. He filled the bottle from the jug. He had no store; but his wine or cider, the witness thought, was kept in a cellar, but the wine that he purchased was taken from a jug that was at the well. Appellant was a farmer, and raised corn, cotton, and potatoes, in addition to his other products. This is practically a complete statement of the facts."—Approved: Hanks v. State, 50 Tex. Cr. R. 577, 99 S. W. 1011.

§ 5520. Saloon—Premises—Defined.

(a) "In this case it is claimed, on the part of the people, that the whole lower floor of the building occupied by the respondent constituted the saloon, including both the front room and two back rooms. It is claimed on the part of the respondent that the front room of the lower floor of the building constituted the saloon, and that the room back of the room in which the bar was located, and having a door opening back of the building, constituted no part of this saloon. If this back room was not used in connection with the room in which the bar was situated, then it would not constitute a part of the saloon; but if, on the other hand, you find from the evidence in this case that this back room, having a door opening out back of the building, was habitually used by the respondent's consent for the purpose of playing cards by persons resorting there, and that liquors were served from

the bar to such persons while in that room, then, it was used in connection with the room containing the bar, and as a matter of law constituted a part of the saloon. If the back room was a part of the saloon, then keeping it open Sunday by the proprietor was a violation of this law."—Approved: People v. Higgins 56 Mich. 159, 22 N. W. 309.

(b) "I charge you that if these rooms were kept and used as accessory to the principal room, the front room, for the purpose of carrying on this business, why then they would all of them constitute a part of the saloon. And I charge you that this would be the case even though the party lived in the rear room, and occupied it for other purposes as well as for the purpose of a saloon. In other words, that must have been for the exclusive use of himself as a family residence, or for some purpose not connected with the saloon itself. But if it was used in connection with the front rooms, in whole or in part, as parcel of the saloon itself, then it would constitute part of the place, and the keeping of it open on Sunday would constitute it a portion of the saloon. It is connected directly by doors, leading from the one place to the other. A door out of the room which is called the 'barroom proper,' leading from this hall by another door into this room in the rear, which was immedately open to the outside by the rear door. You have also the testimony concerning the little hall there, and the place where the liquors were stored. If these rooms, or any of them, were used in whole or in part as a place to carry on this business in there, it was a part of the saloon, and the keeping them open, even though the party might have had a residence in one room, in a rear room, and used as a place for dealing out liquor or keeping it there for his customers, who are in the habit of visiting the place for the purpose of buying liquors, and keeping it as such, then it would be a part of the saloon. But if it were used exclusively for some other purpose, and not for the purpose of selling liquors in them, or for the entertainment of guests or persons who were there for the purpose of procuring liquors, then it would not be a part of the saloon, and the party would be at liberty to occupy that place on Sunday, and keep it open, or allow it to remain open and not close it, the same as any other man would his dwelling or any other place where liquor was not sold or any of the accompaniments of a business of this kind were carried on, and in connection with this I give you the second request of the defendant, with a slight change: That if the bar and its supplies and the appliances of the business of liquor selling were in rooms distinct from others, and the latter were used as a place of residence of the defendant merely, then he would have had a right to keep the latter open, and to make use of them for living purposes on Sundays as well as on other days. Now, under this view of this subject you will determine what the proof shows concerning this. And as you may find in this regard, of course your verdict should be, if you find that these rooms, aside from the testimony of the witness G—; if you shall find that these rooms, or this particular room, called the 'sitting-room,' the room where was the table and the chairs and the stove, if it was kept exclusively or merely for the purpose of residence, or to

resort to for any legitimate purpose, and not in connection with the saloon proper, the front rooms of the building or the rooms where the liquors were kept, or where they were usually drunk, then, as a matter of course, the party, as I told you before, had a right to maintain that as such, and to allow it to remain open, and not close it, the same as any person might have, any dwelling he might reside in or any place of other business where there was not liquors sold as is provided for in this statute. But if it was kept, that room or any others, for the purpose of dealing out drinks therein, or bringing drinks to their customers, or allowing the people who visit this place to sit in there as such as customers there, then it is my opinion it would be a part of the saloon, and the keeping of it open, or not closing it, would be a violation of this statute; and it will be for you, therefore, to determine from all the evidence in the case what the nature of the business that was carried on in this rear room, or what it was really kept for, in whole or in part; and if it should be found to be exclusively for the use of family purposes, or any other legitimate purpose, why then the party has a right to reside there, and to stay there, and to keep it open exactly as he would any other place where there was no liquors sold. But on the other hand, as I have already said, if it was a part of the premises for the purpose of carrying on the saloon, and was used for that purpose either by way of dealing out the drinks therein, or keeping it in connection with the room where the liquors were kept and sold, and customers waited on there, or resorted there for the purpose of buying and drinking, as they do customarily in such places, then it would be a part of the saloon; and the opening of it or the not keeping it closed would be a violation of the law."—Approved: People v. Cox, 70 Mich. 247, 38 N. W. 235.

§ 5521. Sale Without License.

"The jury are instructed that a sale of goods, wares, or merchandise by sample, to be afterward delivered at a certain place, to be paid for on delivery at that place, in law, constitutes a sale at the place and at the time when and where the goods are to be delivered and paid for."—Approved: Town of Canton v. McDaniel, 188 Mo. 207, 86 S. W. 1092.

§ 5522. Merchant Defined.

"If the jury believe, beyond a reasonable doubt, from the evidence introduced in this cause, that the defendant, W. W. McD—, did on the 22d day of December, 1900, occupy a part of the warehouse situated on Lewis street east of Third street, in the town of Canton, and did then and there have placed and stored in said warehouse and buildings goods, wares or merchandise, and did then and there deliver to Thomas C—, Joseph W—, R. A. W—, William D— and other persons any goods, wares or merchandise, that is, groceries of any kind and barrels, and did then and there receive the purchase price of said goods, wares, or merchandise from said parties to whom defendant or anyone for him, then and there delivered any goods, wares, or merchandise; and if the jury shall further believe that the defendant occupied said building for the purpose of delivering said goods to said parties, and

receiving the purchase price thereof, then the jury must find the defendant guilty, unless they shall further find from the evidence that the defendant had at the time, that is, on December 22, 1900, or prior thereto, procured from the marshal of the town of Canton a license to deal as a merchant in said town of Canton."—Approved: Town of Canton v. McDaniel, 188 Mo. 207, 86 S. W. 1092.

§ 5523. Keeping Liquor for Sale Without License.

"The jury are further instructed that whisky and beer are intoxicating liquors within the meaning of the statute, and, if you find from the evidence, beyond a reasonable doubt, that the defendant was on or about the 2d day of September, 1905, in Richardson county, Neb., keeping in his possession in the building described in the information in this case either beer or whisky, with the intention of disposing of the same without a license, either for himself or jointly with others known as a Commercial Club, then, and in that case, you will find the defendant guilty as charged in the information."—Approved: Schulenberg v. State, 79 Neb. 65, 112 N. W. 304.

§ 5524. Engaged in Business of Keeping Liquors for Others.

"You are charged that before you can convict the defendant in this case you must believe from the evidence beyond a reasonable doubt that Will S— was engaged in the business or occupation of keeping or storing spirituous, vinous, or intoxicating liquors for others. And in this connection you are further charged that by the terms 'business' and 'occupation' is meant a calling, trade, or vocation which one engages in for the purpose of making a living or of obtaining wealth."—Approved: Cohen v. State, 53 Tex. Cr. R. 422, 110 S. W. 66.

§ 5525. Intoxicating Liquor Defined.

"You are further instructed that any liquor intended for use as a beverage, and capable of being so used, which contains alcohol, obtained either by fermentation or by the additional process of distillation, in such proportion that it will produce intoxication when drunk in reasonable quantities, such as the human stomach will ordinarily hold, is an intoxicant."—Approved: Murray v. State, 56 Tex. Cr. R. 420, 120 S. W. 438.

§ 5526. Honest Mistake of Seller.

(a) "But in this connection you are instructed that you must believe from the evidence that the defendant used proper care to ascertain whether the liquor was intoxicating, if it was, before he would be entitled to be acquitted on the grounds of mistake in honestly believing, if he did, that the liquor was not intoxicating under the above and foregoing instructions."—Approved: Joyce v. State, 56 Tex. Cr. R. 333, 120 S. W. 453.

(b) "If you believe the defendant actually sold an intoxicating beverage, and that he did not intend to sell an intoxicating beverage, and that he sold the beverage in question honestly believing it would not intoxicate, then you should acquit the defendant, notwithstanding

you might believe the beverage sold did actually intoxicate the witnesses testifying to the fact of its having intoxicated. In this case you would have to believe beyond a reasonable doubt that the defendant sold the article named in the indictment, and that he knew or ought to have known that the article sold was an article prohibited by the law before you could convict him. It is not enough to believe that the article named did actually intoxicate; but you must go further, and believe from the proof that the defendant knew or ought to have known that it was intoxicating."—Approved: Hall v. State, 7 Ga. App. 186, 66 S. E. 486.

(c) "If you believe from the evidence in this case, beyond a reasonable doubt, that the drink sold in this case was intoxicating, as alleged in the information, but shall further believe that at the time the defendant sold the same, if he sold it, he honestly believed that it was not intoxicating, and would not produce a state of intoxication when drunk in reasonable quantities, such as the human stomach will ordinarily hold, then and in such event the defendant would not be guilty, and it will become your duty to acquit him."—Approved: Walker v. State, 50 Tex. Cr. R. 495, 98 S. W. 843.

§ 5527. Reasonable Doubt as to What Was Sold.

"If you do not so believe, or if you have a reasonable doubt as to whether the bottle in question contained whiskey, or some other liquor other than whiskey, you will acquit the defendant, and say by your verdict not guilty."—Approved: Smith v. State, 56 Tex. Cr. R. 501, 120 S. W. 881.

§ 5528. Duty of Seller to Ascertain Character of Liquor.

"It is claimed here, on the part of this defendant, that these liquors were sold here, if they were prohibited by the instruction which I will give you, that it was not intentionally done. This law is passed for the purpose of preventing traffic in such prohibited liquors, and it is the business of the person who engages in selling liquors for a beverage to see that he is not selling prohibited liquors. I do not by this instruction, however, gentlemen, desire you to understand that the sale of such liquors, under all circumstances, would be a violation of this statute; but he should use such reasonable means to determine whether the liquors which he is selling are such as are prohibited by law as a careful, prudent man, desiring to observe and obey the law, would use to ascertain such fact. If this defendant was keeping such a place for the sale of such liquors as I have said would be a violation of this law, the fact that he did not know, at the time when the sale was made, that these liquors were intoxicating, would not excuse him, unless he took such reasonable means to ascertain whether the liquors were such as were prohibited as an ordinarily careful and prudent man, desirous of obeying the law and keeping within its provisions, would take to ascertain such fact. I think that, if he did not know he was keeping a place where such liquors that were prohibited were sold, he did not know that they were such liquors as the statute prohibits from being sold, and he used such reasonable means to find out

whether they were or not, and did not discover it, that he should not be held responsible. The mere fact that this defendant, Mr. William I—, took out this license, does not, in itself, establish the fact that he was keeping such place as is prohibited by the statute. It is one of the circumstances simply, as the court has permitted to go before you to enable you to determine whether he was keeping such a place or not. It should have that weight which you think, in view of all the circumstances, it ought to have. The defendant gives his explanation of why he had it; and you are instructed to construe this portion of the evidence in the light of all the circumstances which surround it. It bears upon the question of whether he was keeping such a place as was prohibited by the statute."—Approved: People v. Ingraham, 100 Mich. 530, 59 N. W. 234.

§ 5529. Sale—Elements Of.

"By the term 'sale' is meant an exchange of property, either real or personal, for a price in money. Three things are necessary to its validity, first, the thing sold, which is the object of the contract; second, the consideration paid or to be paid; and, third, the consent of the contracting parties. You are instructed that it is not a violation of the local option law for a person to give away whisky in a prohibition county."—Byrd v. State, 54 Tex. Cr. R. 170, 114 S. W. 135.

§ 5530. Place of Sale Where Liquor is Delivered.

"The court instructs the jury that the place of delivery to C— is the place of sale, and, unless you believe from the evidence that C— and agent for defendant selected and designated a particular case of beer at the beer house, then in the law the place of delivering would be the place where delivered to C— in the city of Mayfield."—Approved: Cook Brewing Co. v. Commonwealth (Ky.), 99 S. W. 354 (not reported in state reports).

§ 5531. Delivery for Money Paid.

"In order to make a sale, within the meaning of the law, it is not necessary that the defendant should in person deliver the liquor and receive the money, but the state must show by legal evidence beyond a reasonable doubt that the liquor was delivered with the knowledge and consent, and at the instance and direction, of the defendant, and that he or some one for him and for his use received the money therefor; and so in this case, if you believe from the evidence beyond a reasonable doubt that the prosecuting witness, A. J. J—, requested one Gus K— to let him, the said J—, have some whisky, and the said K—, with the intention of selling same, handed said J— whisky, and that said J— gave said K— money therefor, and that the defendant, knowing the purpose and intent of the said K— received the money, or any part of the money, for said whisky, then these facts would constitute a sale within the meaning of the law; but, if, on the other hand, the defendant was merely changing money for the prosecuting witness and the said Gus K—, or if he had no knowledge of any purpose, if any purpose there was on the part of the said Gus K—, to sell intoxicating

liquor to prosecuting witness J—, or received no pecuniary benefit therefrom, then he would not be guilty of any offense, and if you so believe the facts to be, or if you have a reasonable doubt as to whether such are the facts, you will acquit the defendant and say by your verdict not guilty."—Approved: King v. State, 53 Tex. Cr. R. 101, 109 S. W. 182.

§ 5532. Delivery for Cash or Credit.

"In order to constitute a sale in this case, it is not necessary that the purchaser deliver to the seller the money for the whisky; but it is necessary that both parties assent to the sale and payment, if any is made or is to be made therefor."—Approved: Dawson v. State, 55 Tex. Cr. R. 315, 117 S. W. 136.

§ 5533. On Credit to be Repaid in Kind.

"You are therefore instructed that if you believe from the evidence in this case beyond a reasonable doubt that the alleged prosecuting witness Mack B—, on or about the 22d day of December, 1906, or within two years anterior to the presentment of this indictment, did in justice precinct No. 7, in Coleman county, Tex., borrow a quart of whiskey, and that same was intoxicating, from any person, with the understanding and agreement that the said witness, Mack B—, had ordered whiskey, or would order whiskey, and when his (the said Mack B—'s) whiskey came the person so loaning said whiskey, if any, was to have whiskey returned to him for the whiskey so loaned, if any, and you further believe from the evidence beyond a reasonable doubt that the defendant, Dave C—, was present at the time, and with the knowledge of such agreement, if any, to the said Mack B— said quart of whiskey so loaned, if any, at the instance and request of the person loaning same, if any, then you are instructed that the said loan of said whiskey, if any, under such circumstances, if any, would be an unlawful sale of intoxicating liquors within the meaning of the local option statute, and the defendant, Dave C—, under such circumstances, if any, would be a principal in the said sale, and would be guilty of a violation of the local option law; and if you so believe from the evidence beyond a reasonable doubt it would be your duty to find the defendant guilty. It would not be necessary, to constitute a sale for the state to prove, that the witness actually returned the whiskey, if any, borrowed."—Approved: Coleman v. State, 53 Tex. Cr. R. 578, 111 S. W. 1011.

§ 5534. Charging Value to Employee.

"It is claimed by the state that, as one of the ingredients of the offense charged was a sale to the defendant's hired man of a keg of beer under the circumstances as disclosed by the evidence. In that behalf I charge you that, if you believe from the evidence beyond a reasonable doubt that defendant procured a keg of beer or other intoxicating liquor, so that the title and ownership thereof was in him; and that thereafter, on the premises mentioned in the information, he transferred the title to the same to his hired man by charging its value to

him, or in any other manner constituting a sale thereof, then he would be guilty of selling intoxicating liquor in violation of law."—Approved: State v. Thoemke, 11 N. D. 386, 92 N. W. 480.

§ 5535. Receiving Price Before Purchasing to Resell.

"If you shall find and believe from the evidence that defendant furnished or procured the said liquor himself, and that he afterwards sold and delivered the same or a part thereof to the witness M—, you shall find the defendant guilty as charged, notwithstanding defendant may have purchased the said whiskey solely for the purpose of reselling and delivering the same to the witness M—, and that defendant had received from M— the price in payment thereof before he bought the same."—Approved: Missouri v. Morton, 42 Mo. App. 64.

§ 5536. Purchase—Buying as Agent for Another.

(a) "At the request of the defendant, you are further charged by the court that it is not a violation of the law for a person to act as the agent of another person in the purchase of intoxicating liquors in this state, nor to give away intoxicating liquors, nor to buy whiskey from a person who is selling the same in violation of the law. So, if you should believe from the evidence in this case that A. W—, the state's witness, at the time charged gave to the defendant $1.25 in money, and requested and instructed the defendant to go and buy him a quart of whiskey and pay for it with the said $1.25, and bring him the whiskey, and that the defendant did so, and had no other interest or motive than to accommodate the said A. W— in said transaction, then in that case you should find the defendant 'Not guilty.'"—Approved: Davis v. State, 53 Tex. Cr. R. 373, 109 S. W. 938.

(b) "You are further instructed that, if you believe from the evidence that the defendant acted as the agent of and for the witness Charles H— in locating and in purchasing said quart of whiskey, and that he was not interested in the sale thereof as a seller, or if you have a reasonable doubt as to whether the defendant sold said quart of whiskey to the witness H—, or acted as his agent in the purchase of said quart of whiskey, you will acquit the defendant and so say by your verdict."—Approved: Dawson v. State, 55 Tex. Cr. R. 315, 117 S. W. 136.

§ 5537. Original Package—Personal Use.

"If you find the liquor charged to have been carried by the defendant had just been imported by a common carrier from some person in another state of this Union, and that the same was imported for the personal use of the defendant, then the defendant had a right to receive and carry and convey the same to his own house or apartment, in the original package, for his personal use, as long as there was no intent on his part to sell or dispose of the same contrary to law, or to put the same to an unlawful use.'—Approved: Alexander v. State, 3 Okl. Cr. App. 478, 106 Pac. 988.

§ 5538. Traveler Purchasing in Another State.

"You are charged that, under the law, the defendant had the right to go to the state of Texas and purchase the liquor in controversy, and,

having so purchased it, he had the right to transport or convey the same into the state of Oklahoma, and to his place of destination, provided his journey from the state of Texas to his home or place of destination in the state of Oklahoma was a continuous journey; and, if you find from the testimony that his purchase of whiskey was made in the state of Texas, and he was transporting the same from the state of Texas to within the state of Oklahoma, and he was still on a continuous journey from the state of Texas to the place of his destination when arrested, it would be your duty to return a verdict of not guilty."—Approved: Hudson v. State, 2 Okl. Cr. App. 176, 101 Pac. 275.

§ 5539. Sale in Local Option District.

"Therefore, bearing in mind the foregoing instructions, you are charged that if you believe from the evidence beyond a reasonable doubt that B. F. H— did in Jones county, Texas, on or about the 11th day of August, 1906, sell to Walter B— intoxicatng liquor after the qualified voters of said Jones county had determined at an election held in accordance with the laws of said state that the sale of intoxicating liquor should be prohibited in said Jones county, had passed an order to that effect, which order had been duly published in accordance with the law, or if you further believe from the evidence beyond a reasonable doubt that B. F. H— did in Jones county, Texas, on or about the 11th day of August, 1906, acting as the agent of and in connection with August A. Busch & Co. of Waco, Texas, if he did so act as agent as above defined, sell to Walter B— intoxicating liquor after the qualified voters of said Jones county had determined at an election held in accordance with the laws of said state that the sale of intoxicating liquor should be prohibited in said Jones county, and after the commissioners' court had passed an order to that effect, which order had been duly published in accordance with the law, you will find the defendant guilty."—Approved: Holloway v. State, 53 Tex. Cr. R. 246, 110 S. W. 745.

§ 5540. Practicing Subterfuge in Selling.

(a) "Or if you shall believe from the evidence, beyond a reasonable doubt, that the defendant, in this county, and at the time mentioned by the witness, kept liquor for sale at his place of business, and had the liquor mentioned in evidence for sale, and then and there entered into any scheme, plan, device, arrangement, or subterfuge, in error of the local option law, whereby he did sell, give, loan, procure for, or furnish the witness the liquor mentioned in evidence for the pay, then you ought to find him guilty, and fix his punishment as provided in instruction No. 1 above.

(b) "If you shall believe from the evidence that the defendant acted merely as accommodation for the witness in procuring the liquor mentioned in evidence for the witness, and not as agent for the dealers who furnished the liquor, and not as a part of a scheme, plan, device, arrangement, or subterfuge, whereby he sold liquor in evasion of the local option law in force in this county at the time, then you ought

to find the defendant not guilty."—Approved: Day v. Commonwealth (Ky.), 96 S. W. 510 (not reported in state reports).

§ 5541. Local Option Agent for Liquor Dealers.

"Or if you shall believe from the evidence beyond a reasonable doubt, that the defendant, I. S. M. D—, at the time mentioned in the evidence, and within 12 months before the finding of the indictment, was acting as agent for liquor dealers living out of the state, and received the pay for the liquor mentioned in evidence as agent for such dealers alone, and not as agent for the witness alone, and delivered it to the witness in this county, then you ought to find him guilty and fix his punishment as provided in instruction No. 1 above."—Approved: Day v. Commonwealth (Ky.), 96 S. W. 510 (not reported in state reports).

§ 5542. Giving Away as Courtesy.

"The court instructs the jury that, if they believe and find from the evdence in the cause, that the defendant, John F—, was not, on the date mentioned in the information, nor for one year prior thereto, had been engaged in the selling of intoxicating liquor in the county of Stoddard, but that he had been, at the times mentioned, engaged in business or occupation not connected, directly or indirectly, in the sale or disposal of intoxicating liquors for gain, that is to say, solely in the business of buying and selling real estate, and that defendant did, on one or more occasions, during the time above mentioned have and keep at his place of business, intoxicating liquor for his own individual use, and did give away to one or more of the witnesses who have testified in this cause drinks out of his individual supply, solely as an act of courtesy or friendship, and not with a purpose of deriving any pecuniary profit or gain by so doing, or to further any commercial or business enterprise, or to induce any one to trade or transact business with him, you will find the defendant not guilty."—Approved: State v. Fulks, 207 Mo. 26, 105 S. W. 733.

§ 5543. Sale—By Clerk—Presumption.

"That, nothing to the contrary appearing, evidence of a sale by a servant in his master's shop of his master's goods there kept for sale, would, if believed, warrant the jury in finding the sale was authorized by the master, and that this would be so although the defendant was not on the premises at the time the sale was made."—Approved: Commonwealth v. Houle, 147 Mass. 380, 17 N. E. 896.

§ 5544. Sale by Bar-tender—Presumption Conclusive.

"If you find that the bar-tender or clerk of the defendant did, on Sunday, the third day of August, 1890, in Lawrence county, Missouri, sell two glasses of beer to the witness in this case, such selling would be the act of the defendant in contemplation of law, and you will convict him of the charge in this indictment in this case, unless you believe said sale was made by said bar-tender or clerk without the knowledge or consent of the defendant; and against his orders and directions

given by him to his said clerk or bar-tender."—Approved: Missouri v. Meagher, 49 Mo. App. 571.

§ 5545. Sale—Aiding and Abetting—Principal.

"If you find, under the evidence in the case, that illegal sales of liquor were made in Morgan county by some other person than the defendant, but that the defendant did knowingly aid and abet these sales, or that, being absent at the time they were made, he did yet procure, counsel, or command another to make them, he would be held responsible as a principal and would be guilty under this presentment for selling liquor in Morgan county."—Approved: Loeb v. State, 6 Ga. App. 23, 64 S. E. 338.

§ 5546. Sale—Acting Together, All Principals.

(a) "You are charged that, if you believe from the evidence beyond a reasonable doubt that the defendant and any other person, acting together, sold intoxicating liquors to M. P. M— at the time and place alleged in the indictment in this case, and that each and both of said persons were present at the time of such sale, and each knew the unlawful act in making said sale, then the defendant would be guilty, regardless of whether it was the defendant or such other person who actually delivered to said M— such intoxicating liquor or received the pay therefor."—Approved: Reed v. State, 53 Tex. Cr. R. 4, 108 S. W. 368.

(b) "All persons are principals who are guilty of acting together in the commission of an offense; and if you believe from the evdence beyond a reasonable doubt that the defendant, at the time and place mentioned in the information herein, procured and hired the witness Jim B— to sell intoxicating liquors for him in Fannin county, Tex., and you further believe from the evidence beyond a reasonable doubt that in pursuance of such procurement and hiring (if you believe from the evidence beyond a reasonable doubt there was such procuring and hiring) the said witness Jim B—, in Fannin county, Texas, on or about the 20th day of March, 1907, acting under authority of the defendant, sold intoxicating liquor to F. R. S—, then, if you so believe, the defendant would be a principal, and you will find him guilty and assess his punishment according to instructions contained in this charge."—Approved: Oldham v. State, 52 Tex. Cr. R. 516, 108 S. W. 667.

§ 5547. Sale—Aiding Directly or Indirectly.

"The court instructs the jury that all parties who are concerned in the commission of a misdemeanor are guilty as principals. So, if you believe from the evidence that the defendant, George D—, within one year from filing information, aided directly or indirectly or assisted or encouraged the sale of whisky within ten miles of Hendrix college, you will find the defendant guilty as charged."—Approved: Dale v. State, 90 Ark. 579, 120 S. W. 389.

§ 5548. Joint Purchase and Delivery by One to Other.

"If you believe from the evidence that Fred M— and defendant together ordered whisky for themselves, and that they each furnished

their money for the purpose of making said order, and that when said whisky came defendant got the same out of the express office, and gave to said Fred M— the whiskey that he had ordered and for which he had furnished the money, you will find defendant not guilty."—Approved: Dean v. State, 49 Tex. Cr. R. 249, 92 S. W. 38.

§ 5549. Sale—Prohibited Quantity.

"If you believe from the evidence, to the exclusion of a reasonable doubt, that the defendant, Harry McD—, within twelve months before the finding of the indictment herein, sold to Jesse Q— whisky in a quantity less than five gallons at one time, in the city of Hodgenville, Ky., you should find him guilty as charged in said indictment, and fix his punishment at a fine in any sum not less than $60 nor more than $100, or at confinement in jail for any time not less than ten nor more than forty days, or at both such fine and imprisonment, and you may in your discretion provide in your verdict that he shall work at hard labor until the fine and costs are satisfied, or until both are satisfied."—Approved: McDermott v. Commonwealth (Ky.), 100 S. W. 830 (not reported in state reports).

§ 5550. Division in Small Quantities on Premises.

"If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, Brit F—, in this county, and within twelve months next before the date of the indictment, and at the time mentioned by the witnesses, sold directly or indirectly to the witnesses, W—, S—, and Hiram C—, or any one of them, spirituous, vinous, or malt liquors in quantities less than five gallons, then you should find the defendant guilty, and fix his punishment at any fine not less than $60 nor more than $100, or imprisonment in the county jail for not less than ten nor more than forty days, or you may both so fine and imprison the defendant within these limits, at your discretion. Or, if you shall believe from the evidence, beyond a reasonable doubt, that the defendant had a scheme, plan, device, arrangement, or subterfuge, to which he was a party, and which he had arranged, whereby he could sell liquor under the guise of selling it in quantities of five gallons or over, and with the knowledge, purpose, or design that it was to be divided there on his premises or near by, so that the purchasers, or any of them, would receive less than five gallons as his portion, and that that was part of defendant's scheme to sell and distribute his liquor to the public, and that, in pursuance of said plan, device, or subterfuge, he sold the liquor in question at the time mentioned by the witnesses, and within twelve months next before the date of the indictment, to the witnesses, W—, S—, and Hiram C—, or any one of them, with the knowledge, purpose, or design that they, or any one of them, would receive less than five gallons as his portion of the liquor purchased, then the defendant is guilty.'—Approved: Farris v. Commonwealth, 126 Ky. 463, 104 S. W. 288.

§ 5551. Sale—Venue of.

"If the defendant, in Hodgenville, received money from Q—, and agreed in Hodgenville to furnish Q— whiskey therefor, and the defend-

ant sent whisky therefor to Q— at Hodgenville, and Q— received said whisky in Hodgenville, such transaction was a sale in Hodgenville."—Approved: McDermott v. Commonwealth (Ky.), 100 S. W. 830 (not reported in state reports).

§ 5552. Sale—Building Therefor a Nuisance.

"The specific offense charged against the defendant herein is that of keeping a nuisance, that is, of keeping a building or place within this county, wherein he sold and kept with the intent to sell intoxicating liquors, contrary to law. A building in which intoxicating liquors are in fact sold unlawfully, or in which intoxicating liquors are kept for purpose of sale or exchange unlawfully, is a nuisance, and the person who keeps a building for that purpose is guilty of keeping a nuisance. In order to make out the offense the presence of intoxicating liquor is essential and necessary."—Approved: State v. Viers, 82 Iowa, 397, 48 N. W. 732.

§ 5553. Minors—Permitting in Saloons.

"Before you can find the defendant guilty, you must find from the evidence and beyond a reasonable doubt: First, that on or about the twentieth day of June, 1882, the defendant was the keeper of a billiard hall or saloon in Creston, Union county, Iowa; second, that on or about the twentieth day of June, 1882, the defendant either by himself, agent, clerk, or servant, permitted one George C— to remain in said billiard hall or saloon; third, that at the time said George C—was a minor; fourth, if you find from the evidence that the defendant was the keeper of a billiard hall or saloon in Creston, Union county, Iowa, and that on or about the twentieth day of June, 1882, he, by himself, agent, clerk, or servant, permitted one George C—, who was at the time a minor, to remain in his said billiard hall or saloon, then it would be your duty to find the defendant guilty, whether the said defendant knew said C— was a minor or not."—Approved: State v. Probasco, 62 Iowa, 400, 17 N. W. 607.

§ 5554. Evidence—Government License as.

"You are further instructed herein that the defendant, under the laws of the United States, was required to obtain a license to sell malt liquor, whether said malt liquor was intoxicating or not, and the mere possession by the defendant of such internal revenue license would not warrant or authorize a finding against the defendant, but can only be considered by you with any other evidence in the case, and as part of the same, in determining under the instructions of the court given you, as to whether the defendant is guilty of the offense charged in the information, and I instruct you that, if the defendant sold malt liquor, said license would be necessary under the law whether said malt liquor was intoxicating or not, and the fact that he had such license does not imply that the liquor he sold was intoxicating."—Approved: Denton v. State, 52 Tex. Cr. R. 58, 105 S. W. 199.

§ 5555. Evidence—Liquor at Place of Public Resort—Presumption.

"If you find from the evidence that the dwelling-house or its dependencies occupied by the defendant at the time in question was a

place of public resort, or a place which was resorted to by the general public, then the finding of intoxicating liquors there would be presumptive evidence that such liquor was kept or held for sale contrary to law; but this presumption of the law may be overcome by other evidence appearing in the case, and, unless you find that he kept a place of public resort, this presumption would not arise from the fact that he kept liquors there."—Approved: State v. Fleming, 86 Iowa, 294, 53 N. W. 234.

§ 5556. Possession of House Where Liquor was Bought—Presumption.

"If the jury believe from the evidence, beyond a reasonable doubt, that within the time stated in instruction No. 1 the defendant, W. H. N—, was in possession of a house in Powell county, and that Jonas C— from such house obtained any brandy by paying for same, the jury are authorized to find the defendant guilty of making the sale mentioned in the first instruction."—Approved: Noble v. Commonwealth (Ky.), 105 S. W. 413 (not reported in state reports).

§ 5557. Trial—Relying on One of Several Sales.

"The prosecution has elected to rely on the alleged sale to Stanley N—, and, before you can bring in a verdict of guilty in this case, you must be satisfied from the evidence beyond a reasonable doubt that the sale alleged in the information was in fact made to Stanley N— at the time and place, and under the conditions, alleged in the complaint; and it is not sufficient to show merely that a sale was made to the other persons named in the complaint. In other words, you are to try this case as though Stanley N— were the only person to whom it is alleged intoxicating liquor was sold."—Approved: State v. McCormick, 56 Wash. 469, 105 Pac. 1037.

§ 5558. Local Option—Question of Law.

"The court instructs the jury that the provisions of the Codes of Montana, known as the 'local option law,' were adopted in Ravalli county by reason of an election held in said county on December 1, 1903, and became effective in said county on January 7, 1904, and that since said last mentioned date it has been and now is unlawful in said county for any person to sell, either directly or indirectly, or give away to induce trade at any place of business, or furnish, to any person any alcoholic, spirituous, malt, or intoxicating liquors."—Approved: State v. O'Brien, 35 Mont. 482, 90 Pac. 514.

MISCELLANEOUS INSTRUCTIONS.

CHAPTER CXLX.

A. Adulteration.
B. Arson.
C. Banks and Banking.
D. Fences.
E. Libel.
F. Lotteries.
G. Peddling Without License.
H. Physicians and Surgeons.
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A. Adulteration.

§ 5559. Food Stuffs—Selling on False Repesentations.
5560. Inferiority of Food Concealed.

§ 5559. Food-stuffs—Selling on False Representation.

"If the jury believe from the evidence, to the exclusion of a reasonable doubt, that the defendant sold to one F. M. A—, in Ohio county, in the year of 1907, and before the 19th of October, 1907, one hundred pounds, or any less number of pounds of food products marked 'XXX Mixed Feed,' sold for and to be used for food for domestic animals, and branded and labeled as above set out, and represented it as made from wheat middlings and corn, and that said brand and representations were false and untrue, and did not truly and fully give the name of the substances contained in said feed, and said feed was adulterated with corncob meal, then the jury should find for the plaintiff in a sum not less than $10 nor more than $100."—Approved: Small & Co. v. Commonwealth, 134 Ky. 272, 120 S. W. 361.

§ 5560. Inferiority of Food Concealed.

"Now, before the inferiority of an article can be concealed it must be necessarily first ascertained as to whether or not there is an inferiority in the article. If it is an inferior article, and that inferiority is concealed by reason of the addition of foreign substance in this vanilla, and you are satisfied from the proof beyond a reasonable doubt of the fact, then he would be guilty, although he had no knowledge as to the foreign substance being in the bottle."—People v. Hinshaw, 135 Mich. 378, 97 N. W. 758.

B. Arson.

§ 5561. Willful Burning of House of Another.
5561a. Arson May be by Willful Omission as Well as Willful Commission.
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5563. Grist Mill—Inciting and Hiring to Burn.
5564. Singly or with Another—Aiding, Advising and Abetting.
5565. Necessary to Prove Ownership of Property.

§ 5561. Willful Burning of House of Another.

"If you believe from the evidence beyond a reasonable doubt that defendant in the county of ——— in the state of ———, on or about the ——— day of ———, 1901, did willfully set fire to and burn the house of E—, mentioned in the indictment; and if you further so believe from the evidence that said house was situated in said state and county, and was then and there in the possession of and occupied by defendant, then you will find the defendant guilty of arson and assess his punishment," etc.—Approved: Kelley v. State, 44 Tex. Cr. R. 187, 189, 70 S. W. 20.

§ 5561a. Arson may be by Willful Omission as Well as Willful Commission.

"With respect to an attempt to willfully and maliciously set on fire a dwelling house whereby human life is imperilled, the court charges that in order to convict the prisoner of the crime charged the burden rests on the state to show to you beyond a reasonable doubt that the house attempted to be fired was a dwelling house in which there was at the time a human being, and that the prisoner did or omitted to do something whereby he exerted an effort to set fire to such house so inhabited. It is not sufficient to show that by his act the building was in danger of burning, for that might have been the result of accident, or neglect, or carelessness. It must be shown that the act or omission of the prisoner was the result of a willful or deliberate purpose, having for its object burning of the building."—Approved: State v. Lockwood (Del.), 74 Atl. 2.

§ 5562. Feloniously Burning Barn of Another.

"The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, in Hardin county and before the finding of the indictment, feloniously set fire to and burned a barn of Zach H—, they should find him guilty, and fix his punishment at confinement in the penitentiary for not less than one nor more than six years, in their discretion."—Approved: Best v. Commonwealth (Ky.), 92 S. W. 555 (not reported in state reports).

§ 5562a. Malice Implied from Commission of Arson.

"An attempt to burn a house in which human beings dwell is a cruel act, and the law holds that malice of this kind is implied from every

deliberate, cruel act committed by one person against another. The law considers that he who does a cruel act voluntarily does it maliciously. In the crime of attempted arson, as in the crime of arson, the law holds, that when the act constituting the attempt is proved to have been done, and to have been done willfully, it is then inferred to have been done maliciously."—Approved: State v. Lockwood (Del.), 74 Atl. 2, 4.

§ 5563. Grist Mill—Inciting and Hiring to Burn.

"The court instructs the jury that if you find from all the facts and circumstances in this case that Thomas C— at any time within three years before the finding of the indictment, and at and in the county of Ozark in the state of Missouri unlawfully, willfully, maliciously and feloniously did set fire to and burn a certain grist mill there situate, the property of John C. C—, of the value of one thousand dollars, or of any other value, and that from all the facts and circumstances in evidence in this case you believe that Thomas H— at any time within three years before the finding of said indictment in Ozark county, Missouri, before the said arson and felony was committed did unlawfully, willfully, maliciously and feloniously incite, move, procure, counsel, hire, or command the said Thomas C— to commit the said felony and arson in manner as charged in the indictment, you will find him guilty, and assess his punishment at imprisonment in the state penitentiary for a term not less than five years."—Approved: State v. Harkins, 100 Mo. 666, 13 S. W. 830.

§ 5564. Singly or With Another—Aiding, Advising and Abetting.

"You are further instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant personally, or in conjunction with any other person or persons whomsoever, or that the defendant by aiding, advising, or abetting any other person or persons whomsoever, to feloniously, willfully, and maliciously set fire to and burn, did so burn, or cause to be burned, any of the buildings described in the information herein, he is guilty of arson as charged in the information as to any such building or buildings, if any, which you find were so burned."—Approved: Goldberger v. People, 45 Colo. 327, 101 Pac. 407.

§ 5565. Necessary to Prove Ownership of Property.

"The court charges the jury that, if the state failed to prove by evidence of title ownership of the property fired as charged in the indictment, the jury cannot find the defendant guilty."—Approved: Hannigan v. State, 131 Ala. 29, 31 South. 89.

C. Banks and Banking.

§ 5566. Failing Circumstances Defined.
5567. Receiving Deposits by Employee Under Defendant's Control.
5568. Prima Facie Evidence of Insolvency.
5569. Knowledge of Insolvency.
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5571. False Report of Condition.
5572. False Entries by Cashier.
5573. Officer Falsely Certifying Checks as Good, When Known or Believed not to be Good.
5574. Using Worthless Bonds as Security with Intent to Rectify Afterwards.
5575. Misapplication of Funds by Banking Officer.

§ 5566. Failing Circumstances Defined.

"The court instructs the jury that a banking institution is in failing circumstances when it is unable to meet the demands of its depositors in the usual and ordinary course of business, and this is true even though you shall believe that there was at the time a stringency in the money market."—Approved: State v. Darragh, 162 Mo. 522, 54 S. W. 226.

§ 5567. Receiving Deposits by Employee Under Defendants' Control.

"If the jury believe from the evidence that on July 10th, 1893, the witness Christina V— did deposit in the Kansas City Safe Deposit & Savings Bank, a banking institution doing business in the state of Missouri, at the county of Jackson, three hundred dollars, or any part thereof of the value of thirty dollars or more, lawful money of the United States, of the money and property of the witness Christina V—; and shall further believe, from the evidence, that the said deposit was not taken and received by the defendant himself, but was taken and received by some other person, but that such person was then and there in the employ of the said Kansas City Safe Deposit & Savings Bank, and acting under the direction and control of the defendant in said employment, and that such other person had general power and authority from the defendant to receive deposits of money into said bank, and that said bank was then and there in failing circumstances, and the defendant had knowledge that said bank was there and then in failing circumstances, they will find the defendant guilty as charged."—Approved: State v. Darragh, 152 Mo. 522, 54 S. W. 226.

§ 5568. Prima Facie Evidence of Insolvency.

"The court instructs the jury that although by the statute the failure of the Kansas City Safe Deposit & Savings Bank is made prima facie evidence of knowledge on the part of the defendant that the same was in failing circumstances on the 10th day of July, 1893, yet the burden of proving the State's case is not realy changed. The law enables the State to make a prima facie case by proof of the assenting to the creation of said indebtedness and the reception of the money

into the bank; but the defendant can show the condition of the bank, and the circumstances attending the failure, and any facts tending to exonerate him from criminal liability, and then, on the whole case, the burden still rests on the State to establish defendant's guilt beyond a reasonable doubt. The presumption of innocence with which the defendant is clothed, and never shifts, rests with him throughout the case, notwithstanding a prima facie case may have been made out by the State."—Approved: State v. Darragh, 152 Mo. 522, 54 S. W. 226.

§ 5569. Knowledge of Insolvency.

(a) "The material points to be considered by you and necessary to be proven by the state beyond a reasonable doubt are: (1) That the defendant was engaged in the business of banking and receiving deposits in the name of the Citizens' Bank at Mt. Ayr, Ringgold county, Iowa; (2) that while so engaged in the banking or deposit business the defendant, on January 14, 1904, knowingly received or accepted for deposit for the Citizens' Bank a check, the property of J. H. Seevers Lumber Company, of the value of $106.75; (3) that at the time of receiving or accepting said check as a deposit for the Citizens' Bank the said Citizens' Bank and the defendant, Day D—, were both insolvent; and (4) that the said defendant, Day D—, then knew of said insolvency. You are instructed that if the state has failed to prove, beyond a reasonable doubt, any one of the foregoing material points, then you should acquit the defendant; but, if you find from the evidence that each and every one of said material points are proven beyond a reasonable doubt, then it would be your duty to find the defendant guilty."—Approved: State v. Dunning, 130 Iowa, 678, 107 N. W. 927.

(b) "If you find from the evidence that the Bank of Commerce was a banking institution and that the defendant was its president, and that on the sixth day of July, 1893, said bank was insolvent and in failing circumstances, and that the defendant, at the county of Greene and State of Missouri, received $260 in money, or any other sum of money or deposit, the same being of the value of $30 or more, of the property of Graham & Son, a firm composed of F. P. G— and Geo. H. G—, and that the defendant at the time had knowledge that said bank was insolvent and in failing circumstances, then you should find the defendant guilty."—Approved: State v. Burlingame, 146 Mo. 207, 48 S. W. 72.

§ 5570. Keeping Bank Open by Direction of Defendant.

"That even though the jury might believe that the defendant, the appellee, was not present at the time of the reception of the deposit charged in the indictment, and even though they might believe from the evidence that he did not know of this specific deposit being made in said branch bank, yet if the jury further believe from the evidence beyond a reasonable doubt that the defendant was a director in the Scranton State Bank, and that said branch bank at Ocean Springs on the date laid in the indictment was kept open through the direction of said appellee and the other directors of the bank for the reception of

deposits, and further believe from the evidence beyond a reasonable doubt that the appellee knew, or had good reason to believe, on said date, that the said bank was in an insolvent condition, then you should find the defendant guilty as charged."—Approved: State v. Mitchell (Miss.), 51 South. 4.

§ 5571. False Report of Condition.

"You have heard what it (the information) contains, and you have also had offered before you in evidence the report itself, and it is for you to determine under all of the evdence in this case whether or not there are any false statements or false entries in reference to the resources and liabilities of the bank * * * contained in such report, and whether or not such report contains any false statements or false entries with reference to any of the books of such bank."—Approved: Ruth v. State, 140 Wis. 373, 122 N. W. 733.

§ 5572. False Entries by Cashier.

"Before the government can expect conviction in this case, it must show to the jury by evidence which shall satisfy you beyond a reasonable doubt that within the Northern District of the Indian Territory, and on or about the 14th day of February, 1903, S. D. H—, the defendant, was the cashier of the First National Bank of Miami; that on the 6th day of February, 1903, he made a report of the condition of the bank to the Comptroller of the Currency, which report contained certain false entries with reference to his personal liabilities to the bank, with intent to deceive E. B. F—, the president of the bank, by stating in said report that his liabilities to the bank were only $3,470, whereas, at the time his liabilities to the bank were $5,495. These allegations must be proven to your satisfaction, by evidence, beyond a reasonable doubt."—Approved: Harper v. United States, 7 Ind. T. 437, 104 S. W. 673.

§ 5573. Officer Falsely Certifying Checks as Good, When Known or Believed Not to be Good.

"Knowledge of the defendant of the state of Dobbins & Dazey's account, when he certified the checks, is thus made the pivotal question in the case. Upon this question of knowledge, the court charges you that it is not necessary for the government to show that the defendant knew of the lack of funds of Dobbins & Dazey, from an actual examination of the books of the bank or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazey's account to be overdrawn, and refrained from making such inquiry for the reason that he knew of the condition of the account, or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient; that is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on

Dobbins & Dazey's account, or of the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazey had no funds to meet their checks, and that there was no warrant for marking the checks good, that was sufficient."—Approved: Spurr v. United States, 87 F. 701, 31 C. C. A. 202.

§ 5574. Using Worthless Bonds as Security With Intent to Rectify Afterwards.

"There is testimony tending to show that the defendant at the time he was thus depositing the bonds, gave a guarantee that the bonds were good, and that he would guarantee the payment of principal and interest. You can take that into consideration, and such guarantee can only be considered as determining the value of those bonds at that time and the intent of the party in such transaction. As I say again, gentlemen, the only difficult question for you to determine is the intent of the accused. The question of the intent is to be determined by the facts and circumstances and the surroundings at the time of the transaction; but, gentlemen, the law presumes that every party who in any way attempts anything by any guarantee or anything of that kind which is dependent upon future successful operations, takes the risk of the success, and that if a person commits an offense with the intent of temporarily injuring or defrauding another party or a banking institution, although it may be his intent at the time to finally recompense or prevent any injury resulting from such act, he is not protected by such intent to finally correct the temporary wrong deed; or, in this case, if you are satisfied that at the time he placed those bonds there he knew that they were worthless or of a very small value and had a large value charged to the bank and placed to his account ———— if he did that with the intent, for the time being, to injure the bank and take a wrongful advantage of the credit of the bank, no matter if at that time he had an intent to in the future remedy any injury that might come to the bank, it would not protect him in your finding or from your finding, what the intent was at that time."—Approved: Agnew v. United States, 165 U. S. 36.

§ 5575. Misapplication of Funds by Banking Officer.

"The law presumes that every man intends the legitimate consequence of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified or excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. It is a well-settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the result of the action. If, therefore, the funds, moneys or credits of the First National Bank of Ocala are shown to have been either embezzled or willfully misapplied by the accused and converted to his own use, whereby, as a necessary, natural or legitimate consequence, the association's capital was reduced or placed beyond the control of

the directors or its ability to meet its engagements or obligations or to continue its business was lessened or destroyed, the intent to injure or defraud the bank may be presumed."—Approved: Agnew v. United States, 165 U. S. 36.

D. Fences.

§ 5576. Fences—Unlawful Removal—Good Faith.

§ 5576. Fences—Unlawful Removal—Good Faith.

"If you believe from the evidence that the defendant, after consulting with Mr. S— in good faith, believing that he had a right to remove the fence and fix it, as the evidence shows he did, then you are instructed under the facts that he is not guilty of any offense, and if you so believe from the evidence you will acquit him."—Becker v. State, 56 Tex. Cr. R. 92, 119 S. W. 95.

E. Libel.

§ 5577. Jury Judges of Law and Fact—Duty to Listen to Court.
5578. Burden to Show Malice.
5579. Publication Charging One With Being Convict Where Not True.
5580. Reasonable Doubt as to Truth of Libelous Statement Acquits.

§ 5577. Jury Judges of Law and Fact—Duty to Listen to Court.

(a) "This provision of the Constitution does not place the jury above the law, or confer upon them the lawful right to decide simply as they see fit, regardless of the law. Under the constitutional law, if the jury can say on their oaths that they know the law better than the court does, have the right to do so; but, before assuming so solemn a responsibility, they should be sure that they are not acting from caprice or prejudice; that they are not controlled by their will or wishes, but from a deep and confident conviction that the court is wrong and that they are right. Before saying this on their oaths, it is their duty to reflect whether, from their habits of thought, their duty and experience, they are better qualified to judge of the law than the court. If, under all those circumstances, they are prepared to say that the court is wrong in its exposition of the law, the Constitution has given them that right."—Approved: People v. Seeley, 139 Cal. 118, 72 Pac. 834.

(b) "Our law provides that in all prosecutions for libel the jury, after receiving the direction of the court, shall have the right to determine, at their discretion, the law and the fact. In construing this law you are instructed to review carefully the whole case, looking to these instructions for the law, and to the evidence for the facts, and, after both and all, then with a rigid regard for the rights of the people and those claimed to be injured on the one hand, and as rigid and watchful care for the rights of the defendant on the other, seek to determine the truth of the issue. As to the right of the jury to deter-

mine the law and the fact, you are instructed that if the jury can say on their oaths that they know the law better than the court does, they have the right to do so, but before assuming so solemn a responsibility they should be sure that they are not acting from caprice and prejudice, that they are not controlled by their will or their wishes, but from a deep and confident conviction that the court is wrong, and that they are right. Before saying this on their oaths, it is their duty to reflect whether, from their habits of thought, their study and experience, they are better qualified to judge of the law than the court. If, under all these circumstances, they are prepared to say that the court is wrong in its exposition of the law, the statute has given them that right."—Approved: State v. Heacock, 106 Iowa, 191, 76 N. W. 654.

§ 5578. Burden to Show Malice.

"The burden is thrown on the state to show affirmatively that the communication was made with malice; that is to say, not from a sense of duty, but from a dishonest motive. * * * If the defendant honestly believed it to be his duty to make the communication, and did so under a sense of duty only, he is not guilty. If, on the other hand, his motives were not good, if the communication was not made for a justifiable end, but from malice, to gratify a feeling of revenge for supposed injury, then he is not justified, and he should be found guilty."—Approved: Haase v. State, 53 N. J. L. 34, 20 Atl. 751.

§ 5579. Publication Charging One With Being a Convict Where Not True.

"The court instructs the jury that to print and publish concerning any person that he has been a convict in the state penitentiary of the state of Kansas, is libelous per se, unless the same is true; and in this connection, I further instruct you that there is no attempt on the part of the defendant in this case to prove the truth of the matter charged as libelous, or to show that the same was published for justifiable ends."—Approved: State v. Brady, 44 Kan. 435.

§ 5580. Reasonable Doubt as to Truth of Libelous Statement Acquits.

"The court instructs the jury that if they believe from the evidence that the statements made by defendant concerning X—, if any were made, were true, or if they have a reasonable doubt as to whether or not statements were true, they should acquit."—Approved: West v. State, 44 Tex. Cr. App. 417, 71 S. W. 967.

F. Lotteries.

§ 5581. Evidence—Selling Lottery Tickets as Showing Business Established.
5582. Carrying on as a Business.

§ 5581. Evidence—Selling Lottery Tickets as Showing Business Established.

"You are instructed further that the mere fact that the defendant sold lottery tickets is not of itself sufficient to prove the charge made in the indictment herein, unless you further find from the evidence

that within three years next before the filing of the indictment the defendant aided and assisted in making and establishing a lottery or scheme of drawing in the nature of a lottery as a business and avocation in the city of St. Louis and State of Missouri."—Approved: State v. Miller, 190 Mo. 449, 89 S. W. 377.

§ 5582. Carrying on as a Business.

"If you believe and find from the evidence and under these instructions beyond a reasonable doubt that at the city of St. Louis and State of Missouri, at any time within three years next before the 29th day of May, 1903, the defendant, Louis T. M—, willfully and unlawfully did aid and assist in making and establishing as a business and avocation in the city of St. Louis and State of Missouri a lottery or scheme of drawing in the nature of a lottery, and that the same was known as the Mexican Lottery, and whereby any money of any amount and value whatever might be acquired of said lottery by lot or chance, you will find the defendant guilty as charged in the second count of the indictment; and unless you so find the facts you will acquit the defendant."—Approved: State v. Miller, 190 Mo. 449, 89 S. W. 377.

G. Peddling Without Liscense.

§ 5583. Definition Of.
5584. One Sale Sufficient Where There is Intent to Continue.

§ 5583. Definition Of.

"If you believe from the evidence beyond a reasonable doubt that this defendant, at any time within one year before February 21, 1905, in Oregon county, Missouri did deal as a peddler and did engage in the selling of goods, wares and merchandise, to-wit: picture frames, by going from place to place to sell the same without having a license as a peddler, you should find defendant guilty and assess his punishment at a fine not less than ten dollars or more than one hundred."—Approved: Charles v. Pickens, 214 Mo. 216, 99 S. W. 1165.

§ 5584. One Sale Sufficient Where There is Intent to Continue.

"The jury are instructed that it was not necessary that the defendant should have owned the goods or have had any interest in them, or that he engaged in the business for a livelihood or profit; that if defendant knew the owner of the goods had no license, and defendant went along with the owner, and aided and abetted in such sales, G—, the owner, being engaged in the business of peddling, and agreeing to pay defendant's expenses for such services, then defendant would be guilty as charged, although he assisted and participated with the owner of said goods in but one sale, provided it was defendant's intention to continue to assist in the business; that one sale by the defendant would have constituted the offense charged, provided he had made proposition and intended to continue in the business employed by G— to carry the valise for his expenses, and that it was not necessary that he should have engaged further than this in the business for a livelihood or profit."—Approved: Keller v. State, 123 Ala. 94, 26 South. 323.

H. Physicians and Surgeons.

§ 5585. Practicing Without License.
5586. Diploma from Accredited College Filed as Required by Law.
5587. Disinterring Corpses for Anatomical Purposes.

§ 5585. Practicing Without License.

"The court declares the law to be that if you find from the evidence that the defendant, John M. D—, at the county of Scotland and State of Missouri, at any time within one year next before the filing of this information, did publicly profess to be a physician, and that by reason of his publicly professing to be a physician, one Arthur H— accepted his services in his professional capacity by calling upon defendant, and defendant prescribed for, treated, and issued medicine to said Arthur H—, who was then and there a sick person; and that the defendant at the time of so prescribing for, treating, or issuing medicine to said Arthur H— was not a registered physician of the State of Missouri, and had no certificate issued by the Board of Health of the State of Missouri authorizing him to practice medicine in the State of Missouri, you should find the defendant guilty as charged, and assess his punishment at a fine of not less than fifty dollars nor more than five hundred dollars, or at imprisonment in the county jail not less than thirty days nor more than one year, or at both such fine and imprisonment."—Approved: State v. Davis, 194 Mo. 485, 92 S. W. 484.

§ 5586. Diploma From Accredited College Filed as Required by Law.

"In connection with the main charge, the jury are instructed that an accredited medical college is one which is chartered by the legislature of the state, or its authority, in which such college is situated; and if you find that before Jan. 1, ———, defendant did file for record with the clerk of the district court of Gonzales county a diploma from an accredited medical college, as that term has heretofore been defined, then you will acquit him."—Approved: Aldenhoven v. State, 42 Tex. Cr. App. 6, 56 S. W. 914.

§ 5587. Disinterring Corpses for Anatomical Purpose.

"If the jury shall find and believe from the evidence, beyond a reasonable doubt, that the defendant, on or about the ———— of ————, ————, at and in the county of C. and State of Missouri, did then and there dig up, disinter, and remove the dead body and remains of L. G—, deceased, from the grave in which said dead body and remains had been interred, and then and there was, for the purpose of dissection, and surgical and anatomical experiment and preparation, of said body and remains, then you should find him guilty as charged in the indictment."—Approved: State v. Fox, 148 Mo. 517, 50 S. W. 98.

I. Trespass.

§ 5588. Retaking Possession After Ouster by Judgment.

§ 5588. Retaking Possession After Ouster by Judgment.

"You are further charged that, when a person is dispossessed of land by virtue of a writ of possession issued by a court of competent jurisdiction, such person has no right to again enter said premises and retake possession. Such an act would be illegal, and such possession would give such person no property rights whatever by virtue thereof."—Approved: Smith v. State, 52 Tex. Cr. R. 27, 105 S. W. 182.

J. Usury.

§ 5589. Elements of Offense.
5590. Note Bearing on Face Lawful Rate of Interest.

§ 5589. Elements of Offense.

"Gentlemen of the jury, you are instructed that if you believe and find from the evidence that the defendant, T. A. H—, on the first day of November, 1905, or at any time within one year next before the filing of the information in this case, to-wit, the 9th day of March, 1906, at the county of Greene, and State of Missouri, did then and there take or receive, directly, or indirectly, from O. A. S— two dollars per month as interest for the forbearance or use of fifteen dollars, then you will find the defendant guilty as charged in the information, and assess his punishment at a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail for a term of not less than thirty days, or more than ninety days."—Approved: State v. Haney, 130 Mo. App. 95, 108 S. W. 1080.

§ 5590. Note Bearing on Face Lawful Rate of Interest.

"Even though you may find and believe from the evidence in this case that the note signed by O. A. S— and given to the defendant, T. A. H—, on its face bears interest at the rate of eight percent. per annum, yet if you believe from the evidence that the defendant actually took, or received two dollars per month as interest for the use or forbearance of fifteen dollars from O. A. S—, within the time and at the place mentioned in the first instruction, you will find the defendant guilty as charged in the information."—Approved: State v. Haney, 130 Mo. App. 95, 108 S. W. 1080.

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